Submission to the Senate Education & Employment Committee on the Safety, Rehabilitation and Compensation Amendment Bill 2014

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Introduction

1. Unions NSW is a State Peak Body as defined by section 215 of the Industrial Relations Act 1996 (NSW). Unions NSW has over 60 affiliated unions representing members employed across a wide range of public and private sector industries including teaching, local government, retail, distribution, childcare, manufacturing, electrical, health, emergency services, agriculture, engineering, construction, administrative, the public sector and transport. Collectively Unions NSW and its affiliates represent over 600,000 working members employed across NSW.

2. Unions NSW welcomes the opportunity to contribute to the legislation of safety and workers compensation. The safety and workers compensation schemes across Australia have been developed by unions on behalf of injured workers since the end of the 19th century through safety and workplace accident provisions contained in industrial instruments and then transferred to broader legislative arrangements. The Workers Compensation Act 1987, and the Workplace Injury Management and Workers Compensation Act 1998 cover over three million workers making NSW the largest workers compensation scheme in Australia.[1]

3. Unions NSW notes and supports the submission made by the Australian Council of Trade Unions (ACTU) and acknowledges the submissions made by affiliate trade unions.

4. Unions NSW note the very short period for this review and submit that this review should be extended to allow the very important issue of workplace safety and fair compensation for injured workers to be properly reviewed. This will allow an evidence base to be formed to validate any changes rather than simply rhetoric. There is a need for a broader conversation on these issues rather than a cosy deal between a few vested interests and a couple of people in the federal Parliament.

5. Workers bear the disproportionate cost of workplace injuries and not the employers. Safe Work Australia had estimated that only 5% of the cost of workplace injuries was being borne by employers, with the remaining 95% being borne by the worker and the community[2].

> *"In terms of the burden to economic agents, 5 per cent of the total cost is borne by employers, 74 per cent by workers and 21 per cent by the*

[1] Safe Work Australia, Comparison of Workers' compensation arrangements in Australia and New Zealand, July 2013, p.21
[2] Safe Work Australia, The Cost of Work Related Injury and Illness for Australian Employers, Workers and the Community: 2008-09, (2012), p. 3

community. The trends over the three iterations of this report ***are for an increasing proportion of costs borne by workers*** *and a decreasing proportion of costs borne by the community."*[3]

6. The cost of workplace injuries has been estimated to be $60.6 billion (2008-9 dollars) or approximately 5%-6% of GDP by the Industry and Productivity Commissions and Safe Work Australia[4] [5] [6]. These trends of who bares the cost appear to be continuing to shift away from employers to workers and the community through transfer payments as employers pressure governments to reduce the cost of failed workplace safety.

7. We note the short history of the boutique federal workers compensation system being born in the federal public service and then extended in the mid-2000s by the Howard Government, to companies competing with other federal government Entities.

Summary

8. We oppose the changes made by the Federal Government as these changes are designed not to de-regulate health and safety and workers compensation, but to leave the field of workplace safety regulation almost exclusively up to the duty holders under the Work Health and Safety Act; the Person Conducting the Business or Undertaking (PCBU) or the employer. i.e. self-regulation.

9. We also oppose the changes as the self-insurance model proposed provides the PCBU (who will be the insurer, employer, and claims manager) with little or no checks or balances to ensure that workers' rights to fair and just workers compensation are upheld. We also note a few keys areas where the scheme is fundamentally inferior including access.

Workers Compensation

10. Due to the short time frame we have focussed on the following amendments:

[3] Safe Work Australia, The Cost Of Work-Related Injury And Illness For Australian Employers, Workers And The Community: 2008-09 (2012), P.3
[4] Ibid, page 3
[5] Industry Commission, Work health and Safety: an Inquiry into Occupational health and Safety, Volume 1: Report, Industry Commission, Report No. 47, 11 September 1995 pp17-24
[6] Productivity Commission 2004, National Workers Compensation and Occupational Health and Safety Frameworks, Australian Government, p. 265-266

- Amendments to 6 (1) b and 6 (3) which apply to remove recess claims again.
- Injury Caused by Misconduct- Amendments to Sections 14 (3) and 147 (2);
- Licensing Amendments including amendments Section 100 and insertion of new Section 107B;

Amendments to 6 (1) b and 6 (3) which apply to remove recess claims again.

11. These amendments essentially operate to remove injured workers access to recess claims.

12. Although the argument is run by employers that they have no control over the worker whilst at recess, it raises a number of concerns.

13. For example inadequate supply of amenities may require a worker to leave the workplace in order to get hot food. The workplace may be walking distance or further from the food source. The hours of work, safe provision of transport, and the issue of workers who are permanently stationed outside the workplace such as security guards, or field operators, and crib breaks complicates this matter.

    For example what is the difference between an office worker injured during a lunch time meeting with their supervisor in the coffee shop and a work time meeting in the coffee shop? It is the same risk, but one may be covered and the other may not.

14. All this does is aim to provide extra power to the self-insurer to reduce liability. The provisions about exacerbation or voluntary exposure to abnormal risk already exist to prevent undue risk.

Injury Caused by Serious or Wilful Misconduct- Amendments to Sections 14 (3) and 147 (2);

15. With respect to the proponents of these amendments it takes the workplace back to the future, but without the coverage of common law available previously. It was a Victorian era doctrine of *volenti non fit injuria* or the *voluntary assumption of risk* that has been used in tort law as a defence. It allows defendants to state that they person knew of the risks before they entered the way of the risk, and therefore the injury is not compensable.

16. Unions NSW submits that this runs counter to the no fault nature of workers compensation for which the Comcare scheme has been built on, and by which the

Comcare system has been able to significantly curtail common law access to fair and reasonable compensation.

17. The proponents of the Amendments argue that this will allow focus on safety in much the same way as total removal of all workers compensation may focus all workers on safety to the extent where many workers will just not risk work in certain industries.

18. Unions NSW experience is different when these provisions are used and that the focus is not on safety. Our experience is that the employer or PCBU undergoes a speed up or efficiency surge, that a worker should cut corners or expose themselves to risks. There are a number of other workers who do not know any better and are prepare to cut the corners. Several occupations and industries clearly expose workers to these abnormal risks every day. However, when an injury occurs that is fatal the employer is the first to state that the worker followed a different course of action to what normally occurred and voluntarily put themselves at risk. Dead men (and women) can't tell their story.

19. Unions NSW submits that on almost any modern worksite employers are pressuring workers to take risks. This provision does not focus on safety, Unions NSW submits it will probably do the opposite and focus employers on how to increase the speed of production by cutting corners thus reducing focus on safety as there will be not cost and reduced workers compensation liability.

20. The carve out for defence forces in Section 147 (2) demonstrates the unfairness in this amendment, as it places a different value on human life for a person defending our country to for instance one who is building our country. Both should have the highest value placed on their lives.

Licensing Amendments including amendments Section 100 and insertion of new Section 107B;

21. Unions NSW agree that workers where ever they work should be entitled to the same fair and equitable workers compensation. Whilst Comcare may seem more generous than several of the state schemes there is a need to improve Comcare prior to a mass entrance to this scheme.

22. A number of the problems Unions NSW encounters with Comcare include the following:

- The long term trend to reduce benefits
- Comparative schemes more beneficial nature
- Consultation to enter scheme
- The manipulated "early intervention" process
- One sided timeframes
- Lack of obligation on the employer to process claims
- Disputes Process
- Costs
- Common Law
- Whole Person Impairment threshold
- Work Health and Safety

23. Unions NSW submits that these provisions are designed to enable almost any company into the federal Comcare system. Brokers are already selling packages and collective license applications to larger companies. There are significantly substandard entry requirements to the Comcare self-insurance regime and this will be exploited. The competition rights of employers are being given primacy over worker's human rights.

24. The question is raised with the mass entrance to the scheme, who is going to underwrite the long term liability of the Comcare scheme? When large employers go under during economic downturns the state schemes have maintained liability. A similar type of event occurred in NSW with the asbestos companies and the unfunded liability that their products have incurred on workers for generations to come. Has this ongoing liability been considered?

The long term trend to reduce benefits

25. Unions NSW has observed in almost all schemes a trend to reduce benefits whenever employer pressure mounts or when the schemes funding is reduced by fluctuations to investment returns.[7]

26. The arguments vary :
"The schemes viability is threatened by these generous payments"
"Poor claims management has extended the costs to the scheme"
"Return to work rates have extended the tail"
"Why should the scheme cover people when the employer can't control what people do"

[7] Purse, K. (2011). Provisions of fair and competitive worker's compensation legislation, University of South Australia. Research funded by the Industrial Health and Research Foundation, pp 20 -39

"The workers voluntarily turned up at work to undertake these risky activities and should have been aware"

Unfortunately these arguments had been used for over a hundred years in one form or another and seem to have worked their way back into the Parliament's proposed legislation.

27. Once enough employers enter the scheme there will be the same pressures to reduce benefits. Large businesses interested in increasing profits will be able to pressure the federal government to make cuts to benefits that will simply increase profits on the back of injured workers.

28. This occurred when the Comcare scheme was opened in the mid-2000s to those companies in competition with public sector agencies. This saw the removal of recess claims and journey claims. There were also amendments to the psychological claims.

29. We foresee the Hanks/Hawke Review being used for the purpose to further reduce benefits.

Comparative schemes more beneficial nature

30. There are several schemes that have been developed between workers and the employers that are of a significantly more beneficial nature. The movement to the Comcare scheme will simply reduce the compensation available to workers in these schemes.

31. For example NSW has the Coal Compensation Scheme. This scheme is specifically targeted at coal miners in NSW, and is designed to provide a better standard of compensation as well as return to work.

32. The scheme also redistributes back to the mining industry and mining community benefits such as better emergency rescue services (reducing harm from incidents) and health care for mining communities.

33. There are insufficient provisions for the workers in these schemes from being simply transferred to the Comcare system at the stroke of a CEO's pen whilst the CEO is probably enjoying life above ground in the Northern Hemisphere.

34. If any of the Senators believe that workers and their families should all have their compensation reduced to the same low standard, then they should visit the Cessnock office of the CFMEU Mining and Energy Union. They should spend a day a

few kilometres below the surface of the earth. If the Senators still feel the same after they have read all the more than 1800 names in the CFMEU District memorial including the two who died last month, then they should not be in this Parliament to represent people.

Consultation to enter scheme

35. There are inadequate provisions to require consultation to enter the scheme. Entrance to the scheme is governed and decreed by the employer. The whole purpose of the scheme is to ensure that the workers are safe and are compensated when they get injured at work, yet how this happens and to what degree appears to be dictated by the employer.

36. It appears the employer's competitive rights have trumped the workers' human rights in this instance.

37. The need for an appropriate rigorous no disadvantage test should be included to prevent workers being disadvantaged when their employer wishes to enter the scheme. There should be scope to have appropriate instruments to make conditions on how the self-insurance works and any additional provisions.

The manipulated "early intervention" process

38. A number of workers advise of the use of the early intervention process to falsely give the worker the view that they have made a workers compensation claim for an injury when they have not.

39. The Comcare website discusses early intervention:

> *"Early intervention is about identifying and responding to warning signs and reports of accidents and incidents in the workplace. An early response often prevents a worker from becoming ill, taking long-term sick leave or* ***submitting a workers' compensation claim."***[8]

40. Whilst this may be a useful tool to assist someone who may have witnessed a traumatic event, or been stressed due to over work, it is being systematically misused for purposes to reduce claims of legitimate injuries.

[8] http://www.comcare.gov.au/early_intervention

41. For example when someone undergoes the early intervention process they believe the medical assistance being provided is due to the claim they made as they reported the injury to their employer.

42. However, after the initial treatment they then find the injury gets worse and they may require an operation or more intensive rehabilitation. Instead they are told that they have no history of reporting the claim, the claim may be sitting on the employer's desk or that the claim should have been reported at the time of the incident and the claim will not be paid for further expenses.

43. This manipulation is based on the worker having little to no knowledge of the system and little to no power, whilst the employer and self-insurer being one and the same having all knowledge and power.

One sided timeframes

44. There are a number of one sided time frames for workers in the Comcare system. This requires workers to report injuries, and respond to requests whilst the employer or the self-insurer can delay the process or systematically misplace paperwork.

45. This process is one sided and continues the power imbalance whereby the self-insurer makes a decision and the worker either does not get rehabilitated or their income is cut off or reduced whilst the process is delayed or reviewed. The self-insurer won't default their mortgage or go hungry, yet the worker is disadvantaged.

46. We propose an amendment to this scheme to make it fairer such as the provisional liability mechanism in NSW whereby insurers went from processing claims from between 40-80 days to being required to pay claims without reasonable excuse within 7 days and make a decision on the claim within 12 weeks. The same excuses existed in NSW prior to 2001 amendments whereby it was satisfactory for an insurer to state after 40 days that they had not processed the claim. This does not aid the worker in accessing rehabilitation or return to work or recovery.

Lack of obligation on the employer to process

47. This lack of obligation to process claims is continued throughout the disputes process. Despite self-insurers meant to be a position of privilege with managements systems to efficiently manage claims.

48. Greater obligations on the self-insurer should be included throughout the disputes process also.

Common Law: Delays, Costs and Limitations

49. The Common Law system under Comcare is a compilation of problems for injured workers.

50. Due to the large delays with the AAT that sees workers often settle for inferior unsustainable compensation in order to end the process.

51. As the worker must bear their own costs this makes the AAT process less beneficial as delays combined with the costs often lead to the unviability of the claim proceeding further. Workers do not choose to get injured yet they have to bear their own costs under Comcare.

52. The limit on common law damages, adds to the problem as the delays and increased costs simply make the claim unviable and settlement with something is better than a better claim reduced by costs even to negative.

53. The Whole Person Impairment threshold also makes it difficult to achieve fair compensation for many who cannot reach this arbitrary standard of injury but can't work.

Work Health and Safety

54. Despite the changes to the SRC Act being about workers compensation, the changes to the WHS Act (Commonwealth) appear to have the tail wag the dog when it comes to its affect on safety.

55. The current government has stated that they wish to reduce "regulation and red tape".

56. Unions NSW submits that for almost every piece of safety regulation there is a story of mass injuries or death. To categorise safety regulation as "Red Tape" is an insult to all the families and workers who have lost family or been maimed by work.

57. Work Health and Safety is union business and we oppose any attack on standards or processes that risk the safety of working people. These Amendments have no features that are aimed at improving workplace safety. The multiplier effect is

enormous up to 20 times the cost of workers compensation for the economy[9] for every injury prevented.

58. We are aware of the arguments that there is the same harmonised legislation in the Comcare scheme as the States, but this is not the case even after the harmonised laws.

59. Victoria and Western Australia still do not have the harmonised Work Health and Safety legislation.

60. In New South Wales there is also the residual right of third parties to prosecute for offences unavailable under the other harmonised jurisdictions. This right has been only occasionally used but in all occasions has led to improved safety in the industries they are pursued. The approach to regulation and enforcement also changes culture of the organisations and can lead to larger reductions in safety.

61. The changes proposed are of concern to Work Health and Safety for a number of reasons including but not limited to:

    - Dual Regulators;
    - Comcare's absence of capacity;
    - Comcare's absence of a will;
    - Self-Insurer's power imbalance;
    - The drain on the states Work Health and Safety capacity;
    - Consultation.

Dual Regulators

62. The question of the complexity of regulating a death in an environment with multiple layers of business was contemplated in NSW Parliament[10]. This complexity was acknowledged by WorkCover NSW to be more complicated when multiple jurisdictions are input into the same workplace, or safety risk system.[11]

63. The dual regulator simply poses another layer for the regulation of work health and safety. This will be further complicated by the broadening of the access to the Comcare scheme. A number of questions are raised:

[9] Safe Work Australia, The Cost of Work Related Injury and Illness for Australian Employers, Workers and the Community: 2008-09, (2012), p. 3
[10] Transcript Standing Committee on Law and Justice, Inquiry into review of the Exercise of the functions of the WorkCover Authority, Monday 12 may 2014. Pp10
[11] Ibid. p. 22

- If an inspection occurs where there is a Comcare subcontractor and a State system principle what will the inspector be able to do without first confirming who owns what and who works for whom?
- Will the Comcare subcontractor be able to refuse to comply with the state inspectors requests for evidence of their safety systems?
- What will happen if a PIN is issued to the PCBUs by a HSR and what inspector can assist in resolving a safety matter?
- What happens if the inspectors from each jurisdiction provide different issue resolutions?
- Will there be different licensing requirements continued to the future?
- Will a Comcare inspector be able to issue a notice to a state system employer or worker, or vice versa?

We suggest that these problems will likely be resolved with the Regulator/s being challenged or just deciding that it is too hard and that they would be better to do nothing. Rather than the regulation failing to safety, it will regulate to fail.

Comcare's absence of capacity

64. In meetings between Unions NSW and Comcare, Unions NSW were advised of a serious incapacity to undertake regulatory work.

65. In March this year Unions NSW were advised there were a total of 7 current inspectors for Comcare in NSW. These Sydney based inspectors however, had workers under the scheme who were working anywhere from Broken Hill to Queensland to Victoria.

66. The opportunity to undertake responsive regulatory action such as with a workplace fatality or to resolve a serious issue would be almost impossible if not in the Sydney basin.

67. NSW WorkCover Authority despite our criticisms has inspectors throughout the state of NSW who can respond to incidents anywhere within the state within a few hours if necessary.

68. Unions NSW were not aware of provisions in the May 2014 federal budget, adding to this small society of Comcare inspectors through an expansionary funding regime.

69. There are current requirements under the Work Health and Safety Act for workplace attendance by an inspector to assist the workplace parties.

70. Despite Unions NSW arguments that there are not enough, there are 315 inspectors in NSW that have a broad background and variety of skills from different industries, in different locations. The Work Health and Safety legislation covers everything from construction, major hazard facilities, plant and machinery, chemicals, manual handling, through psychological hazards and confined space. It is hard to fathom, 7 inspectors in NSW let alone the 2 in Western Australia, or those states with no inspectors being able to have enough expertise to provide guidance to industry, let alone successfully undertake an efficient evidence gathering process to enforce legislation across broadened industry coverage.

Comcare's absence of a will

71. We have seen over time Comcare's unwillingness to enforce the WHS legislation. Despite a quick flirtation with enforcement of the laws during the previous government, Comcare has reverted to an approach to encourage compliance and educate employers of late. With the last annual report reporting several enforceable undertakings and a handful of notices this appears to indicate that Comcare has absented the field of enforcement of legislation. This is despite a significant OHS criminal record for several Comcare participants and multiple workplace fatalities.

72. This hands off regulatory approach seems to operate absent from the reality of the industry covered, who are all large companies or Agencies, with considerable available resources to dedicate to safety. The intent to not regulate leads to a perpetuation of the self-insurer's power imbalance.

73. If the employer of this size can't get it right, then their privileged position as a self-insurer should be reviewed.

Self-Insurer's power imbalance

74. A self-insurer is for safety, rehabilitation, return to work, and compensation; the equivalent of judge, jury and executioner.

75. We have seen a number of examples where self-insurers have both refused to fix a safety issue or pay compensation as to do either will admit that there is a problem with the other and will cost money to the self-insurer. We have seen self-insurers

threaten misconduct to their employees who raise safety concerns or who do not comply with the provisions of the self-insurers injury management or return to work plan.

76. The power imbalance is immense when a self-insurer/employer with their lawyers, their paid consultants, and forests of policy folders having all the resources. Unions NSW experience has been that rather than applying these resources to better prevent injury, the resources are applied to reduce workers' access and voice at consultation and to reduce attention spent on safety. The worker has no comparable knowledge about how to access safe processes or what is reasonably practicable for safety. When the worker calls the regulator, the regulator has a conversation with the employer who advises that the employer has all the systems in place and the regulator does nothing about the issue. This is not a satisfactory application of safety systems.

The drain on the states' Work Health and Safety capacity.

77. To date it has been mostly large state self-insurers who have migrated to Comcare. This has failed to make a large dent in the premium pool nor the levy that facilitates the Regulator in each state.

78. However, with the proposed amendments to the Safety Rehabilitation Compensation Act, we are already witnessing insurance brokers approaching national employers and federally registered companies about establishing a self-insurance system under Comcare. If these brokered collectives are formed it will then become more difficult to maintain regulation of the number of companies that come in as a collective group license application by the seven Comcare inspectors in NSW.

79. There appears to be no minimum size for the applicant, nor minimum standard of safety applied in order to gain access to the Comcare scheme, except a statement as to guidelines that may be issued. The unfettered movement of employers to Comcare will drain states like NSW's Regulator of the valuable levy that is included in the state workers compensation premium to pay for the administration of WorkCover as Safety Regulator. Even self-insurers in NSW pay a levy based on a small percentage of the premium that they would have had to pay if they were in the scheme.

80. The business model for Comcare appears to operate on the basis fees for services. Comcare charges the self-insurer for audit, and regulation work as opposed. So whilst the large groups of employers would possibly move to Comcare, there would

be no equivalent contribution to pay for the regulation of safety and the Comcare license.

81. Unions NSW submit that there should be a broad conversation similar to the NDIS about any changes to occupational health and safety and workers compensation in Australia. The balance has swung too far away from the workers that the systems were designed to protect. It is time to restore the balance.

Yours faithfully

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