Inquiry into the provisions of the Occupational Health and Safety and Other Legislation Amendment Bill 2009

Submission to the Senate Education, Employment and Workplace Relations Legislation Committee

by

Department of Education, Employment and Workplace Relations

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Occupational Health and Safety and Other Legislation Amendment Bill 2009

INTRODUCTION

1. This submission deals with the provisions of the Occupational Health and Safety and Other Legislation Amendment Bill 2009 (the OHSOLA Bill) covered by the terms of reference for the inquiry by the Senate Education, Employment and Workplace Relations Legislation Committee.

2. The OHSOLA Bill proposes amendments to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). The SRC Act sets up the workers compensation and rehabilitation framework for the Comcare scheme which covers about 217,000 Australian and ACT government employees and about 160,000 employees of self-insured licensees.

3. The proposed amendments will:
    a) re-instate workers compensation coverage for injuries arising from off-site recess breaks;
    b) provide for payment of medical expenses notwithstanding that payment of other associated compensation benefits has been suspended;
    c) introduce time limits for claim determinations; and
    d) restore Comcare's access to the Consolidated Revenue Fund (CRF) to pay compensation for certain long-latency disease claims.

OVERVIEW

4. The OHSOLA Bill implements the legislative aspects of the Government's response to the review of the Comcare scheme, as well as some other associated amendments.

5. As one of its election commitments, the Government undertook to review the Comcare scheme, in particular, its self-insurance arrangements which apply to certain private-sector corporations which are covered by the scheme. The review was to ensure that the scheme has suitable occupational health and safety and workers compensation arrangements for self-insurers and their employees.

6. The Government placed a moratorium on companies seeking to join the Comcare scheme while this review was conducted.

7. On 25 September 2009, the Minister for Employment and Workplace Relations announced a number of improvements to the Comcare scheme arising out of the review. The OHSOLA Bill implements the legislative aspects of these improvements through amendments to the SRC Act, as well as implementing certain other amendments.

8. The measures proposed in the Bill are designed to improve the Comcare scheme by increasing benefits for injured workers; strengthening the focus on rehabilitation and return to work; and ensuring that long-latency disease claims are funded appropriately.

SUMMARY OF MEASURES IN THE OHSOLA BILL

9. The OHSOLA Bill includes three changes to workers compensation arrangements under the Comcare scheme arising from the Comcare review.

10. First, to encourage timely determination of workers compensation claims, the Bill amends the SRC Act to enable statutory time limits to be set within which claims must be determined. Claims determined quickly tend to be shorter in duration and less costly because injured workers are able to commence their medical treatment and rehabilitation sooner.

11. Second, the Bill reinstates workers compensation coverage for injuries occurring during off-site recess breaks. This will realign the Comcare scheme with most state and territory jurisdictions and remove the inequity in coverage for employees whose employers do not provide on-site facilities for meal breaks.

12. Third, the Bill amends the SRC Act so that medical and related costs will continue to be paid where a worker's weekly compensation benefits are suspended for refusing to undertake a rehabilitation program or refusing to undergo an examination for rehabilitation purposes. Suspending weekly compensation benefits can be a useful incentive to encourage claimants to comply with these requirements. However, suspending medical and related payments can be counterproductive to early rehabilitation and return to work.

13. The Bill also restores Comcare's access to the CRF to pay compensation for long -latency diseases which are attributable to employment before 1 December 1988 but did not become evident until after that date.

RATIONALE AND IMPACT OF THE OHSOLA BILL MEASURES

<u>Introducing time limits for claims determination</u>

14. There is currently no requirement under the SRC Act for workers compensation claims decision-makers to act within specified time limits. By contrast, all state workers compensation schemes apply statutory time limits for claims determination.

15. A number of submissions to the Comcare review by unions and lawyers' associations raised concerns that the absence of statutory time limits provided scope for considerable delays in determining and reconsidering claims.

16. According to data from the Safety, Rehabilitation and Compensation Commission's Annual Report 2008-09, the average time taken by Comcare on

behalf of premium-paying agencies to determine new claims under the scheme is 24 days for injuries and 65 days for disease. This is longer than under most state schemes. Furthermore, some claims under the Comcare scheme take much longer to determine.

17. The OHSOLA Bill proposes the inclusion of an explicit power in the SRC Act to prescribe time limits by regulation. The Comcare review noted that claims determined quickly tend to be shorter in duration and less costly because claimants can commence medical treatment and rehabilitation sooner. The actual time limits and how they will be applied are still under consideration.

Reinstating off-site recess break coverage

18. The OHSOLA Bill proposes the reinstatement of workers compensation coverage for off-site recess break claims which were removed in April 2007 through the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007*.

19. The removal of coverage resulted in a number of practical difficulties. One concern was the difficulty in determining what would and what would not constitute an off-site recess break where, for example, employees worked off-site or where no facilities were provided for lunch breaks. Another concern was the inconsistency between the fact that an employee would be covered when attending employer-sanctioned courses at educational institutions either within or outside normal working hours but not necessarily during lunch breaks.

20. It should be noted that all other jurisdictions, with the exception of South Australia and Tasmania, provide coverage for off-site recess breaks. In common with all jurisdictions in Australia, the SRC Act provides on-site recess break coverage.

21. In these circumstances, the Government believes the reinstatement of coverage for off-site recess breaks would be reasonable bearing in mind that it will have no net impact on the Budget and only a minimal financial impact on premium payers ($1.7 million annually for this group as a whole which would represent about a 0.7% increase in premium paid) and self insurers ($1.5 million annually for this group as a whole and a similar low percentage increase for licensees for their self insured costs).

Amending suspension provisions in the SRC Act

22. Currently, an injured worker's right to workers compensation under the SRC Act is suspended if the worker refuses or fails without reasonable excuse to undertake a rehabilitation program or undergo an examination for rehabilitation purposes.

23. Suspending weekly compensation benefits can be a useful incentive to encourage injured workers to comply with these requirements.

24. Under the SRC Act, however, compensation includes medical and related benefits. The Government is concerned that suspending medical payments could be counterproductive to early rehabilitation and return to work. To that end the

OHSOLA Bill seeks to amend the SRC Act to protect the payment of medical and related benefits to claimants notwithstanding the suspension of their weekly benefits. Similar arrangements are contained in workers compensation legislation in several other jurisdictions, for example, Victoria, Tasmania and the ACT.

25. The financial impact of this measure on the Comcare scheme would be negligible.

Restoring Comcare's access to the CRF to pay compensation for certain long-latency disease claims

26. Items 7 to 10 inclusive of Schedule 3 of the OHSOLA Bill seek to amend the SRC Act to give Comcare access to the CRF to pay for certain long-latency disease claims. These amendments seek to restore the intended operation of section 90B of the SRC Act.

27. By way of background, the SRC Act had been drafted with the intention that Comcare would have access to the CRF to pay for long-latency disease claims from the time of the Act's commencement on 1 December 1988. Accordingly, Comcare drew on the CRF until a Federal Court decision in 2006, on matters unrelated to funding, indirectly invalidated the CRF arrangements.

28. The history of the Comcare scheme's funding arrangements dating back to 1988 is relevant to understanding what the real impact on the CRF of the proposed amendments will be. This history is set out below and is followed by a more detailed discussion of the proposed amendments.

Section 90B and its intended operation in the SRC Act

29. The Comcare scheme covers employees of premium-paying employers[1] and corporations licensed to self-insure with the scheme. (For the purposes of this submission, premium-paying employers will be referred to as agencies and self-insurers will be referred to as licensees.)

30. The *Commonwealth Employees Rehabilitation and Compensation Act 1988* (CERC Act) established the Comcare scheme on 1 December 1988 and, with it, the first iteration of the scheme's premium system.

31. The CERC Act included provisions to deal with claims pre-dating the introduction of the premium system. The CERC Act consequently established separate funding frameworks, one for what became known as 'premium' claims and the other for 'pre-premium' claims. (Note that the CERC Act was renamed as the SRC Act in 1992. Except where the context requires, references in the remainder of this submission will be to the SRC Act.)

32. Premium claims are those lodged by agencies' employees for injuries or diseases attributable to employment from 1 July 1989—the date on which the premium system began. Comcare uses premiums to pay for all premium claims. Initially,

1 Commonwealth government and ACT government departments and statutory authorities. (The Australian Defence Force is covered by a separate scheme.)

premiums[2] were paid to Comcare via the CRF.[3] Later, new arrangements provided for the payment of premiums directly into a premium fund held by Comcare separate from the CRF.

33. Pre-premium claims are those claims attributable to employment before 1 December 1988 that had not been fully or partly discharged by this date.

34. Where Comcare is liable for pre-premium claims, the intention was that Comcare would have direct access to the CRF to pay for these claims thus preserving the integrity of the premium system.[4]

35. Section 128 of the SRC Act transferred undischarged pre-premium liabilities and deemed them to be Comcare's[5] liabilities or the liabilities of the relevant licensee[6] under a corresponding provision of the SRC Act. These section 128 liabilities were understood to cover both actual and contingent liabilities attributable to employment before 1 December 1988 and were to be payable by Comcare through access to the CRF.[7]

36. Until 30 June 1992 when sections 90A, 90B, 90C and 90D were inserted into the SRC Act by the *Commonwealth Employment (Miscellaneous Amendments) Act 1992* (CEMA Act), the Act did not provide for separate accounting of premium and pre-premium claims.

37. In his second reading speech for the CEMA Act, the Hon Ralph Willis MP, the then Minister for Finance, said of the new provisions that:

> [They aimed to simplify] the operation of the [SRC Act] by including a special or standing appropriation.[8] There will be payable to Comcare the moneys necessary to meet undischarged liabilities for claims under the previous compensation arrangements [section 90B]. In addition, Comcare will also be paid amounts equal to the administrative costs attributable to these claims [section 90B]. There will also be payable to Comcare the moneys necessary to discharge its liabilities for claims under the [SRC Act] and to cover administrative costs associated with those claims.[9]

38. To paraphrase the Minister's comments, sections 90B and 90D of the SRC Act provided that Comcare would have access to the CRF to pay for its section 128 liabilities (being liabilities that would have arisen under the Acts repealed by the SRC Act). Section 90C provided that Comcare would draw on its premium fund to pay for premium liabilities.

39. Although modified in subsequent years, the main features of these new

2 Referred to as 'contributions' in the CERC Act.
3 Comcare's access to moneys in the CRF was equivalent to notional premiums paid by these agencies.
4 The policy rationale for introduction of the premium system is that agencies will have more of an incentive to give greater priority to implementing better workplace safety strategies if their premiums are linked to their individual workers compensation performance. If premiums are to be used to pay for claims pre-dating the introduction of the premium system, there is a clear risk that the integrity of the premium system will be compromised.
5 Formerly known as the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees.
6 Referred to as 'administering authorities' under the CERC Act.
7 See CERC Act, Part VII, Division 4—Finance, for the original provisions relating to funding and contributions.
8 Section 90D provides a standing appropriation from the CRF for the purposes of sections 90B and 90C.
9 House Hansard, 30 April 1992, p. 2173. Section 90C specifies that Comcare has access to its premium pool ('Comcare-retained funds') to pay for premium claims and common law damages claims. If the premium pool is insufficient to pay these claims, section 90C gives Comcare access to the CRF to make up any shortfall.

arrangements still apply.

Effect of Comcare v Etheridge

40. From 1988 until 2006, Comcare used the CRF to pay for its pre-premium (section 128) liabilities purportedly in compliance with section 90B of the Act. In 2006, as a result of the decision of the Full Federal Court in *Comcare v Etheridge* (Etheridge)[10] on matters unrelated to funding, Comcare's access to the CRF to pay for its pre-premium liabilities was closed off.

41. Among other things, the Etheridge case centred on whether a declaration made under the now repealed section 101 of the CERC Act that a Commonwealth authority was a licensee, operated to vest contingent as well as actual liabilities in that licensee. The Court concluded that section 101 covered actual liabilities only and commented that, in this regard, the section had the same ambit as section 128 of the SRC Act.[11]

42. The Court's reference to section 128 meant that section 90B could not be taken to authorise Comcare's access to the CRF to pay for contingent liabilities including those for long-latency disease claims. Furthermore, the Court's decision meant that Comcare's past drawings from the CRF, purportedly in compliance with section 90B, had always been invalid.

43. Since 2006, Comcare has had to draw on premium funds, as opposed to the CRF, to pay for long-latency disease liabilities.

What the proposed amendments will do

44. Proposed paragraph 90B(ab) will restore Comcare's access to the CRF to pay for pre-premium long-latency disease liabilities.

45. While, legally, it is not possible to legislate retrospectively to cure an invalid appropriation, the invalidated drawings constitute a debt owed by Comcare to the Commonwealth and amendments to the SRC Act should be made to effect the notional recovery of this debt.

46. Accordingly, the saving provision in item 10 deals with Comcare's invalidated drawings on the CRF and sets up a mechanism for the recovery and off-setting of these drawings as follows:

- Paragraphs (1)(a) and (b) of item 10 provide that the section applies in relation to amounts paid out of the CRF to Comcare under section 90B which were invalidly paid at the time (the relevant amounts) but which, if the new paragraph 90B(ab) (Item 7 of the Bill) had been in force, would have been validly made.
- Subsection (2) proposes that the relevant amounts already paid to Comcare may be recovered by the Commonwealth as a debt.
- Subsection (3) proposes that Comcare is entitled to be paid an amount equal to

10 [2006] FCAFC 27.
11 [2006] FCAFC 27 at [65].

the relevant amounts referred to in paragraphs (1)(a) and (b) above out of the CRF.

- Subsection (4) proposes that the Commonwealth may off-set the debt in subsection (2) against Comcare's entitlement under subsection (3).
- Subsection (5) would appropriate funds from the CRF for the purposes of the proposed item.

Impacts on the CRF

47. The proposed amendments will mean that Comcare will no longer have to pay for its pre-premium long-latency liabilities out of premium funds which it has done since the Etheridge decision. These liabilities are estimated at about $3 million annually.[12]

48. By restoring Comcare's access to the CRF, the proposed amendments will do no more than restore funding arrangements that the SRC Act intended to authorise, and which were thought to be authorised, from 1 December 1988. But for the Etheridge decision, these funding arrangements would have continued.

49. It is not possible to estimate reliably Comcare's drawings from the CRF to cover long-latency (pre-premium) liabilities before the Etheridge decision. In this regard, Comcare has disclosed the drawings as an unquantifiable contingent liability in its Annual Report 2008-09 Financial Statements.[13]

12 Comcare has cautioned that this estimate should be considered in the context that most of the relevant liabilities stem from asbestos-related disease claims and trends with these claims can be especially difficult to predict.
13 Note 11, p. 122. Accessible at http://www.comcare.gov.au/forms__and__publications/corporate_publications/annual_reports/comcare_annual_report_2008_-_2009