SAFETY, REHABILITAION AND COMPENSATION LEGISLATION AMENDMENT BILL

Senate Standing Committee on Education and Employment

SUBMISSION BY

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

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Shop, Distributive and Allied Employees' Association (SDAEA)

Submission to the Senate Standing Committee on Education and Employment on the Safety, Rehabilitation and Compensation Legislation Amendment Bill.

The Shop, Distributive and Allied Employees' Association (SDAEA) is on of Australia's largest trade unions with over 210,000 members. Its principal membership coverage is the Retail Industry. It also has members in warehousing and distribution, fast food, petrol stations, pharmacy, hairdressing, beauty and the modeling industries.

We welcome this opportunity to make a submission to the Senate Standing Committee on Education and Employment in relation to this Bill.

The SDAEA supports the submission of the Australian Council of Trade Unions (ACTU).

General comments

1. The SDAEA is greatly concerned about the negative impact this Bill will have on both the health and safety of our members and the livelihood of injured workers. This Bill proposes to remove fundamental workers compensation protections, access to benefits and the common law, and will result in a substandard level of health and safety protections and enforcement. The SDAEA is particularly concerned about the impact this Bill will have on young workers and women working in the retail industry

2. The Retail industry employs more workers in Australia than any other industry (11%) of which over one-third (37%) are in the 15-24 year old age group. Of all workers in this age group, 24% are employed in the retail trade industry. This shows the dominance of young workers in this industry in which one-third worked in supermarkets and a further 15% worked in clothing shops.[1] The Retail trade industry accounted for 14% of injuries to female workers. One-third of the female workers in retail work in the Food retailing sector which as a sector accounted for 50% of in the injuries in this industry.[2].

ComCare as the sole regulator

3. The *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014* ("the Bill") seeks to reverse the requirement for corporations entering the ComCare scheme to continue to comply with requirements of State based health and safety regulators, thereby making ComCare the sole regulator. This will have a dramatic and traumatic effect on the health and safety of workers in all industries.

4. ComCare has only 44 inspectors nationally. An inspectorate this size does not have the capacity to enforce health and safety standards nationally across a wide range of industries which it has no experience in regulating.

5. ComCare appears unable to manage their current level of responsibility; as demonstrated by their significantly lower rate of proactive health and safety interventions compared to other schemes (State regulators). Unlike the State

[1] Safe Work Australia: *Australian work-related injury experience by sex and age, 2009–10,* July 2012, page 31.

[2] Safe Work Australia :Australian work-related injury experience by sex and age, 2009–10, July 2012

regulators, ComCare has historically low rates of prosecutions. A low prosecution rate and an inadequate inspectorate arm demonstrate a poor enforcement capability. In light of ComCare's current performance it seems incongruous that this Bill would seek to encourage an influx of employers and new industries into the what is clearly an under- resourced and poor performing regulatory body. Such a move will have a huge and detrimental impact on the health and safety of workers nationally and is dramatically at odds with the Australian Work Health and Safety Strategy 2012-2022.[3]

6. It is concerning that the retail industry; the countries biggest employer of workers will be able to opt into a scheme with such deficiencies. The SDAEA would be concerned should a large employer, such as Coles or Woolworths with upwards of 100,000 employees each, enter into such an ill-equipped regulatory scheme. It is the workers who will bear the heavy burden of a sub- standard scheme through increased injury and fatality rates.

New tests for employer eligibility to self-insure under ComCare

7. The combined impact of the new 'national employer' test and 'group employer licences' potentially expose injured workers to a large scale shift out of State schemes and loss of common law rights. In addition, proposed 'group employer' provisions mean that individual big and small companies could form a 'group' for the purposes of self-insuring under ComCare. The Federal Government again cites savings for companies as the rationale. The RIS conceptualizes equity as workers within a group of companies having the same rights, without reference to the fact that most workers' would lose health and safety protection and rights as a consequence of a shift out of a State scheme.

8. There appears to have been little consideration in this Bill as to the likelihood and impact a mass exodus will have on the viability of the State regulatory schemes and the impact this will have on worker protections and entitlements.

Abolition of the 'competition test'

9. The SDAEA does not support the abolition of the 'competition' test and a simpler application process for entry into the scheme. The Bill proposes to allow all

[3] Safe Work Australia. http://www.safeworkaustralia.gov.au/sites/swa/australian-strategy/pages/australian-strategy

Corporations operating in 2 or more States or Territories to be entitled to apply for a license. Additionally, companies that only operate in one State can join a 'group' to self-insure under ComCare if they do not meet the 'national employer' test. Proposed section 104(2A) also means licenses could be given to corporations who held a licence immediately before the commencement of this section (whether or not they meet the new test).

10. The ComCare system does not afford adequate health and safety protections or adequate compensation for injured workers. Furthermore, ComCare does not have the requisite means and expertise to be the sole regulator for an industry the size of the retail industry.

No-fault scheme – exclusion of injury caused by 'misconduct'

11. The Bill proposes that compensation will not be payable for injuries alleged to be "caused by the serious and wilful misconduct of the employee".

12. The Regulation Impact Statement notes that this introduces a 'new concept' in workers compensation. However there is little if any discussion as to the need for this exclusion, except that is it somehow aligned to 'evolving community expectations'. The RIS does not identify any savings associated with this proposal.

13. Currently, compensation for injuries caused by serious and wilful misconduct of the employee can be paid, assuming injury was not intentionally self-inflicted, only if the injury resulted in death, or serious and permanent impairment. The drafters of the current legislation saw fit to exclude workers severely injured or deceased as they and their families are disadvantaged in proving their case.

14. Despite the characterisation of the misconduct as "wilful", where death has been caused, how can the deceased's actions be considered "wilful" without them having an opportunity to respond to an employer's allegation? The same issue may arise in instances of catastrophic injury where the injured worker is unable to explain the circumstances of a work place accident.

15. The Bill provides that the accuser bears the onus of proof. It will be relatively easy for an employer to discharge the onus in the face of a significantly injured or deceased employee. Given the lack of procedural fairness afforded to a severely injured person or the dependants of a deceased, which raises serious doubts that

this process will enable a decision-maker or subsequent Tribunal make 'the most correct and preferable decision' as required by the *Administrative Appeals Tribunal Act 1975.*

Re-introduction of exclusion - 'Recess in employment'

16. In 2011, the government reintroduced compensation for workers who were temporarily absent from their place of employment during an ordinary recess (for example, while on a lunch break). The proposed amendments would remove this entitlement. Access to compensation for injuries sustained at the workplace during recess is not affected, and compensation will still be recoverable by a worker if he or she was injured during an off-site recess which was at the direction of the employer.

17. At present, all state and territory jurisdictions, with the exception only of South Australia and Tasmania, provide compensation for injuries sustained during a recess break. This means that all workers currently residing in Victoria, the ACT, New South Wales, the Northern Territory, Western Australia and Queensland will be materially worse off if the proposed amendment, in relation to recess breaks, succeeds.

18. The government's rationale for carving out recess breaks from compensation coverage is that "costs will be reduced by removing injuries that occur in circumstances outside the control of the employer from the coverage of the ComCare scheme."[4] It is debatable what impact, if any, these changes would have on the premiums paid by employers, and at any rate, the very small cost saving arising from these changes is outweighed by the high price that workers would pay as a result.

19. There are a number of legal grey areas arising from the proposed amendment in relation to rest breaks. For example, the definition of 'place of work' under the Act is fairly ambiguous, being defined as "any place at which the employee is required to attend for the purpose of carrying out the duties of his or her employment."[5] There is some debate over whether, for example, a construction camp built near a mine site would be considered a 'place of work'. If so, given that an employee doing fly-in-fly-out (FIFO) work is required to be located in a particular town or camp, would the entire town or camp constitute the employee's place of work, or only a section of it? If an employee works in a building with several other employers' offices and the

[4] Ex Mem, i
[5] Work Health and Safety Act 2012

incident occurs in the building's common area, such as the foyer or elevator, does this constitute the employee's place of work? Would the outside of the building be classified as a place of work, given the employee is required to enter the building from that particular street or entrance?

20. An additional grey area relates to the Act's definition of being "temporarily absent from the employee's place of work undertaking an activity associated with the employee's employment". Would a fitness activity that has been sponsored by the employer, such as a lunchtime charity fun run or an employee-only fitness program, constitute an 'activity associated with the employee's employment'? Would a worker be covered if they were travelling to their next meeting or appointment while on their lunch break? And what if the employee was attending a social work function, such as a birthday celebration for a colleague? Or alternatively if they are engaged in a work-related conversation with a colleague when the incident occurs, how would that affect the employee's access to compensation?

21. The proposed amendment would only serve to shift the burdens and risks associated with employment further onto an employee –bear in mind, the only reason why the employee is on break is as a result of being in employment at that particular location in the first place. Therefore the only test that should be applied to determine whether compensation is due is whether work was a contributing factor to the injury.

Extension of exclusions - Abnormal risk of injury

22. A further amendment is proposed so that compensation for injuries is not payable to a worker in cases where he or she 'voluntarily and unreasonably submitted to an abnormal risk of injury' in the course of employment. This exemption previously only applied to injuries sustained in particular places, or during an ordinary recess.

23. For those inside the ComCare scheme, a number of injuries which are currently compensable will be excluded. For those outside the ComCare scheme, it will be far easier to transfer from State Workers Compensation and Health and Safety Schemes and to self-insure under ComCare. This will mean that workers will be left with virtually no common law rights to compensation and benefits will be calculated through a scheme predominantly tailored to risks of injury in white collar industries.

24. A further amendment is proposed so that compensation for injuries is not payable to a worker in cases where he or she 'voluntarily and unreasonably submitted to an

abnormal risk of injury' in the course of employment. This exclusion previously only applied to injuries sustained in particular places, or during an ordinary recess. The exclusion now applies in *all* circumstances; that is, even when the workers is at their usual place of employment during their usual working hours.

25. The potential ramifications of this amendment are severe. An example would be if a supervisor directs an employee to undertake an action which the employee reasonably suspects may put them at risk. If the employee ignores their gut instinct or underlying concern and is injured as a result of unsafe action at the direction of the employer, the proposed amendment could serve to exclude that employee from access to compensation.

26. This amendment is yet another example of an attempt to shift the onus onto the employee to make individual assessments, potentially with no guidance from the employer, as to what level of risk is or is not acceptable to them. In general, such judgement calls should be made by the employer, not the employee. Such an amendment is also at odds with the primary duty of care under Work Health and Safety legislation as it is employers who have control over the workplace.

Serious and Wilful Misconduct

27. Workers' compensation systems rightly operate on the concept of 'no fault' for all workplace injury and diseases. Rather than apportioning blame, the no-fault system of compensation presumes that workplace incidents and injuries have a variety of causes, and workers are nevertheless entitled to income replacement, medical coverage and permanent impairment benefits. The no-fault system merely requires work to be a contributing factor to an injury in order for a worker to be compensated for that injury.

28. Any watering down of the concept of a no-fault compensation scheme would only serve to increase the red tape burden on employers, who will then be required to maintain extensive records and collect evidence to determine whether serious and wilful misconduct is a contributing factor to a death or impairment, and to what extent this may be the case.

29. Moving back to an adversarial system represents a cost-shifting exercise by workers' compensation schemes onto injured workers and government services. Any savings incurred as a result of this amendment would be negligible, and likely

outweighed by the serious impost associated with going through a review process and trying to prove or disprove a claim.

30. There is a community expectation that if an employee suffers from a workplace injury resulting in serious impairment or death, the individual has already paid an extremely high price. Therefore, even if their own actions were a contributing factor in the incident, such employees should still be afforded workplace protections and compensation. The exclusion in the current legislation was put in place for severely injured or deceased workers as they and their families are disadvantaged in proving their case.

31. Moreover, in the event that death has occurred, families of the deceased have paid the ultimate price for their loved one's momentary lapse of judgement and should not be further penalised as a result of their death. In the amendment were to pass, the onus of proof would fall to the worker or (in the case of death) the worker's estate, making it relatively easy for an employer to discharge that onus in the face of a significantly injured or deceased employee. Despite the characterisation of the misconduct as 'wilful', where death has been caused, how can the deceased's actions be considered 'wilful' without the worker having an opportunity to respond to an employer's allegation? The same issue may arise in instances of catastrophic injury where the injured worker is unable to explain the circumstances of a work place accident.

32. As a community, we acknowledge that sometimes incidents happen and there is not always a need to assign blame. This is the fundamental principle underpinning our no-fault system, and any attempts to erode this principle should not succeed.

33. It is difficult to understand the necessity for such a Bill, particularly in light of the Regulatory Impact Statement (RIS) released with this Bill. The RIS concludes that only minor savings are anticipated for major corporations, yet these minor cost savings will come at a very high cost to workers across all industries. Workers will lose important workers compensation entitlements and protections and be afforded less health and safety protections.

34. The SDAEA does not support the proposed amendments

Conclusion

35. The proposed amendments will;

a. increase red tape for business by creating a more adversarial system which will lead to increased administrative and legal costs.
b. will strip away important and hard-won protections that have been put in place to give workers and their families peace of mind in the event of an injury;
c. will be inequitable, leading to lesser compensation payments than workers would otherwise have received under the state system;
d. will unfairly shift the risks and burden of employment away from the employer and onto the employee; and
e. will massively overburden a ComCare scheme that is already operating on limited resources.
f. will disproportionally affect young workers and women working in the retail industry.

36. The SDAEA does not support the proposed amendments outlined in this Bill.