CHAPTER 2

Introduction

2.1 There was general agreement amongst almost all submitters that the bill represented the most fundamental reform of the *Safety Rehabilitation and Compensation Act 1988* (SRC Act) since its introduction.

2.2 The key issues and points of contention are summarised in the introduction. The remainder of the chapter sets out the issues in greater detail on a schedule by schedule basis.

2.3 Key points made by the government included the need to modernise the SRC Act in keeping with significant changes in health care and rehabilitation practices, recent research on the benefits for employees of returning to work after rehabilitation, prevailing community expectations about encouraging people to work and return to work, and the overarching importance of maintaining the integrity and financial viability of the scheme on an ongoing basis.[1]

2.4 The Department of Employment (the department) noted that the Comcare scheme (the scheme) was established in an era with low expectations of recovery and return to work after illness or injury. As a consequence, the scheme was designed to compensate people for injury, but it 'had no focus on return to work'.[2]

2.5 The department further noted that decisions by the Administrative Appeals Tribunal (AAT) and courts have skewed the application of the SRC Act away from the original intention of compensating for work-related activities by extending the scheme to compensate employees for non-work related injuries.[3]

2.6 The department stated that the focus on compensation and the extension of the scheme into non-work related injuries have had unfortunate consequences. The first consequence has been a tendency to entrench low expectations for recovery and return to work. This has deprived injured workers of the support and encouragement to recover and return to work. In turn, injured workers (and their families) have been denied the mental, social and health benefits associated with returning to work.[4]

2.7 The second consequence has been a decline in return to work rates from 89 per cent in 2008-09 to around 80 per cent in recent years. Studies indicate that the longer an injured worker is off work, the chances of them rehabilitating successfully and returning to work reduce dramatically. In turn, this decline in return to work rates

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1 Department of Employment, *Submission 22*, p. 5.

2 Department of Employment, *Submission 22*, p. 5.

3 Department of Employment, *Submission 22*, p. 5.

4 Department of Employment, *Submission 22*, p. 5.

has placed an increasing burden on the scheme finances (see figures 2.1 and 2.2 below).[5]

Figure 2.1: Decline in return to work rates over last five years (Source: Department of Employment, Submission 22, p. 5).

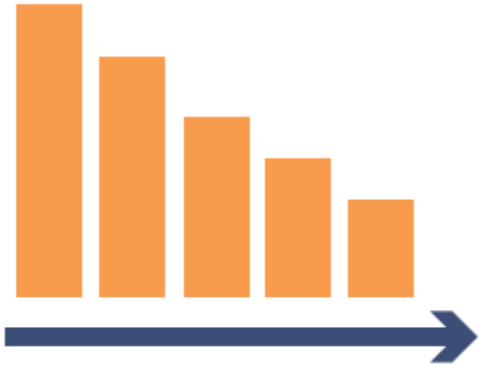
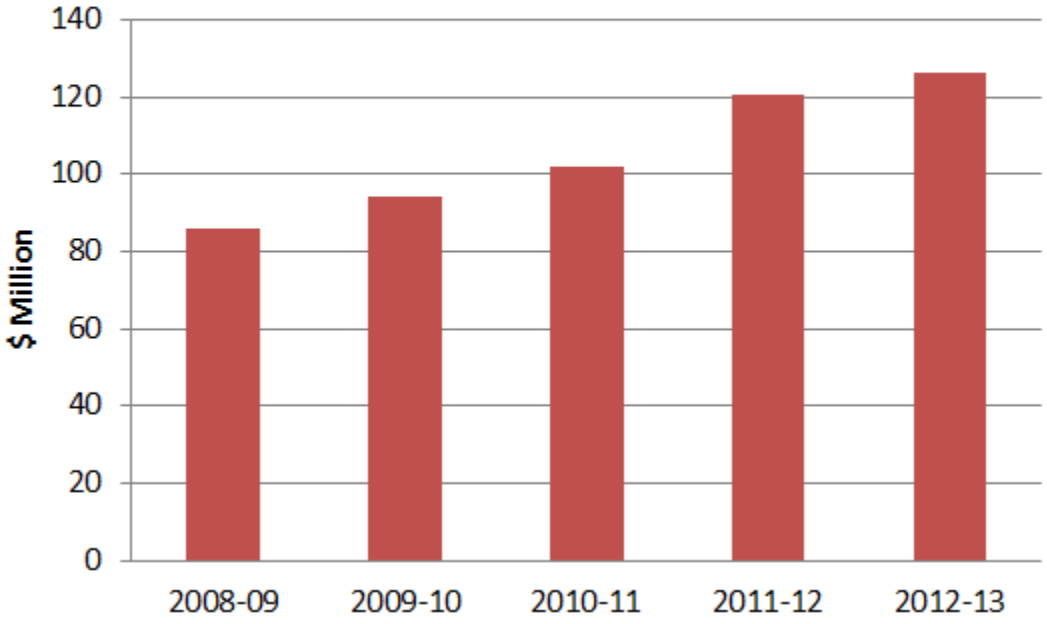


Figure 2.2: Medical and Rehabilitation costs from 2008-09 to 2012-13 (Source: Department of Employment, Submission 22, p. 5).



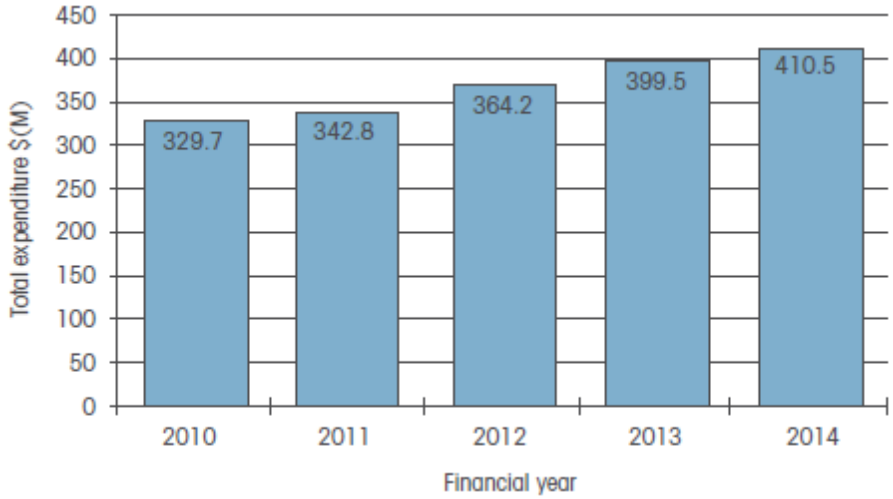
2.8 Claim costs under the SRC Act have risen by 37 per cent in the five years to 2012-13 and the premiums charged to Commonwealth agencies have increased by more than 50 per cent over the four years to 2013-14.[6] The department noted that steadily increasing medical and rehabilitation costs had contributed to the rise in claim costs and that Comcare's 'limited ability to determine the reasonableness or the

5 Department of Employment, *Submission 22*, p. 5.

6 Department of Employment, *Submission 22*, p. 6.

appropriateness of medical treatment and rehabilitation' prescribed by doctors had resulted in payments for 'questionable treatments' (see figure 2.3 below).[7]

Figure 2.3: Total Payment for claims under the Comcare scheme from 2009-10 to 2013-14 (Source: Department of Employment, Submission 22, p. 6).



2.9 The points outlined above by the department were endorsed by the Australian Public Service Commission (APSC). The APSC noted that the Australian Public Service was of the view that the scheme provided 'a generous set of entitlements for injured public service employees'. However, the APSC pointed out that there was 'general agreement amongst Secretaries and Chief Executive Officers that the current legislation focuses on administrative decision making rather than injury management and supporting staff to get back to work'. Consequently, the APSC stated that the senior leadership of the Australian Public Service welcomed the reforms to the scheme.[8] The committee notes that this is a unique situation whereby the senior leadership across the Australian Public Service is united in support of the changes embodied in the bill.

2.10 Several submitters, particularly employers, employer groups, and licensee associations agreed with the key elements set out in the bill. These submitters noted that the SRC Act was outdated and did not take account of modern trends in business and employer/employee expectations. Employers were also gratified that the bill rectified certain anomalies introduced by case law. Employers considered that the bill was balanced, fair and equitable for both employees and employers, that it would lead

7 Department of Employment, *Submission 22*, p. 6.

8 Australian Public Service Commission, *Submission* 12, p. 8.

to greater business confidence and employment opportunities, and that the bill should be passed either in its entirety,[9] or with minor amendments.[10]

2.11 Some submitters recommended that certain proposals be amended or omitted, and considered that, whilst undertaking such fundamental reform of the SRC Act, Parliament should include provisions for access to common law.[11] Other submitters recommended that the bill not be passed without substantial amendment.[12]

2.12 Opponents of the bill disagreed with the fundamental premise of the proposed legislation and argued that the bill would dramatically reduce the rights and entitlements of workers and would make it even harder for genuine claimants to gain urgent and necessary access to benefits. Noting that the primary objective of reform should be to achieve safe and healthy workplaces, these submitters pointed out that the bill failed to give effect to most of the recommendations made in the Hanks/Hawke Review, especially those which would be advantageous to injured workers. Opponents also argued that the bill put the considerations of big business ahead of those of injured workers. Opponents therefore considered the bill to be unbalanced, unfair, and punitive and recommended that the bill be rejected in its entirety.[13]

2.13 Many submitters also stated that the bill should be seen in a broader context, and expressed concerns about the combined effect of the three Comcare bills before Parliament. These submitters argued that the cumulative impact of the changes would be to remove rights that workers currently enjoy under State workers' compensation laws and enable employers to join a cheaper scheme with minimal health and safety regulations that was not designed for blue collar workers who often perform high risk work in remote locations.[14]

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9 Australian Air Express, *Submission 2*; TNT Express, *Submission 8*; Australian Public Service Commission, *Submission* 12; Jim Pearson Transport, *Submission 17*, Australian Chamber of Commerce and Industry, *Submission 18*; CSL Limited, *Submission 19*; National Electrical and Communications Association, *Submission 20*; Safety Rehabilitation and Compensation Licensees Association, *Submission 23*.

10 Transpacific Industries, *Submission 1*; Ai Group, *Submission 6*; John Holland, *Submission 10*.

11 Law Council of Australia, *Submission 29*.

12 Angela Sdrinis Legal, *Submission 13*, p. 9.

13 Australian Lawyers Alliance, *Submission* 3; UnionsWA, *Submission 7*; Victorian government, *Submission 9*; Slater and Gordon Lawyers, *Submission 14*; Communication Workers Union, *Submission 15*; Finance Sector Union, *Submission 16*; Queensland Council of Unions, *Submission 21*; Australian Manufacturing Workers' Union, *Submission 24*; Maritime Union of Australia , *Submission 25*; Australian Council of Trade Unions, *Submission 26*; Construction, Forestry, Mining and Energy Union, *Submission 27*.

14 UnionsWA, *Submission 7*; Victorian government, *Submission 9*; Communication Workers Union, *Submission 15*; Finance Sector Union, *Submission 16*; Queensland Council of Unions, *Submission 21*; Australian Manufacturing Workers' Union, *Submission 24*; Maritime Union of Australia , *Submission 25*; Australian Council of Trade Unions, *Submission 26*; Construction, Forestry, Mining and Energy Union, *Submission 27*; Queensland Government, *Submission 28*.

2.14 Other submitters stated that the bill, in combination with the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, would seriously damage every state and territory workers' compensation and work health and safety arrangements.[15]

2.15 In addition, several submitters drew attention to the extensive number of new rules to be established or altered by legislative instruments under the bill.[16] ACTU noted that several of the legislative instruments will 'provide for the removal or alteration of rights and exclusions from compensation'. ACTU therefore noted that the full impacts of the bill might not be known when the bill is voted on.[17]

2.16 Finally, a connection was drawn between the *Seafarers Rehabilitation and Compensation Act 1993* (Seafarers Act) covering Australian seafarers and the SRC Act including that the Seacare and Comcare schemes were both founded on the no-fault principle. In this regard, concerns were raised about the potential for shipping employers to exit the Seafarers scheme and join the Comcare scheme should the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 pass the Parliament.[18]

Schedule 1: Tightening eligibility requirements for compensation and rehabilitation

2.17 The bill tightens the eligibility requirements for workers compensation by distinguishing between work and non-work related injuries. The department sets out the rationale behind these changes:

> There is little justification for workers' compensation to be paid where an injury or disease is not caused by work but occurred at work. Similarly, workers' compensation should only be available where either an underlying condition, or the culmination of that condition (such as a heart attack or stroke), is contributed to, to a significant degree, by the employee's employment.[19]

2.18 The department noted that in 2002, the Federal Court decided in *Wiegand v Comcare*[20] that an employee's perception that their illness or injury was caused by work was sufficient to enable them to claim and receive workers' compensation, irrespective of the reasonableness or reality of that perception:

> In 2013 a CSIRO employee received workers' compensation under the Comcare scheme for migraines that he claimed were caused by the

15 Queensland Government, *Submission* 28; see also Construction, Forestry, Mining and Energy Union, *Submission 27*.

16 Australian Council of Trade Unions, *Submission 26*, pp 57–61; see also Law Council of Australia, *Submission 29*; Slater and Gordon Lawyers, *Submission 14*.

17 Australian Council of Trade Unions, *Submission 26*, p. 57.

18 Maritime Union of Australia , *Submission 25*.

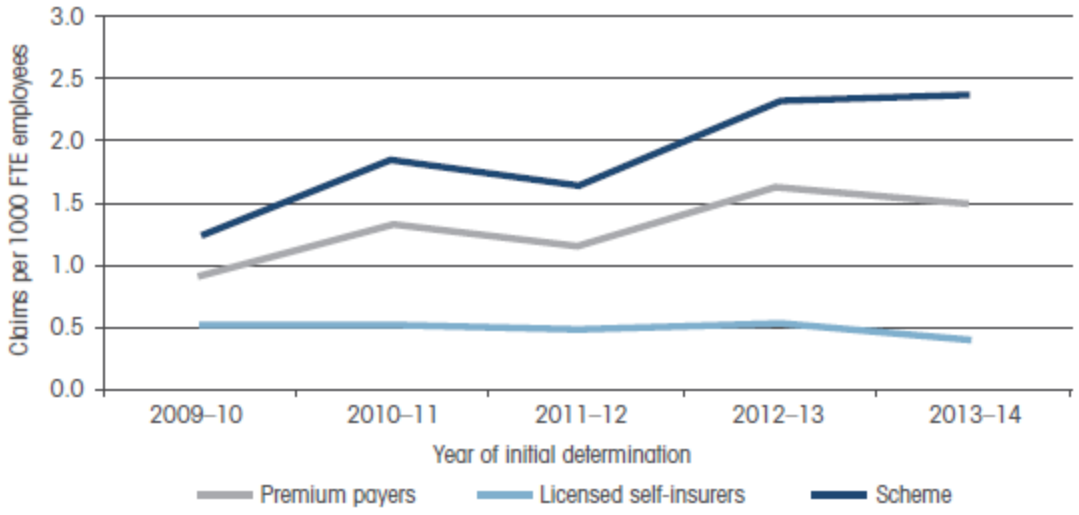
19 Department of Employment, *Submission 22*, p. 7.

20 *Wiegand v Comcare* [2002] FCA 1464.

> electromagnetic frequency (EMF) emitted from his work computer even though there was no medical evidence to support his claim. For recreation, this employee flew a light aircraft from his rural property. Experts considered that in-flight EMF would be considerably higher than in an office environment. Based on the Federal Court judgement in *Wiegand v Comcare* [2002] the Administrative Appeals Tribunal found that the employee's perception that the disorder from which he suffered was caused by exposure to EMF was sufficient to accept his claim, even though the perception was not reasonable or based in fact.[21]

2.19 The department also noted that a 61 per cent increase in the incidence of mental stress claims under the scheme between 2009-10 and 2013-14 'is significantly higher than the average cost of other claims' (see figures 2.4 and 2.5 below).[22]

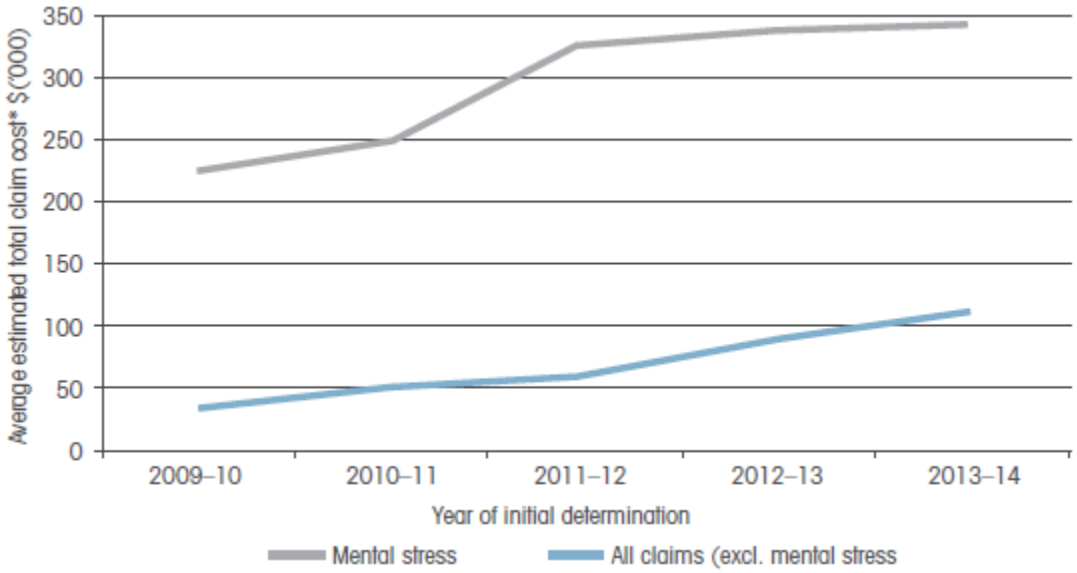
Figure 2.4: Incidence of mental stress claims (Source: Department of Employment, Submission 22, p. 7).



21 Department of Employment, *Submission 22*, p. 7.

22 Department of Employment, *Submission 22*, p. 7.

Figure 2.5: Average total cost of mental stress claims (premium payers)(Source: Department of Employment, Submission 22, p. 7).



2.20 In order to address the consequences of the decision in *Wiegand v Comcare*, the bill therefore requires 'reasonable grounds' for an employee's perception that an injury 'was contributed to, to a significant degree, by an employee's employment'.[23]

2.21 The APSC welcomed the differentiation between work and non-work related injuries. The APSC pointed out that:

> By requiring an increased causal connection between the injury and the employee's employment, employers in the Comcare scheme will no longer be required to insure against the costs of injuries, like strokes and degenerative spinal conditions, over which they have little control or influence.[24]

2.22 The APSC also welcomed the increased threshold for perception-based claims because it 'will introduce further rigour into the scheme when determining liability for psychological injury claims'.[25]

2.23 The APSC gave the following example of how the findings in *Wiegand v Comcare* had been applied in a work related stress claim:

> In 2012, an Australian Government employee submitted a claim for workers compensation for 'work related stress'.
>
> In her claim, the employee alleged that when she requested a fellow colleague assist her to move a table on a trolley, the colleague did so by moving the table 'wildly from side to side' and 'banging on glass and metal'.

23 Department of Employment, *Submission 22*, p. 7.

24 Australian Public Service Commission, *Submission 12*, p. 5.

25 Australian Public Service Commission, *Submission 12*, p. 5.

> The employee further stated that the colleague's behaviour was 'volatile and extremely pressured' and she could 'feel the intensity of his anger and rage'.
>
> Whilst CCTV footage shows the employee and her colleague moving a table together, it did not reveal any behaviour which may be construed as aggressive or violent.
>
> Comcare applied the Federal Court decision of *Wiegand v Comcare* in finding that the employee's perception of the events significantly contributed to her condition.
>
> The claim was therefore eligible and compensation was paid.[26]

2.24 The APSC noted that as a result of successful claims based on the decision in *Wiegand v Comcare*, 'managers in the APS regularly report that some employees covered by the Commonwealth scheme see Comcare as a 'soft touch'. The APSC stated that 'such an attitude is not healthy for the individual concerned, undermines the majority of hard working and ethical public servants and is not fair on agencies and taxpayers'.[27]

2.25 The APSC saw the tightening of the eligibility requirements as vital for arresting the substantial increase in workers' compensation premiums over the last four financial years.[28]

2.26 Furthermore, the APSC noted that fraud notifications had increased by 15 per cent during 2013-14 compared to the previous year, and that injured worker fraud accounted for more than 95 per cent of all allegation types. The two most significant fraud allegations were embellishment of an injury and injured workers earning an undisclosed income or working without notifying Comcare or their workplace.[29]

2.27 The APSC stated that spurious and fraudulent claims not only undermined the viability of the scheme, but also unfairly tarnished the reputation of the majority of public servants:

> The APS believes in providing support to employees who are injured and genuinely need support. Doing so requires a viable and sustainable workers' compensation scheme. The APS cannot afford to continue paying for a scheme that accepts claims that are unrelated to work, and provides treatment and services to employees that are not evidence-based.
>
> …
>
> The taxpaying public expects the Comcare scheme to be fair and comparable to other schemes. The cost associated with defending spurious claims has been increasing. If unchecked, this has implications for the

26 Australian Public Service Commission, *Submission 12*, p. 5.

27 Australian Public Service Commission, *Submission 12*, p. 6.

28 Australian Public Service Commission, *Submission 12*, p. 4.

29 Australian Public Service Commission, *Submission 12*, p. 6.

> scheme's viability. In addition, a prevalence of spurious claims invokes a broader impact of undermining respect for APS employees.[30]

2.28 Employers and employer groups generally welcomed the changes to eligibility requirements proposed in Schedule 1. Ai Group viewed the amendment as important because it 'should ensure that employers are not required to make workers' compensation payments for injuries which are not closely connected to work'.[31]

2.29 Transpacific Industries (TPI) supported both the proposal to exclude designated injuries such as heart attacks, strokes and spinal disc ruptures where there is no significant employment contribution, and the increase to the threshold for perception-based disease claims. Noting that the changes would align the scheme with State based workers compensation legislation, TPI stated that the amendments 'will greatly assist employers in reducing the burden of cost for lifestyle and age related disease processes over which they have limited control'.[32]

2.30 Ai Group also welcomed clauses 10 to 13 and new section 7A that enables Comcare to determine, by legislative instrument, a Compensation standard. Ai Group was of the view that:

> these combined amendments will allow for a transparent assessment to be undertaken in relation to the very difficult scenarios that arise when there is a potential combination of work related and non-work related factors associated with an ailment or aggravation. Employers continually raise this issue across all schemes and it will only become more important as the ageing workforce continues to work into years where it would generally be expected that such ailments or aggravations would occur as part of the ageing process.[33]

2.1 Concerns about Schedule 1 went to both the form and the substance of the changes. The Law Council of Australia (Law Council) was concerned about the basis upon which decisions are to be made. The Law Council proposed safeguards around the provision for a decision-maker to assess the probability that an injury was employment-related to a significant degree. The Law Council recommended the decision be based on appropriate medical evidence:

> The Law Council recommends that Parliament impose a safeguard in Schedule 1, Part 1, Clause 11 of the Bill, requiring that, in the assessment of the probability that an employee would have suffered an ailment or aggravation, or a similar ailment or aggravation, at or about the same time or stage of an employee's life, a decision-maker must base his/her/its decision on medical evidence from an appropriately qualified specialist.[34]

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30 Australian Public Service Commission, *Submission 12*, p. 6.

31 Ai Group, *Submission 6*, p. 5; see also TNT Express, *Submission 8*, p. 2.

32 Transpacific Industries, *Submission 1*, p. 2; see also TNT Express, *Submission 8*, p. 2; National Electrical and Communications Association, *Submission 20*, p. 5.

33 Ai Group, *Submission 6*, p. 6.

34 Law Council of Australia, *Submission 29*, p. 6.

2.31 Concerns were also raised about making substantive changes to the law by regulation. The Law Council, Slater and Gordon Lawyers (Slater and Gordon), and the Australian Council of Trade Unions (ACTU) were of the view that substantive legislative change should be effected by amending the SRC Act rather than by using delegated legislation:

> The Law Council is also concerned that further conditions could be added by regulation rather than amending the Act itself (Schedule 1, Item 15 - Clause 5C(1)(g)). Additional injuries should be added to the legislation only by legislative amendment, not regulation, which should only be used for non-substantive changes.[35]

2.32 Several submitters disagreed with the basic premise of the legislation.[36] The Australian Lawyers Alliance (ALA) claimed that the changes to the assessment that an injury was employment-related to a significant degree might provide an avenue for an employer to 'shirk responsibility' for an injury by contending that, because of an employee's age,' they probably would have suffered the injury anyway'.[37]

2.33 Angela Sdrinis Legal (Angela Sdrinis) expressed disappointment that the bill will reduce the costs of the scheme by cutting the benefits currently available to workers, rather than reducing costs by focusing on reducing injuries in the first place and getting injured workers back to work more quickly:

> There is no doubt workplace injuries do cost too much both in monetary terms and in terms of human suffering. Work injuries cost employers and they cost workers. The SRCA has never provided common law type damages the aim of which is to put a worker in the position they would have been had they not been injured. Increasingly, with limits on and reduction of benefits, workers who are in receipt of compensation under the Comcare scheme, find that they struggle to make ends meet. Many workers with long term injuries go so far backwards after a work injury that they never recover, either psychologically or financially. Of course the effects are worse for those workers whose claims are denied altogether and the proposed changes to the SRCA will mean that some workers will lose the right to receive compensation at all or their benefits under the scheme will be substantially reduced.
>
> If the Government and employers want to save money in the long term the emphasis should be on health and safety and not on trying to reduce benefits once an injury occurs. In the area of mental health in particular,

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35 Law Council of Australia, *Submission 29*, p. 5; see also Slater and Gordon Lawyers, *Submission 14*; Australian Council of Trade Unions, *Submission 26*.

36 Australian Lawyers Alliance, *Submission* 3; UnionsWA, *Submission 7*; Victorian government, *Submission 9*; Slater and Gordon Lawyers, *Submission 14*; Communication Workers Union, *Submission 15*; Finance Sector Union, *Submission 16*; Queensland Council of Unions, *Submission 21*; Australian Manufacturing Workers' Union, *Submission 24*; Maritime Union of Australia , *Submission 25*; Australian Council of Trade Unions, *Submission 26*; Construction, Forestry, Mining and Energy Union, *Submission 27*.

37 Australian Lawyers Alliance, *Submission 3*, p. 4.

> where we are seeing an increasing incidence of psychological injury because of bullying in the workplace, the changes proposed in the Bill will make it even harder for these workers to successfully claim compensation. This means that there will be even less pressure on employers to provide a safe workplace and injured workers will end up on the scrap heap at the cost of tax payers rather than employers.[38]

2.34 Angela Sdrinis stated that, overall, the bill 'is very hard on workers who develop psychiatric injuries' and might even be counter-productive:

> Instead of reducing benefits available to workers, the Government should be asking what is making workers sick and how to decrease the incidence of work place bullying and stress. There is no incentive for employers to deal with bullies in the workplace, or indeed with injuries generally, if they do not have to deal with the consequences and someone else has to pay for the damage done.[39]

2.35 Slater and Gordon stated that:

> The Bill will dramatically reduce the rights and entitlements of workers currently in the Comcare scheme. Many more thousands of injured workers will lose rights to compensation if the 2014 bill is passed as the 2014 bill proposes opening up the Comcare scheme for major expansion nationally.
>
> …
>
> The Bill fails to give effect to most of the recommendations made in the Hanks/Hawke Review, especially those which would be advantageous to injured workers. It contains a series of devices to remove injured workers from the scheme and other provisions that reduce quantum of compensation. We believe that almost all provisions in the Bill are unfair to injured workers and that some of the provisions can be characterized as grossly unfair and inhumane.[40]

2.36 Several submitters found the introduction of a 'reasonable basis' test for psychological injuries deeply troubling.[41] The ALA noted that the test had 'the potential to drastically restrict legitimate access to compensation' by unfairly judging workers' actions:

> Many people faced with difficult, urgent and threatening situations at work are likely to be judged by decision makers with the benefit of hindsight. Decision makers are essentially asked to retrospectively analyse a situation

38 Angela Sdrinis Legal, *Submission 13*, pp 2–3; see also Construction, Forestry, Mining and Energy Union, *Submission 27*, p. 10.

39 Angela Sdrinis Legal, *Submission 13*, p. 9.

40 Slater and Gordon Lawyers, *Submission 14*, p. 1.

41 Australian Lawyers Alliance, *Submission 3*, p. 5; Slater and Gordon Lawyers, *Submission 14*, p. 3; Angela Sdrinis Legal, *Submission 13*, p. 3; Australian Council of Trade Unions, *Submission 26*, p. 19.

> and form a judgement concerning how someone should have reacted objectively.[42]

2.37 Slater and Gordon stated that:

> The current test for psychiatric injury is known as the *Weigand* test. Whilst this test requires there to be a significant work event that contributed to the condition for liability to be accepted, it is not necessary to establish the worker's response was reasonable. The bill removes this test and introduces an objective test that requires a worker to demonstrate there were reasonable grounds for the belief or interpretation of the incident or state of affairs'.
>
> …
>
> This is at odds with the fact that psychological conditions may of their nature not be rational. The Courts define a psychological condition as one that is 'outside the bounds of normal mental functioning'. Consequently, this proposed test is flawed and inappropriate.[43]

2.38 Noting that 'many workers never recover from the effects of work place stress/bullying and some actually take their lives', Angela Sdrinis found the further restrictions placed on claims for psychological injuries 'particularly concerning'.[44]

2.39 The implications for workers engaged in manual work, of excluding spinal injuries from compensation, were of concern to several submitters. Angela Sdrinis noted that since the expansion of the scheme to include licensees, the scheme no longer just covered white collar workers. Consequently, with many workers under the scheme now employed in industries where the work is largely manual, 'there are many more workers suffering serious spinal injuries', and those injuries will not be compensable under the changes proposed in the bill:

> We all suffer degeneration in the spine as we age. The law to date has essentially been that provided that a worker with degenerative changes had been asymptomatic, where an injury at work renders the conditions symptomatic, workers are entitled to compensation. The proposed changes will mean that many workers with back injuries will no longer be eligible to receive compensation and employers will be under less pressure to ensure safe work places in terms of lifting and other manual handling arrangements.[45]

2.40 The Communication Workers Union (CWU) noted that many of its members worked for self-insurers in the Comcare scheme such as Telstra and Australia Post. The CWU noted that motorcycle crashes and manual handling formed a significant component of all injuries amongst workers at Australia Post:

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42 Australian Lawyers Alliance, *Submission 3*, p. 5.

43 Slater and Gordon Lawyers, *Submission 14*, p. 3.

44 Angela Sdrinis Legal, *Submission 13*, p. 3; see also Australian Council of Trade Unions, *Submission 26*, p. 19.

45 Angela Sdrinis Legal, *Submission 13*, p. 4.

> Truck drivers and posties recorded the highest number of deaths on the job in 2012. Transport workers accounted for nearly one-third of all workplace deaths that year. Vehicle collisions caused most fatalities. Motorcycle crashes occur in significant numbers accounting for about 30 per cent of all workers' compensation claims within Australia Post
>
> Muscular stress while lifting, carrying or putting down objects (manual handling) is the most common cause of serious injury across the postal industry. Manual handling is about 43 per cent of all workers' compensations claims within Australia Post. Machinery hazards persist in causing injury and being struck by moving objects such as mail handling equipment.
>
> Our postal members also work in the retail trade. The retail trade is in the top 10 most dangerous line of work. The most common cause of serious injury for retail workers within Australia Post is manual handling, slips, trips and falls, being struck by objects, verbal abuse and threats from customers and armed hold ups. The system of work itself contributes to musculoskeletal injury because of the burden of standing all day upon the body.
>
> …
>
> Our field workforce members continue to suffer muscular injuries associated with work in confined spaces (pits, ceilings, spaces under houses), work which also involves potential exposure to hazardous substances, including (but by no means limited to) asbestos.[46]

2.41 Given the prevalence of musculoskeletal conditions within this sector of the workforce, the CWU therefore expressed grave concern that 'the changes to eligibility requirements ('designated injury') potentially rule out any or every musculoskeletal injury from workers' compensation'.[47]

2.42 Likewise, the CFMEU pointed out that the proposal to disallow musculoskeletal claims would be particularly unfair on manual workers whose 'vulnerability and susceptibility invariably arises from the simple fact of doing hard manual work all their lives'. The CFMEU was therefore of the view that workers are:

> …entitled to expect that their employer will make financial provision so that if an accident happens they will be properly paid until they are able to come back to work. If that is expensive for employers the way a First World country should seek to limit those costs is by paying even more attention to safety and eliminating, to the maximum extent possible, injury and illness at work.
>
> The method proposed in the 'Improving Comcare' Bill is to do it in the way of a Third World country, by reducing the cost of each claim, or making it impossible for claims to be made.

46 Communication Workers Union, *Submission 15*, pp 2–3.

47 Communication Workers Union, *Submission 15*, p. 4.

That is not something that the Parliament should be involved in.[48]

Reasonable management action

2.43 Mental stress claims related to 'reasonable administrative action' was a particular area of contention. Some submitters argued that the balance had tilted too far in favour of employees and that this shift had had a detrimental impact on the ability of employers to effectively manage employees in the workplace. The department noted that as a result of recent rulings by the AAT and courts, even appropriate action by employers and managers can lead to successful claims for mental stress injury, with unfortunate consequences for management practices, professional reputations and staff morale:

> Employers have argued that if they and their managers behaved appropriately when an employee claims to have suffered a mental stress injury, they should not be liable for workers' compensation. The AAT and courts have ruled that the only areas that are exempt from employee mental stress claims are those where managers are undertaking formal performance appraisals, counselling action, suspension action or disciplinary action. In practice, this means that a stress claim can be successful in every other circumstance, even where a manager was behaving appropriately. For example, stress claims can be successful where the workplace undertook a reasonable and appropriate restructure and the employee did not like it; or where a manager has asked an employee to work in another location that is reasonable; or where a manager is working one on one with an employee to improve their performance.
>
> …
>
> Most Commonwealth agencies have reported they are concerned that if they encourage assertive and accountable management practices they risk mental stress claims being lodged. Managers are understandably concerned about the impact of this on their professional reputations, and on the morale of the rest of their staff.[49]

2.44 The department argued that by broadening the definition of 'reasonable administrative action' to include any reasonable management action, the bill would remove impediments to effective workplace management. Furthermore, the bill would close a loophole that had allowed employees to 'make a claim in *anticipation* of reasonable management action being taken'. The department noted these changes were necessary to ensure that 'employers and taxpayers are not held financially responsible for certain injuries and illnesses (including stress) that have no causal connection to the workplace or to a manager's behaviour'.[50]

2.45 The APSC provided the following example to demonstrate the narrowness of the current 'reasonable administrative action' exclusions:

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48 Construction, Forestry, Mining and Energy Union, *Submission 27*, pp 9–10.

49 Department of Employment, *Submission 22*, pp 8–9.

50 Department of Employment, *Submission 22*, p. 9.

> An Australian Government employee's manager had a discussion with her about aspects of her performance, and a failure to follow direction.
>
> The employee filed a workers' compensation claim for psychiatric symptoms she claims arose out of that discussion. The employee claimed her manager was ineffective, subjected her to bullying and harassment, and socially isolated her from the rest of the team when she complained.
>
> The employee's claim progressed to the Administrative Appeals Tribunal, where Comcare agreed that the employee had been properly diagnosed as suffering from adjustment disorder with symptoms of anxiety and that her employment made a significant contribution to the condition.
>
> However, Comcare denied liability for the claim on the basis that the manager took reasonable administrative action in a reasonable manner.
>
> In 2014, the Tribunal found that the discussion between the employee and her manager did not constitute administrative action and was not action taken in respect of the employee's employment. It ruled in favour of the employee and ordered Comcare to pay compensation.[51]

2.46 The APSC pointed out that the ability to manage employee underperformance is a critical and legitimate aspect of successful management. However, the threat of potential stress claims can impede reasonable management action with negative impacts on the organisation, co-workers, and every supervisor in the APS:

> The reasonable administrative action provisions were introduced to protect an employer's capacity to manage their staff through legitimate human resource management actions undertaken in a reasonable manner. This means that when an employer has exercised a legitimate human resource action, which was reasonable in the circumstances and done in a reasonable manner, an employee should not be eligible for workers' compensation for an ailment that arises from that action.
>
> …
>
> However, over time, the Courts have adopted a narrow interpretation of the definition of reasonable administrative action. This has resulted in unintended consequences. Anecdotal evidence suggests that APS managers are often apprehensive of workers' compensation claims or allegations of bullying and harassment when they are being pro-active and responsible managers.
>
> …
>
> Failure to manage underperformance is a drain on resources and productivity, which also has a negative impact on co-workers, and must be addressed.[52]

2.47 The APSC therefore welcomed the proposed amendments because they would 'empower managers to better manage underperformance and workplace change

51 Australian Public Service Commission, *Submission 12*, p. 7.

52 Australian Public Service Commission, *Submission 12*, pp 7–8.

without fear of reprisal through a workers' compensation stress claim, if they manage their workers in a reasonable manner'.[53]

2.48 Within the context of reasonable management action, it is important to note that employers in the APS are governed by a stringent set of rules:

> Employers in the APS are subject to a strict framework of rules and regulations when managing employees and workplace change including under the *Public Service Act 1999*, the *Fair Work Act 2009* and the *Work Health and Safety Act 2011*.[54]

2.49 Employer responsibility also extends to preventing and, where required, managing workplace bullying:

> The APS acknowledges that it has a responsibility to prevent bullying. Also, they are committed to engendering a workplace culture that does not tolerate bullying. In circumstances where bullying does occur, employers have an important role under the Act to manage early intervention and rehabilitation. The amendments strengthen and clarify this role and the mutual obligations of employers and employees.[55]

2.50 Both Ai Group and TPI supported the proposal to exclude reasonable management action (including anticipated actions and organisational and corporate restructures). Ai Group stated that it was 'totally inappropriate for a person to be able have a claim accepted simply because they lodged the claim before the employer commenced reasonable management action in a reasonable manner'.[56] TPI noted that the change would align with State based workers compensation legislation.[57]

2.51 The degree to which the bill accurately reflected the recommendations of the Hanks Review with respect to the definition of 'reasonable administrative action' was questioned by several submitters.

2.52 The Law Council argued that contrary to recommendation 5.6 from the Hanks Review, 'the bill expands the notion of 'reasonable administrative action' to virtually any management action by an employer'.[58]

2.53 Angela Sdrinis stated that widening the scope of 'reasonable administrative action' while ignoring other relevant elements of the Hanks Review amounted to 'cherry-picking' the Review recommendations.[59]

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53 Australian Public Service Commission, *Submission 12*, p. 8.

54 Australian Public Service Commission, *Submission 12*, p. 8

55 Australian Public Service Commission, *Submission 12*, p. 9.

56 Ai Group, *Submission 6*, p. 4.

57 Transpacific Industries, *Submission 1*, p. 2.

58 Law Council of Australia, *Submission 29*, p. 4; see also Slater and Gordon Lawyers, *Submission 14*, p. 3.

59 Angela Sdrinis Legal, *Submission 13*, p. 4; see also Australian Manufacturing Workers' Union, *Submission 24*, p.4; Australian Council of Trade Unions, *Submission 26*, p. 14.

2.54 Slater and Gordon (and ACTU) pointed out that a further consequence of broadening the concept of 'reasonable administrative action' to 'management action' (and thereby include any operational direction) would be to not only exclude most workplace injuries, but also reverse the existing burden of proof, contrary to the original purpose of the scheme:

> Hence, an injury which has been contributed to by a system of work may be excluded from compensation unless the worker can establish that the system of work was not reasonable. This introduces the concept of fault into a no-fault scheme and a perverse onus of proof upon a faultless injured worker. The injured worker may be completely faultless and merely following an employer direction when injured, but unless the worker is prepared to take legal action to prove unreasonableness on the part of the employer, they will be excluded from Comcare.
>
> …
>
> We submit that such a proposition is at odds with the history and purpose of all Australian workers' compensation schemes.[60]

2.55 Furthermore, the Law Council warned that the failure to qualify the meaning of 'management action' could lead to protracted litigation:

> …the absence of a limitation or qualification of what is meant by the phrase 'management action' is likely to lead to uncertainty and complex litigation, such as in *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463, in order to determine the distinction between an employee's usual duties and 'management action'.[61]

2.56 The Law Council also pointed to an inconsistency between the SRC Act and the *Fair Work Act 2009* (Fair Work Act) regarding the definition of 'management action', noting that the effect of the inconsistency could be undesirable:

> The effect is particularly significant given the decision of *Hart v Comcare*, that if just one of the factors leading to the development of a condition was 'reasonable administrative action', then the claim will be excluded, even if that factor was a minor or insignificant one.[62]

2.57 The Law Council and Angela Sdrinis both noted that the Hanks Review had suggested amending the SRC Act to make the operation of the provisions fairer by ensuring that 'reasonable administrative action' must be a significant contributing factor in the injury in order for a psychological injury claim to fail.[63]

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60 Slater and Gordon Lawyers, *Submission 14*, p. 4; see also Australian Council of Trade Unions, *Submission 26*, p. 19.

61 Law Council of Australia, *Submission 29*, p. 4; see also Australian Manufacturing Workers' Union, *Submission 24*, p. 4.

62 Law Council of Australia, *Submission 29*, p. 4.

63 Law Council of Australia, *Submission 29*, p. 4; Angela Sdrinis Legal, *Submission 13*, pp 3–4.

2.58 The Law Council recommended that 'Parliament adopt an exhaustive definition of 'management action' and harmonise the definition' between the SRC Act and the Fair Work Act.[64]

2.59 Noting that broadening the definition of 'reasonable management action' would make 'it much easier to disqualify claims', the ALA argued that the change was a complete reversal of what paragraph 5.123 of the Hanks Review recommended.[65]

2.60 The Finance Sector Union (FSU) and the ALA pointed out that the Full Federal Court judgment in *Reeve*[66] distinguished between the 'administrative' and 'operational' actions of an employer. The distinction meant that an instruction to an employee to perform work at a particular location was an operational and not an administrative action and would not therefore trigger the exclusionary provision. This meant that any injury to an employee resulting from an operational action would still be compensable.[67]

2.61 The ALA argued that 'the Court came to this conclusion because otherwise it would be difficult to see how 'anyone would have an entitlement to workers' compensation'':

> The Court gave the example of injury incurred to an employee in falling down stairs at his or her workplace being the result of administrative action in directing that employee to work at that workplace. If a truck driver became injured as a result of a motor vehicle collision, it could be asserted that the injury was the result of the administrative action in directing the driver to drive a particular route on that day.[68]

2.62 The FSU noted that many of their members work in financial services organisations that undertake regular organisational and corporate restructures, including off-shoring' jobs. Given the uncertainty regarding ongoing employment, employees are especially vulnerable to stress-related injuries at this time. The FSU was concerned that the bill would absolve the employer from any responsibility for their workforce's mental well-being resulting from the restructuring process.[69]

2.63 The CFMEU pointed out that many of their members work in FIFO operations and that the bill would serve to exclude those workers from advancing a claim for psychiatric illness:

> Those workers are not FIFO because it suits them. They are FIFO because employers choose to structure their operations in that way. This Committee will be well aware of the issues to psychiatric health posed by that lifestyle. As a result of the amendments proposed in the 'Improving' Bill, it will be

64 Law Council of Australia, *Submission 29*, p. 5.

65 Australian Lawyers Alliance, *Submission 3*, p. 7.

66 *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21

67 Australian Lawyers Alliance, *Submission 3*, p. 7; Finance Sector Union, *Submission 16*, p. 5.

68 Australian Lawyers Alliance, *Submission 3*, p. 7.

69 Finance Sector Union, *Submission 16*, p. 6.

> almost impossible to advance a claim. It will no doubt be said by employers that all rostering, accommodation, messing, travel and other decisions affecting the health and well-being of FIFO workers are simply 'Management Actions' and therefore squarely caught by the exclusionary provisions. This is not an improvement.[70]

2.64 The ALA argued that by circumventing the decision made by the Court in *Reeve*, the bill would 'make it far more difficult for anyone to receive compensation for accidents and injuries arising in the workplace'.[71] The ALA gave the following example of the dangers in the new approach:

> Michael works as an Agent for the Australian Federal Police. As part of his duties, he was directed by his Superior Officer to investigate a suspected drug lab that was located in a residential home.
>
> Michael goes to the location and sees the drug lab through the back window. He knocks on the front door and out jumps a stranger and stabs him in the chest multiple times, causing severe puncture wounds to his heart and lungs. He is put in a critical condition and is fighting for his life in hospital.
>
> A compensation claim was lodged. However, under the new laws, the claim can be rejected because the injury resulted from the reasonable operational direction given by Michael's superior officer to investigate the suspected drug lab.[72]

Committee view

2.65 The committee recognises that difficult decisions will need to be made regarding situations that involve a combination of work related and non-work related injuries or ailments, and that this situation will be exacerbated by both an ageing population and people working till later in life.

2.66 However, decisions made under the current SRC Act have placed employers in an invidious position by lumbering them with responsibility for injuries that have scant connection to the workplace. The committee is of the view that the amendments will bring a greater degree of clarity and transparency to the decision-making process around eligibility for compensation. The committee is also of the view that the bill strikes the right balance between fair and reasonable compensation for employees and ensuring scheme viability by enabling employers to fund work-related claims.

2.67 The committee takes very seriously the evidence provided by the Australian Public Service Commission concerning the increasing incidence of allegations of injured worker fraud. The committee regards it as imperative that greater rigour is introduced into the assessment of compensation claims and is confident that the

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70 Construction, Forestry, Mining and Energy Union, *Submission 27*, p. 8.

71 Australian Lawyers Alliance, *Submission 3*, p. 7; see also Finance Sector Union, *Submission 16*, p. 5.

72 Australian Lawyers Alliance, *Submission 3*, p. 8.

changes brought in by the bill are both necessary and sufficient to accomplish this vital task.

Schedule 2: Enhancing rehabilitation and return to work outcomes

2.68 A key facet of the bill is the focus on the vocational (rather than medical) nature of rehabilitation services. The bill amends the rehabilitation and return to work requirements in the SRC Act in order to improve return to work outcomes.

2.69 Comcare noted that early intervention programs benefit both employees and employers:

> Early intervention programs have been found to have a positive effect not only in terms of improving employee outcomes (recovery), but also in terms of their capacity to remain at work, reducing the length of time they are away from work, reducing the likelihood of further sickness absences, and ultimately, improving their longer term perceptions of the workplace. Similarly, workplaces using early intervention programs have found that they reduced the number of days employees are absent from work, their costs, and the amount of lost productivity.[73]

2.70 Comcare also pointed to 'compelling international and Australasian evidence that work is generally good for health and wellbeing, and that long-term absence, disability and unemployment generally have a negative impact on health and wellbeing'. Comcare noted these views are endorsed by Australian medical experts led by The Royal Australasian College of Physicians and the Royal Australian College of General Practitioners.[74]

2.71 The APSC supported the moves to improve return to work outcomes and agreed with the evidence on the benefits to employees of returning to work in some capacity as soon as possible:

> The APS believes that the Comcare scheme provides a generous set of entitlements for injured public service employees. However, there is general agreement amongst Secretaries and Chief Executive Officers that the current legislation focuses on administrative decision making rather than injury management and supporting staff to get back to work.
>
> …
>
> There is strong international evidence that injured workers will get sicker if they remain at home. Historical thinking was that injured employees should be at home until they are 100 per cent job ready. Current evidence is that the interests of employees are best served if they return to work as soon as possible, with workplace adjustments to support their return.[75]

2.72 The Safety Rehabilitation and Compensation Licensees Association (SRCLA) noted that licensees 'have a proven history of effective rehabilitation of injured

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73 Comcare, *Submission 5*, pp 4–5.

74 Comcare, *Submission 5*, p. 5.

75 Australian Public Service Commission, *Submission 12*, p. 2.

employees and the SRCLA welcomes the proposed introduction of change that will provide further opportunity to improve rehabilitation effectiveness'.[76]

2.73 However, the Australian Manufacturing Workers' Union (AMWU) argued that the department was using the research on the benefits of work selectively:

> Research on the benefits of work is selectively used to justify the changes. Being employed in good work is much better than being unemployed and it is also better than being employed in bad work. The evidence is strong – there are health benefits of being involved in good work. Work that kills or maims – physically or psychologically – is not beneficial.[77]

Suitable employment

2.74 The bill expands the definition of what is considered suitable employment by enabling an employee to 'look beyond their current employer while they are returning to work without losing the right to employment with their employer'. Consequently, authorities can maximise the opportunities for vocational rehabilitation by using the return to work hierarchy set out below:

- Same job/same employer: the first goal is to return the injured employee to the original employer in the original job.
- Modified job/same employer: to encourage the employer to modify the original job or to provide employment in a different job at that employer.
- New job/same employer: to enable continuity of employer when the employee is no longer able to undertake their original job.
- Same job/new employer: to assist the injured worker in finding employment with a different employer in a related industry.
- Modified job/new employer: to assist the injured employee in finding employment in a modified role with a different employer in a related industry.
- New Job/new employer: to assist the injured worker in finding a job in another industry.[78]

2.75 TPI welcomed the simplification and streamlining of the administrative process relating to the provision of rehabilitation services as well as 'the focus on work readiness and assessment in line with vocational capability rather than incapacity'.[79]

2.76 Comcare noted that the bill will engender greater cooperation between employers, employees and the relevant authority to improve return to work outcomes

76 Safety Rehabilitation and Compensation Licensees Association, *Submission 23*, p. 2.

77 Australian Manufacturing Workers' Union, *Submission 24*, p. 5.

78 Department of Employment, *Submission 22*, p. 9.

79 Transpacific Industries, *Submission 1*, pp 2–3.

for employees, and will provide Comcare with the ability under the SRC Act to support employees to find suitable employment in all employment sectors.[80]

2.77 The APSC noted that under the bill, Comcare would be empowered to take a more active role in determining which agency has rehabilitation responsibilities following a machinery of government change.[81]

2.78 Angela Sdrinis welcomed the emphasis on return to work requirements, but expressed disappointment employers will face no penalties if they 'fail to provide suitable duties in circumstances where there is evidence that alternative work could be made readily available'.[82]

2.79 Furthermore, Angela Sdrinis pointed out that the Hanks Review had made specific recommendations with regard to return to work and job replacement programs:

> Hanks recommended that the SRCA be amended to provide for a requirement that all reasonable steps be undertaken to return an injured employee to work (6.14) and to provide for the power to impose penalties where this does not occur (6.17). Further, Hanks recommended the establishment of a scheme wide job placement program (6.18). This could work particularly well with respect to workers with work related psychological injuries where the barriers to ever returning to the workplace where their injuries occurred are in many cases insurmountable.
>
> It is very disappointing that this approach has not been adopted by the Government. There would be a certain reciprocity involved in a scheme wide job placement program i.e. employers would be a lot more willing to take on a worker injured in another workplace if they knew that other employers would be under pressure to take on 'their' injured workers.[83]

2.80 Likewise, Slater and Gordon (and ACTU) argued that the new workplace rehabilitation plans in the bill put the interests of employers ahead of the needs of workers:

> The bill allows the 'liable' employer unfettered discretion to impose workplace rehabilitation requirements, whether or not the requirements could in fact be harmful. This will put many workers in an impossible position whereby they must either disobey the advice of their qualified medical practitioner or face sanctions and further financial penalty. Their right to challenge the reasonableness of directions given to them by their employer is removed by the bill.
>
> …

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80 Comcare, *Submission 5*, pp 6–7.

81 Australian Public Service Commission, *Submission 12*, p. 4.

82 Angela Sdrinis Legal, *Submission 13*, p. 4: see also Australian Council of Trade Unions, *Submission 26*, p. 25.

83 Angela Sdrinis Legal, *Submission 13*, p. 5.

> On the one hand, workers are faced with financial penalty and sanctions for failure (in the opinion of the employer) to adhere to their obligations, however, on the other hand, employers are to be provided with financial incentives to meet their obligations. Again, this is a further illustration of putting the interests of employers before the needs of injured workers and their families.[84]

2.81 UnionsWA and ACTU expressed concern that the changes imposed greater responsibilities and penalties on workers while at the same weakening the responsibilities of liable employers:

> The proposed Schedule 2 of the bill on Rehabilitation would weaken the responsibility of the liable employer to assist workers to return to work, yet it also provides those same employers with extraordinary powers to direct injured workers on what health providers they must see and what tasks they must under-take. The proposals take rehabilitation out of the hands of qualified health practitioners and into the hand of employers.
>
> Despite these new powers for employers, the bill provides for no penalties on employers if they fail genuinely to engage in the rehabilitation process. The bill ensures that a Workplace Rehabilitation Plan remains valid even when a worker is not consulted. Employers also need only consult with medical practitioners as far as 'reasonably practicable' when constituting a plan.[85]

2.82 The FSU recounted several instances of injured workers either being pressured to return to work too early or not being provided with adequate equipment (such as a seat and footstool), or appropriate breaks to accommodate posture changes, despite the recommendations in certificates of capacity provided by treating doctors and specialists.[86]

Schedule 3: Improving the scheme's integrity and financial viability

Provision of medical information

2.83 The ALA asserted that requirements dealing with the provision of medical information lacked any privacy protections and effectively undermined the doctor-patient relationship:

> The bill's proposal to compel workers to provide all medical information from treating medical providers is highly inappropriate. No other workers' compensation scheme provides for such a broad and unrestrictive provision of private medical information. The private rights of individuals to consultation and treatment are being eroded by these provisions without justification. Workers may be obliged to disclose highly confidential and

84 Slater and Gordon Lawyers, *Submission 14*, p. 8; see also Finance Sector Union, *Submission 16*, pp 8–9; Australian Council of Trade Unions, *Submission 26*, pp 26–27.

85 UnionsWA, *Submission 7*, p. 2; see also Australian Council of Trade Unions, *Submission 26*, p. 25; Australian Manufacturing Workers' Union, *Submission 24*, p. 10.

86 Finance Sector Union, *Submission 16*, p. 8; see also Australian Council of Trade Unions, *Submission 26*, p. 26.

> sensitive information irrelevant to the workers compensation issues in dispute. That information can be used for a variety of purposes to the detriment of the injured worker without adequate protection checks and balances.
>
> S 58, 58A, 120A and 120B all represent changes that now enable Comcare and licensees to force an injured worker or claimants to obtain their doctor's private clinical notes. A worker must obtain 'relevant information' or risk draconian sanctions being applied which, in this case, extends to a refusal to deal with a claim.
>
> These changes represent an erosion of the doctor-patient relationship of confidentiality.
>
> …
>
> Such a proposal is deeply concerning and attacks the fundamental rights of individuals to engage in meaningful and confidential consultations with their medical practitioners.[87]

2.84 Slater and Gordon agreed with the above assessment and also made the following observations. First, there is no appeal mechanism 'where there is a genuine dispute in relation to whether certain information or a certain document is actually relevant to a claim'. Second, 'there is no obligation enshrined in the bill that requires an employer to use the information for the purpose for which it was obtained'. And third:

> The new section 58A takes the breach of privacy one step further in that it enables Comcare or the relevant authority to obtain documents about an injured worker from a third party. The bill also enables the gathering of information without the permission of the injured worker from third parties.[88]

2.85 UnionsWA and ACTU also expressed concern that the bill invaded the privacy of injured workers backed up with the force of sanctions:

> If it is passed Comcare or an employer can demand that an injured worker provide documents in not less than 14 days. A failure or refusal to do so would be a breach of an obligation of mutuality. Comcare or a relevant authority would also be able to obtain third party documents about injured workers.[89]

Timeframes

2.86 ACTU welcomed the introduction of statutory time limits on decision-making, but noted that the timeframes 'are the least beneficial by far for injured

87 Australian Lawyers Alliance, *Submission 3*, p. 14.

88 Slater and Gordon Lawyers, *Submission 14*, p. 8.

89 UnionsWA, *Submission 7*, p. 3; see also Australian Council of Trade Unions, *Submission 26*, p. 28.

workers of any scheme in Australia (except for other Commonwealth schemes that like Comcare, don't have time frames)'.[90]

2.87 Furthermore, ACTU pointed out that:

> There are no sanctions or penalties placed on Comcare, the employer, or the relevant insurer if self-insured, if these time frames are not met.
>
> If these time frames are not met, the worker's claim is automatically deemed to be rejected, even if their claim is in fact valid. Although the worker has access to an appeals process, they may not always be aware of this and as a result, may not receive compensation to which they are entitled, due to lack of knowledge of the proper processes.[91]

Compensation for detriment caused by defective administration

2.88 The department noted that the bill will rectify this matter and improve the integrity of the scheme 'by creating an avenue for reparation' through 'empowering Comcare to make discretionary payments to people who have suffered detriment due to defective administration on Comcare's part'.[92] These changes were welcomed by Angela Sdrinis.[93]

Schedule 4: Provisional medical expense payments

Medical expense payments

2.89 The bill introduces provisional medical expenditure payments capped at $5 000 without the need for an employee to lodge a formal workers' compensation claim.

2.90 The APSC supported this change as being complementary to the focus on early intervention by ensuring that injured or unwell employees gain assistance as soon as it is required, leading to improved health outcomes.[94]

2.91 Several submitters made suggestions for improving the schedule of fees. TPI did not fully support the provision in Schedule 4 to enable a relevant authority to make provisional medical expense payments capped at $5 000 in respect of an alleged injury before a claim is determined. While supporting the current medical expense process, TPI recommended that the capped amount be at the discretion of the relevant authority rather than legislated:

> TPI does not fully support the amendments proposed under Schedule 4. TPI strongly agrees with the provisional medical expense process as it already allows an ability to pay provisional expenses under an Early Intervention program. This is currently working well with the goal of employees receiving and having access to medical assessment and treatment post

90 Australian Council of Trade Unions, *Submission 26*, p. 29.

91 Australian Council of Trade Unions, *Submission 26*, p. 29.

92 Department of Employment, *Submission 22*, p. 20.

93 Angela Sdrinis Legal, *Submission 13*, p. 5.

94 Australian Public Service Commission, *Submission 12*, p. 3.

> injury without a need for liability determination. Treatment then follows from this, but it is time and cost limited to enable management and control. It also ensures that claims are moved to determination of liability outside of the set parameters. This sets an expectation that if the nature of the injury is ongoing then the claim liability determination process is important to ensure the appropriate expertise in its management. The ability to recover payments being made as a result of false or misleading statements is an important protection in this process. TPI's primary concern with the proposed change is the legislated amount of $5 000 as an upper limit. This will potentially present an extra burden in relation to management of this process, potentially delay employees submitting claims as they will be keen to utilize the full (new) amount available under provisional medical treatment. TPI proposes that the capped amount is not legislated but at the discretion of the relevant authority.[95]

2.92 John Holland did not support a mandated schedule of medical fees and recommended greater flexibility in the development of any fee schedule:

> John Holland considers that the mandated schedule of fees for medical treatment, examination and reports will negatively impact on our employee's ability to access appropriate care in a timely manner. Mandating schedule fees for independent medical examinations may also restrict the number of bookings doctors are willing to take which may also delay decisions regarding claimed entitlements or treatment options such as surgery requests. John Holland considers that treatment outcomes as well as managing costs associated with it, can be better achieved through initiatives such as clinical frameworks. We strongly suggest that any schedule of fees that is developed, be developed in a manner providing for flexibility to account for changes in location; urgency; particular; and peculiar circumstances. Our people are often working in remote and rural settings where choice of treatment is limited and we do not support legislation that may result in them needing to seek treatment in alternate locations purely due to cost; or situations where our employees themselves will be required to contribute to their own medical treatment as a result of the introduction of a mandated schedule of fees.[96]

2.93 Ai Group was similarly cautious about the proposal:

> …there is scope, unless the scheme has specific protections, for employees to obtain multiple short periods of weekly compensation without claims ever being determined. This is of particular concern to employers when liability would generally be contested, i.e. psychological injury or aggravations of pre-existing injuries.[97]

2.94 On balance, however, Ai Group believed 'that the granting of provisional liability for medical costs establishes a workable compromise that enables an

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95 Transpacific Industries, *Submission 1*, p. 4.

96 John Holland, *Submission 10*, p. 2.

97 Ai Group, *Submission 6*, p. 7.

employee to seek timely medical treatment which could enable them to stay at work, or return to work in a timely manner'.[98]

2.95 Angela Sdrinis welcomed the introduction of the provisional medical expense payments because early medical intervention can often assist in quick recovery. However, Angela Sdrinis noted that the Hanks review also recommended the introduction of provisional acceptance of liability:

> Hanks also recommended provisional acceptance of liability so that an injured worker may access up to 12 weeks in incapacity payments (recommendation 6.1). Interim liability to pay incapacity payments mean that workers can survive financially whilst claims are being investigated. The capacity to be paid and to have treatment also means that some of the 'heat' would be taken out of claims during the investigation phase and this in turn generally means that workers are better disposed to trust an employer and be more willing to give early return to work a go.[99]

2.96 Slater and Gordon, the FSU, and ACTU all noted that 'the bill includes no appeal mechanism in the event an employer refuses to pay provisional medical expense payments'.[100]

Schedule 5: Ensuring compensated medical expenses are evidence-based

Medical treatment based on evidence

2.97 The department stated that medical treatment under the SRC Act is ill-defined and lacks objective standards, resulting in potentially poor outcomes for employees, excessive costs for employers, and sub-optimal return to work outcomes:

> …medical treatment under the SRC Act is currently broadly defined, not based on objective standards, and not required to be provided by medical practitioners who meet a level of national accreditation. This puts injured employees at risk, increases costs for employers, and delays recovery and return to work.[101]

2.98 The department (and the APSC) noted that current practices have led to questionable claims for treatments and potential damage to the professional reputation of the Commonwealth public service:

> There have been many legal cases over the years that have considered 'reasonable' medical treatment and compensation has been awarded for what are arguably questionable claims. These have received media attention and potentially undermined the professional reputation of the public service. For example:

98 Ai Group, *Submission 6*, p. 7.

99 Angela Sdrinis Legal, *Submission 13*, pp 5-6.

100 Slater and Gordon Lawyers, *Submission 14*, p. 8; see also Finance Sector Union, *Submission 16*, p. 10; Australian Council of Trade Unions, *Submission 26*, p. 30.

101 Department of Employment, *Submission 22*, p. 16.

> The AAT approved the continuation of massage therapy payments as part of a broader treatment plan, despite no evidence of any curative effect associated with the massage therapy in this case. This cost $29,000 over an eight-year period.
>
> The AAT found it was reasonable for an injured employee living in Alice Springs (who had 'generalised anxiety disorder and adjustment reaction with brief depressive reaction') to attend a Buddhist meditation retreat in Queensland as part of their workers' compensation treatment.
>
> The AAT found it was reasonable for an employee to be funded through Comcare to be flown from Canberra to Townsville to receive psychoneuroimmunology treatment after the clinical nurse psychotherapist providing the treatment relocated. This relatively new form of treatment was not offered by anyone else in Canberra.[102]

2.99 The department argued that the bill addresses the issues outlined above by ensuring that 'compensable medical treatment is based on evidence and provided by appropriately qualified health practitioners'.[103]

2.100 The APSC agreed with the department's views on these matters and noted that, as a result of the changes in the bill, agencies would 'no longer be liable through premiums for the cost of treatments with little to no curative effect'.[104]

2.101 TPI was of the view that the requirement to ensure medical treatment was performed by an appropriately qualified health would 'enhance clinical standards and controls of treatment delivery'. TPI also stated that the requirement to consider the Clinical Framework principles would be of benefit to the scheme.[105]

2.102 Both Angela Sdrinis and Slater and Gordon raised concerns about the Clinical Framework Principles (prepared by Comcare and defined by legislative instrument) stating that the attempt to codify reasonable medical treatment might unduly impinge on an individual's choice of medical practitioner.[106]

2.103 The CWU noted the increasing use of Facility Nominated Doctors (FNDs) doctors by Australia Post and expressed concern about the discrepancies between the recommendations of the injured worker's treating doctor and those of the FND. Furthermore, by empowering employers to make the final decision on return to work, backed up by the sanctions regime (see Schedule 15), 'the rights of workers to follow

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102 Department of Employment, *Submission 22*, p. 16; see also Australian Public Service Commission, *Submission 12*, p. 3.

103 Department of Employment, *Submission 22*, p. 16.

104 Australian Public Service Commission, *Submission 12*, p. 3.

105 Transpacific Industries, *Submission 1*, p. 5.

106 Slater and Gordon Lawyers, *Submission 14*, p. 10; see also Angela Sdrinis Legal, *Submission 13*, p. 6.

the advice of their own doctors in relation to treatment and rehabilitation' will be undermined.[107]

2.104 ACTU warned that a situation where injured workers are 'being managed by employer and Comcare-funded practitioners … will create a significant conflict of interest'.[108]

Medical services table

2.105 Several submitters raised concerns about the level at which Comcare will set the reasonable costs of medical treatment in the new Medical Services Table:

> The risk is that there may be a significant gap between what Comcare will pay and what treatment providers will charge. This may lead to some injured workers being unable to afford to subsidise their treatment.[109]

2.106 The Law Council therefore recommended either that the medical services table and related provisions be excised from the bill and that 'Comcare continue to consider and pay reasonable costs for medical treatment required by injured workers on a case by case basis', or:

> Alternatively, if a medical services table is to be included then it should be subject to:
>
> (a) an overriding requirement that standard fees set are reasonable, having regard to the reasonable market rates for the relevant services;
>
> (b) consultation with the medical profession;
>
> (c) regular review by Comcare to ensure that the fees rates remain fair; and
>
> (d) regular review by the Office of the Auditor-General to ensure that the fees rates remain fair and unintended consequences do not occur.[110]

Schedule 6: Household/attendant care services

2.107 The department pointed to anomalies in the provision of household and attendant care services such that 'employees with relatively minor injuries are entitled to the same level of compensation for household and attendant care services as those with the most severe injuries'.[111]

2.108 The department stated that the bill addressed these anomalies by establishing 'a tiered approach' to the payment of compensation for household and attendant care services. Accordingly, 'there will be no time limit or cap on the amount of compensation payable for household and attendant care services for employees with a

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107 Communication Workers Union, *Submission 15*, pp 5–6; see also Australian Council of Trade Unions, *Submission 26*, pp 34–35.

108 Australian Council of Trade Unions, *Submission 26*, p. 35.

109 Law Council of Australia, *Submission 29*, p. 6; see also Slater and Gordon Lawyers, *Submission 14*, p. 10; Australian Council of Trade Unions, *Submission 26*, p. 32.

110 Law Council of Australia, *Submission 29*, p. 7.

111 Department of Employment, *Submission 22*, p. 17.

catastrophic injury'. By contrast, there is a three year limit to compensation for household and attendant care services payable to employees with a non-catastrophic injury.[112]

2.109 TPI supported the tiered approach to catastrophic and non-catastrophic cases. However, TPI reserved judgment on the setting of the three year limit for non-catastrophic cases (with payment beyond three years extended only if there is hospitalization for a further 6 months) stating that it would need to be evaluated against outcomes over time.[113]

2.110 The Law Council raised serious concerns about the extent of parliamentary scrutiny that would be applied to substantive changes in the definition of 'catastrophic injury' given that the bill proposes to effect definitional changes by delegated rather than primary legislation:

> …the definition of catastrophic injury in section 4(1) should be specified in the Act not by Regulation, to promote consistency and certainty in the law. It is unclear why potentially lesser Parliamentary scrutiny should be required to amend the definition of catastrophic injury given the significant consequences that the amendments might have for the treatment of those with very serious injuries.[114]

2.111 Several submitters also voiced concerns about cutting the provision of services after three years for injured workers with non-catastrophic injuries given that the definition of non-catastrophic injury is to be specified by legislative instrument at a future date. The FSU, Angela Sdrinis, and Slater and Gordon noted that workers with very severe injuries (such as amputation) could be defined as non-catastrophic and therefore denied services after the initial three year period.[115]

2.112 Slater and Gordon and ACTU also observed that the formal system of accreditation introduced by the bill will prevent family members from being paid to provide such services (unless they become accredited, approved and registered). While 'fully support[ing] the goal of a trained and professionally recognised attendant care workforce,' Slater and Gordon noted that in cases where family members are appropriate as attendant carers, 'removing family members from the field of compensation will be detrimental to the care of many long-term injured workers'.[116]

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112 Department of Employment, *Submission 22*, p. 17.

113 Transpacific Industries, *Submission 1*, pp 5–6.

114 Law Council of Australia, *Submission 29*, p. 7; see also Australian Council of Trade Unions, *Submission 26*, pp 36–37.

115 Finance Sector Union, *Submission 16*, pp 11–12; Slater and Gordon Lawyers, *Submission 14*, p. 11; Angela Sdrinis Legal, *Submission 13*, p. 6.

116 Slater and Gordon Lawyers, *Submission 14*, pp 11–12; Australian Council of Trade Unions, *Submission 26*, p. 37.

Schedule 7: Compensation for absences from Australia for non-work purposes

2.113 Given the nature of modern workforces and work requirements, ACTU noted a worker may have valid reasons for leaving the country:

> Many FIFO [fly in fly out] workers, working in high risk industries such as mining or offshore oil and gas industries, are based in nearby countries and fly in to work in Australia. This means that their family base and support network may be located in a country other than Australia. These workers would be negatively impacted by this proposal, and may be forced to relocate their entire family in order to access compensation.[117]

2.114 ACTU also noted that the amendments would impact on temporary visa holders:

> Many 457 and 417 visa workers are forced to return to their country if they no longer have employment in Australia. This leads to a catch-22 situation in instances where a migrant worker is injured at work, in that they will be forced to return to their home country once their employment ceases, and thereby would be ineligible for workers' compensation.[118]

Schedule 8: Accrual of leave or absence entitlements while on compensation leave

2.115 The National Electrical and Communications Association (NECA) supported the move to align the SRC Act with the end of accrual of leave entitlements under National Employment Standards within the Fair Work Act. [119]

2.116 NECA also strongly endorsed the changes in the bill and was of the view that the current arrangements imposed an unfair impost on small business:

> The accrual of leave during an employee's absence, away from the workplace is a significant impost on the business community and typically places an unfair burden on small and medium enterprises with the least capacity to manage workplace disruption and the costs of accrued leave through injury downtime. As the average electrical contracting business employs 13 staff, with 92 per cent employing less than 25 staff, we support the concerns of our members who believe that leave accrual whilst on compensation leave is an unfair cost to bear, particularly for a small business.[120]

2.117 Ai Group raised a concern about a potential inconsistency between the SRC Act and the Fair Work Act with regard to the taking and accruing of leave during a period of workers' compensation. Ai Group was of the view that:

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117 Australian Council of Trade Unions, *Submission 26*, p. 38.

118 Australian Council of Trade Unions, *Submission 26*, p. 38.

119 National Electrical and Communications Association, *Submission 20*, p. 6.

120 National Electrical and Communications Association, *Submission 20*, p. 6.

> the insertion of section 116(1A) creates unnecessary confusion. This will be exacerbated once the amendments to the Fair Work Act are in place, with employers and employees having to refer to two pieces of legislation in order to understand that leave is not to accrue, and cannot be taken. It would be much clearer if section 116 was repealed altogether, effective on the date of Royal Assent.
>
> If it is not appropriate to do so before the amendments to the Fair Work Act are passed, clarity could be achieved inserting an effective date written in the same manner as is currently the case for the proposed introduction of clause 116(1A).[121]

2.118 Noting the government proposal to end the accrual of leave entitlements under National Employment Standards within the Fair Work Act for all workers' compensation schemes, Slater and Gordon (and UnionsWA) were of the view that the changes to the accrual of leave during a period of incapacity would place an injured worker at a significant disadvantage:

> The bill also proposes to prevent those who are unable to work as a result of a work injury from accruing leave entitlements under their workplace agreement. Under the current scheme, such accruals are permitted for the first 45 weeks of a worker's incapacity. This cut places injured workers' at a significant disadvantage compared with their uninjured colleagues who are able to accrue sick leave, long service leave and annual leave in the same period. There is no justification for this financial penalty against workers. This amendment effectively punishes workers for sustaining an injury.[122]

Schedule 9: Calculating incapacity payments

2.119 The bill uses incentives to improve return to work outcomes by restructuring the incapacity payments for injured employees. Currently, employees receive 100 per cent of their normal weekly earnings for the first 45 weeks and 75 per cent thereafter. Under the bill, four 'step-downs' are introduced such that employees will receive:

- 100 per cent of their average weekly remuneration (AWR) for the first 13 weeks of incapacity;
- 90 per cent of AWR for 14–26 weeks;
- 80 per cent of AWR for 27–52 weeks; and
- 70 per cent of AWR thereafter.[123]

2.120 The department noted that using 'step-downs' to 'encourage return to work is consistent with the international evidence',[124] and that the restructured incapacity

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121 Ai Group, *Submission 6*, p. 9.

122 UnionsWA, *Submission 7*, p. 3; see also Slater and Gordon Lawyers, *Submission 14*, p. 12; Finance Sector Union, *Submission 16*, p. 12; Australian Council of Trade Unions, *Submission 26*, p. 40.

123 Department of Employment, *Submission 22*, p. 10.

124 Department of Employment, *Submission 22*, p. 11.

payments 'are in line or are more generous than those schemes that operate in all states and territories'.[125]

2.121 Moreover, the new 'step-down' provisions will only affect 15 per cent of injured employees because '85 per cent of employees receiving income replacement have returned to work after 13 weeks' (see figures 2.6 below).[126]

Figure 2.6: Percentage of employees receiving compensation in the Comcare Scheme at defined periods (Source: Department of Employment, Submission 22, p. 11).

Period of Absence	Less than 1 week	1 week or more	12 weeks or more	45 weeks or more	52 weeks or more
Percentage of employees receiving compensation	58%	42%	15%	4%	3%

2.122 The criteria for suitable employment (see Schedule 2) are integrated with the restructured return to work incentives. This means that 'an employee's ability to earn in suitable employment (either actual or deemed) is regularly assessed', and that at each 'step-down', the income replacement that an employee receives 'may be reduced if the employee has a deemed ability to earn that they are not utilising'.[127]

2.123 Protection for low income earners is retained, however, because 'low income earners will continue to receive 90 per cent of their average weekly remuneration, less their actual or deemed ability to earn, after 26 weeks'.[128]

2.124 In addition, 'employees who return to work after 26 weeks may increase their take-home pay (a combination of income replacement and salary from their employer) to up to 90 per cent of their average weekly remuneration.[129]

2.125 The department argued that allowances should not be paid to employees that no longer perform the tasks that attract an allowance. However, recognising that employees may require time to adjust their expenditure if they are unable to return to work, the bill includes a two year transition period during which injured employees are able to receive the overtime and allowance they had prior to injury. The department gave the following example to illustrate the arrangement:

> Gary, an Australian Federal Police officer, suffered an injury in the course of employment which has left him with no capacity for work and an 18 per cent permanent impairment. Gary has been receiving incapacity payments for over two years therefore under the amended Comcare scheme,

125 Department of Employment, *Submission 22*, p. 10.

126 Department of Employment, *Submission 22*, p. 11.

127 Department of Employment, *Submission 22*, p. 10.

128 Department of Employment, *Submission 22*, p. 11.

129 Department of Employment, *Submission 22*, p. 10.

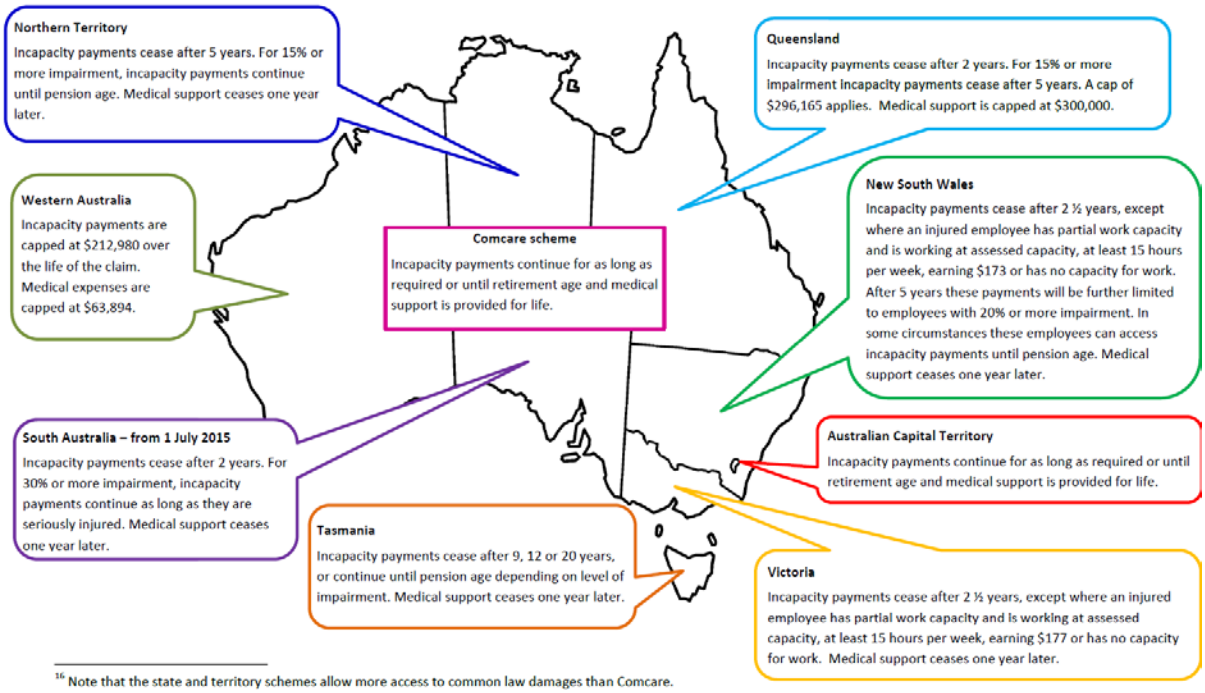
> allowances and overtime are no longer included in the calculation of his incapacity payments. Gary will continue to receive incapacity payments for all other aspects of his pre-injury total earnings (salary, commissions, fringe benefits, and reportable employer superannuation contributions) until retirement age or as long as required. If Gary was covered under the New South Wales workers' compensation scheme all Gary's incapacity benefits would cease after five years.[130]

2.126 The department also noted that 'all states and territories utilise 'step-downs' of incapacity payments to encourage injured employees to return to work and to remove disincentives to stay at home and become sicker'. Furthermore, the department pointed out:

> The Comcare scheme is one of the few workers' compensation schemes in Australia that remains long-tail, that is, it provides income replacement until retirement age or as long as is required, for all levels of incapacity. Western Australia and Queensland place caps on the amount of compensation payable per claim while New South Wales, Victoria and Tasmania only provide incapacity payments long term if the injured employee has a severe incapacity or has partially returned to work.[131]

2.127 A comparison of incapacity payments across Australian jurisdictions is provided in figure 2.7 below.

Figure 2.7: Comparison of workers' compensation after two years (Note that the state and territory schemes allow more access to common law damages than Comcare)(Source: Department of Employment, Submission 22, p. 14).



[16] Note that the state and territory schemes allow more access to common law damages than Comcare.

130 Department of Employment, *Submission 22*, p. 12.

131 Department of Employment, *Submission 22*, p. 11.

2.128 NECA stated that 'step-down' provisions in the bill were 'justified by evidence of claims within the scheme that suggest that injured workers who are off work for between 13 and 45 weeks are less likely to return to and stay in work'.[132]

2.129 Furthermore, NECA noted that the four level 'step-down' 'puts downward pressure on premiums, reduces claims costs for licensees and decreases burdens for employers under the Act'.[133]

2.130 Ai Group supported the new approach to accruing weeks as it aligned the scheme with most other jurisdictions, ensured 'a relatively easy approach to counting weeks', and provided 'an incentive, through more timely step-downs, for injured employees to return to full time duties'.[134]

2.131 TPI supported all of the changes to:

> …the concept of normal weekly earnings to average weekly remuneration, the change in calculation method, the proposed incapacity step down arrangements, the amendment addressing the *Comcare v Simmons* and *Comcare v Burgess* decisions, changes to minimum earnings arrangements and AWOTEFA reduction provisions and the increase in statutory amount for compulsory redemptions.[135]

2.132 Nonetheless, while supporting the 'step-downs', TPI would have preferred the inclusion of 'a 104 week capacity test as per the Victorian legislation'.[136]

2.133 TPI also raised concerns about aligning the retirement age to the pension age and the greater flexibility in determining the 'relevant period':

> With the relevant period remaining flexible this leaves a greater opportunity for cases being disputed. If the relevant period was set at 12 months this would potentially provide a set process that if applied would not result in dispute. When flexibility is offered it can lead to disputes and challenges as to what the relevant period should be.[137]

2.134 The Law Council noted that the 'step down' provisions contained in Schedule 9 were 'an easier test to apply and understand', but remained of the view, consistent with the Hanks Review, that the final 'step-down' should be to 80 per cent of AWR.[138]

2.135 However, Slater and Gordon pointed out that for those injured employees deemed totally incapacitated for work, the new provisions (including the earlier and deeper 'step downs'; the cap on incapacity payments based on 150 per cent of Average

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132 National Electrical and Communications Association, *Submission 20*, p. 4.

133 National Electrical and Communications Association, *Submission 20*, p. 4.

134 Ai Group, *Submission 6*, p. 11.

135 Transpacific Industries, *Submission 1*, p. 7.

136 Transpacific Industries, *Submission 1*, p. 7.

137 Transpacific Industries, *Submission 1*, p. 7.

138 Law Council of Australia, *Submission 29*, p. 9.

Weekly Ordinary Time Earnings of Full-time Adults (AWOTEFA) at 13 weeks rather than the current 45 weeks; and the cuts to eligible allowances after 104 weeks) represented a significant reduction in cumulative payments that would 'have a disproportionate financial impact on the seriously and permanently injured'.[139]

2.136 Both Slater and Gordon and ACTU produced a range of graphs based on information contained in the Hanks/Hawke Review. The graphs demonstrated that a majority of seriously and permanently incapacitated workers stood to lose tens of thousands of dollars in compensation as a result of the changes in the bill.[140]

2.137 With regard to the effectiveness of an incentive based scheme, the AMWU disputed the assertion that there was evidence to support the claim that 'step-downs' operate as an incentive for injured workers to return to work:

> Although oft quoted there is a dearth of reliable evidence to support the assumption that step downs provide the necessary incentive for injured workers to return to work.[141]

2.138 Instead, the AMWU noted a series of steps that contribute to sustainable return to work outcomes:

> Focus on a safe workplace and injury prevention;
>
> Promote workers' wellbeing, including support for both physical and emotional problems;
>
> Build and maintain relationships with treatment and rehabilitation services and insurance agents; and
>
> Train all managers and workers in workplace safety and return to work procedures.
>
> Best-practice organisations have well established procedures for injury prevention and occupational rehabilitation, including provision of health treatments for workers, return to work co-ordinators of staff, and regular contact with insurers and other key stakeholders.[142]

Liability to pay compensation during a period of suspension without pay

2.139 The bill addresses the issue of liability to pay compensation during a period of suspension without pay. However, the Law Council was of the view that proposed section 8(11) was unnecessary:

> The proposed s 8(11) attempts to overcome the decision in *Comcare v Burgess* [2007] FCA 1663 (1 November 2007), which held that Comcare was liable to pay compensation to an employee during a period of

139 Slater and Gordon Lawyers, *Submission 14*, p. 12.

140 Slater and Gordon Lawyers, *Submission 14*, pp 13–15; Australian Council of Trade Unions, *Submission 26*, pp 42–44; see also Finance Sector Union, *Submission 16*, pp 10–11.

141 Australian Manufacturing Workers' Union, *Submission 24*, p. 5.

142 Australian Manufacturing Workers' Union, *Submission 24*, p. 6.

> suspension without pay. However, the provision is unnecessary given the rewording of the earlier provisions and should be deleted on this basis.[143]

Calculation of normal weekly earnings

2.140 Section 9(1) of the SRC Act provides that for the purposes of calculating the normal weekly earnings of an employee before an injury, the relevant period is the latest period of two weeks before the date of the injury during which the employee was continuously employed by the Commonwealth or a licensed corporation.

2.141 The Law Council noted that 'a significant amount of unnecessary litigation' resulted from the two week rule and, therefore, recommended that the basic rule be amended to six weeks.[144]

Schedule 10: Redemption of compensation

2.142 Several submitters argued that the sustainability of the scheme could be addressed in substantial measure by tackling the twin matters of redemptions ('pay outs') and access to common law.

Redemptions ('pay-outs')

2.143 The Law Council considered that amending the SRC Act to allow for redemptions in agreed circumstances would provide a cost-effective means of managing Comcare's finances:

> A major disadvantage of the SRC Act compared to other legislative schemes is that it does not afford employees and employers the opportunity to resolve disputes through lump sum settlements that reflect future entitlements, in circumstances where the employee has received independent financial and legal advice as to the reasonableness and consequences of a lump sum settlement.[145]

2.144 Angela Sdrinis also stated that an appropriate redemption scheme should be implemented. She noted that this was recommended in the Hanks Review, would be of benefit to workers, and would contribute to the viability of the scheme:

> Whilst there is always a lot of debate about 'pay outs' versus ongoing benefits in statutory compensation schemes, it is the case that workers inevitably want 'out' of the system and a process which allows this to occur so that workers are not disadvantaged and with significant savings to the system should be implemented and was recommended by Hanks.[146]

Access to common law

2.145 The Law Council was of the view that 'the fundamental problem with the Comcare scheme is its long-tail nature' and that this 'inevitably leads to projections of liabilities exceeding assets and the call for benefits to be reduced in response'. The

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143 Law Council of Australia, *Submission 29*, p. 9.

144 Law Council of Australia, *Submission 29*, p. 9.

145 Law Council of Australia, *Submission 29*, p. 12.

146 Angela Sdrinis Legal, *Submission 13*, p. 7.

Law Council noted that this experience was common to other schemes, such as the previous South Australian WorkCover scheme, that did not allow recourse to common law.[147]

2.146 In contrast, the Law Council drew attention to Queensland Workcover as an example of a well-preforming scheme in terms of financial sustainability and return to work outcomes that did allow access to common law:

> …Queensland WorkCover, which allows virtually unrestricted access to common law, is among the best performing schemes in the country, with the second-lowest premiums, the lowest disputation rate, highest assets to liabilities ratio and is among the better performing schemes in terms of return to work outcomes.[148]

2.147 The Law Council was of the view that the failure to address the twin matters of redemption and access to common law remedies was a 'wasted opportunity'. The Law Council therefore recommended that Parliament take 'the opportunity to remove existing restrictions on redemptions and common law payments to ensure the long-term viability of the Comcare scheme'.[149]

2.148 Angela Sdrinis also pointed out that the availability of a common law remedy for negligence would provide an appropriate incentive for employers to improve workplace safety:

> This is particularly so under the Comcare scheme where there is effectively no common law right to sue. In other words, the decision to set the maximum payment for pain and suffering damages with respect to a negligence action at $110,000 (which has not been indexed since the SRCA was introduced in 1988) means that no matter how bad the employer's negligent conduct, it is not in a workers' interests to sue given the limited nature of the damages available under the Act. However common law or negligence actions have been a powerful tool for change and improvement of safety in workplaces. This bill does very little to put pressure on employers to improve safety in the workplace.[150]

2.149 Given that Queensland WorkCover provides access to common law while the scheme does not, the Queensland government voiced grave concerns about the impact that the bill, in combination with the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014, would have on Queensland WorkCover and on small business in particular:

> Queensland has around 8,000 non-government employers with annual wages in excess of $1.5 million. Around one third of these employers

147 Law Council of Australia, *Submission 29*, pp 11–13.

148 Law Council of Australia, *Submission 29*, p. 13; see also Queensland Government, *Submission 28*, pp 2–3.

149 Law Council of Australia, *Submission 29*, p. 15; see also Slater and Gordon Lawyers, *Submission 14*, p. 12.

150 Angela Sdrinis Legal, *Submission 13*, p. 9.

> employ in two or more states, meaning more than 2, 500 employers would be eligible to move to the Comcare scheme. Based on the 2014-15 projected premium, this would result in a reduction in premium income of over $250 million (18 per cent of $1.4 billion premium pool). This reduction would invariably result in greater premium rate volatility and a higher average premium rate.
>
> This will have significant impacts on business generally and small business in particular. In Queensland there are an estimated 138,000 private sector non-agricultural small businesses (employing fewer than 20 workers). Many of these small businesses may not be in a position to absorb premium fluctuations that would necessarily result from a reduced premium pool caused by exiting employers.[151]

2.150 By contrast, the Maritime Union of Australia stated that it:

> …does not consider it appropriate to introduce a common law damages entitlement into the SRC Act, nor by implication into the Seafarers Act, given our strong support for no-fault Commonwealth compensation schemes. We strongly favour the no-fault basis of the compensation arrangements established in the Seafarers Act, based on the five principles that underpin no-fault compensation schemes:
>
> Community responsibility;
>
> Comprehensive entitlement;
>
> Complete rehabilitation;
>
> Real compensation; and
>
> Administrative efficiency.[152]

Schedule 11: Legal costs

2.151 The department noted that under the SRC Act, legal costs had increased significantly over the last year while dispute resolution rates were much lower than in other jurisdictions:

> In the last year, legal, administrative and regulatory costs paid under the SRC Act increased by 25 per cent. The Comcare scheme has the worst resolution rate for disputes resolved within nine months of all Australian workers' compensation schemes at 47.7 per cent. By comparison, New South Wales resolves 89.7 per cent of disputes within nine months. The more protracted a matter in the AAT, the greater the legal costs.[153]

2.152 The department noted the bill addresses the issue of legal costs by enabling Comcare 'to develop a Schedule of Legal Costs that provides for the maximum amount that may be awarded or reimbursed to a claimant in certain circumstances'.[154]

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151 Queensland Government, *Submission 28*, p. 5.

152 Maritime Union of Australia , *Submission 25*, p. 11.

153 Department of Employment, *Submission 22*, p. 19.

154 Department of Employment, *Submission 22*, p. 19.

2.153 The SRCLA supported the set schedules for legal costs noting that the change would address the excessive fees charged by some providers, align the scheme with many State schemes, and would not be expected to impact on employees.[155]

2.154 Furthermore, Comcare has been burdened with protracted and costly merits review proceedings:

> Over the last five years a claimant under the Comcare scheme has made five unsuccessful applications for merits review to the AAT, and judicial review to the Federal Court. To date, the claimant has been unsuccessful in all matters that have proceeded to hearing. Despite this, Comcare's legal costs of the AAT proceedings alone exceed $176,000, with the total bill exceeding $277,000 (to date).
>
> Under the proposed changes the amount of legal costs that may be reimbursed or awarded to a claimant would be capped, and the AAT would be able to order costs against the claimant for a frivolous and vexatious claim. This would act as both a penalty and as a disincentive against future unnecessary proceedings.[156]

2.155 The department noted the bill addresses issues arising from merits review proceedings by introducing a mechanism to resolve claims before proceedings are commenced:

> The bill empowers relevant authorities to reimburse costs incurred by a claimant in connection with the reconsideration of a determination, subject to the claimant undertaking not to apply for review to the AAT. The claimant must repay the amount if he or she subsequently decided to escalate the matter to the AAT.[157]

2.156 TPI supported the proposed amendments under Schedule 11 as measures 'designed to reduce unnecessary legal costs in relation to AAT matters' and 'to expedite AAT cases' including:

> The ability for Comcare to set a Schedule of Legal Costs, the payment of legal costs at reconsideration stage under specified conditions and the AAT carrying the discretion to make cost orders against a claimant in limited circumstances and setting limits on the timeframes for the admission of new evidence prior to a Hearing (but with the AAT being able to grant leave to admit evidence) are all measures that are designed to reduce unnecessary legal costs in relation to AAT matters.[158]

2.157 The Law Council disagreed 'with the prospect of unsuccessful litigants having to pay Comcare's legal costs as proposed by clause 7 because it can be difficult to determine whether a claim is actually frivolous or vexatious'. Noting this was particularly difficult when an injured worker is self-represented, the Law Council

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155 Safety Rehabilitation and Compensation Licensees Association, *Submission 23*, p. 2.

156 Department of Employment, *Submission 22*, p. 19.

157 Department of Employment, *Submission 22*, p. 19.

158 Transpacific Industries, *Submission 1*, p. 7.

recommended, instead, that 'costs be payable by an employee if the claim is fraudulent or dishonestly made'.[159]

2.158 The Law Council also noted that the AAT 'already has power to dismiss claims that are frivolous or vexatious' and that this power is 'sufficient'.[160]

2.159 The ALA strongly opposed the establishment of a Schedule of Legal Costs (proposed section 67A) arguing that it would perpetuate an asymmetry in favour of employers and insurers who are able access experienced legal representation as opposed to the limits being imposed on the legal representation available to injured workers.[161]

2.160 The Law Council agreed that the Schedule of Legal Costs 'will lead to workers being unable to afford legal representation'. This will result in institutional parties gaining 'an even greater litigation advantage if injured workers are unable to have their legal costs met on an equal footing'.[162]

2.161 The FSU described the difficulties that an injured worker, often without income, already faces in trying to appeal a decision made by an employer under the Act:

> With decisions about granting workers compensation to injured workers being made by the liable employer in the Comcare scheme, access to a timely, affordable and independent review process is critical for injured workers. The current process for appealing decisions made by the employer under the SRC Act is stacked against workers. It is lengthy, complex and expensive. Many workers do not have the legal, financial and emotional resources to effectively dispute a decision by their employer.
>
> At present if an employer declines a claim, the worker goes through a process of review, this starts with appealing the decision to the employer. Workers are not eligible to receive any assistance with legal costs at this stage to pursue their claim.
>
> Appealing a disputed claim is a very complex technical process. Employers can of course pay for legal advice at this stage, with many employers in the finance industry directly employing legal specialists to head up their workers compensation areas. One of the finance sector licensees employs a Head of Health, Safety and Wellbeing who is a former Special Counsel at Minter Ellison. She has run workers compensation litigation at all levels including the Supreme Court and the High Court, specialising in matters involving statutory interpretation and administrative law. Reporting to her is the Manager for Workers Compensation who was also a workers

159 Law Council of Australia, *Submission 29*, p. 10; see also Angela Sdrinis Legal, *Submission 13*, pp 7–8.

160 Law Council of Australia, *Submission 29*, p. 10; see also Slater and Gordon Lawyers, *Submission 14*, p. 17.

161 Australian Lawyers Alliance, *Submission 3*, p. 15.

162 Slater and Gordon Lawyers, *Submission 14*, p. 16; see also Finance Sector Union, *Submission 16*, pp 13–14.

> compensation lawyer for Minter Ellison. Clearly an unrepresented worker with no understanding of the law in this area is in a very unequal position in this situation.[163]

2.162 The FSU argued that the changes compound the difficulties that an injured worker already faces by empowering 'the AAT to require that the costs incurred by the employer in running the matter must be paid by the worker if they are unsuccessful in their appeal.[164]

Schedule 12: Permanent impairment compensation

2.163 The department stated that the new method for calculating permanent impairment compensation would reduce anomalies and introduce greater fairness into the way that injuries are compensated under the scheme.[165]

2.164 First, the bill targets compensation to those employees with a more serious permanent impairment and a greater need for support. The bill increases the maximum amount payable to those with a serious permanent impairment from $243 329 (as at July 2014) to $350 000, and reduces the amounts payable to those with lesser impairments.[166]

2.165 Second, because injured employees must meet an impairment threshold of 10 per cent before a lump sum payment for permanent impairment is payable, employees with multiple injuries each resulting in less than 10 per cent impairment are unable to access lump sum compensation. The bill changes this by allowing the threshold to be met through combining multiple injuries:

> Injured employees must meet an impairment threshold of 10 per cent before a lump sum payment for permanent impairment is payable. Consequently, employees with multiple injuries each resulting in less than 10 per cent impairment are unable to access lump sum compensation.
>
> …
>
> The bill provides that permanent impairment resulting from multiple injuries attributable to the same incident or state of affairs (including secondary injuries, other than secondary psychological or psychiatric injuries) will be combined to allow more injured employees to meet the 10 per cent threshold before a lump sum payment is payable.[167]

2.166 The APSC supported the proposed changes to the permanent impairment provisions as improving employee access to permanent impairment compensation.[168]

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163 Finance Sector Union, *Submission 16*, p. 13

164 Finance Sector Union, *Submission 16*, p. 14.

165 Department of Employment, *Submission 22*, p. 15.

166 Department of Employment, *Submission 22*, p. 15.

167 Department of Employment, *Submission 22*, p. 15.

168 Australian Public Service Commission, *Submission 12*, p. 3.

2.167 The department also noted that while primary psychological or psychiatric injuries will still attract compensation for permanent impairment, 'the bill will exclude access to permanent impairment compensation for secondary psychological or psychiatric conditions'. However, 'all other forms of compensation, including incapacity payments, and access to rehabilitation, will continue to be available for secondary psychological or psychiatric injuries'.[169]

2.168 While agreeing with most of the changes in Schedule 12, including raising the maximum lump sum payment and excluding secondary psychiatric impairment from compensation, TPI did not support the combination of two or more injuries being treated as a single injury.[170]

2.169 Slater and Gordon provided some historical background to the discussion on the lump sum impairment, noting that:

> When the Comcare scheme was introduced in 1988, the Parliament increased workers' entitlement to a lump sum impairment payment in part to offset their relinquishment of common law rights. This should not be forgotten when reviewing the benefits available to injured workers under the scheme.[171]

2.170 ACTU noted that the bill represented 'a major departure from the 'compensation bargain' in the 1980s that saw workers under Comcare give up common law rights in return for statutory no-fault benefits'.[172] Given this historical trade-off, both Slater and Gordon and ACTU were of the view that simplistic comparisons between workers' compensation schemes were untenable:

> The Government has sought to justify this Bill by making a simple comparison between the benefits across all workers' compensation jurisdictions without consideration of the relinquishment of common law rights under Comcare. All State and Territory schemes continue to include common law rights albeit with differing thresholds.[173]

2.171 The Law Council welcomed the increase to the permanent impairment cap and the amendments to allow impairments to be combined. However, the Law Council did not accept the reasons set out by the government for reducing the entitlements to the majority of claimants. Furthermore, the Law Council warned that the changes might have unintended consequences:

> The Law Council believes an unintended consequence of this will be for injured employees meeting the 10 per cent threshold to, where possible, opt

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169 Department of Employment, *Submission 22*, p. 16.

170 Transpacific Industries, *Submission 1*, pp 8–9.

171 Slater and Gordon Lawyers, *Submission 14*, p. 17; see also Australian Council of Trade Unions, *Submission 26*, pp 12–13.

172 Australian Council of Trade Unions, *Submission 26*, p. 13; see also Australian Manufacturing Workers' Union, *Submission 24*, p. 9.

173 Slater and Gordon Lawyers, *Submission 14*, p. 17; see also Australian Council of Trade Unions, *Submission 26*, pp 12–13.

> for common law action. This is likely to lead to further litigation, contrary to the original intention of the SRC Act.[174]

2.172 Several submitters disputed the claim that the bill makes the system fairer by delivering more compensation to workers with significant injuries. These submitters noted that a large number of workers are already excluded from compensation under the scheme due to the tough criteria needed to reach a 10 per cent Whole Person Impairment. Slater and Gordon and the ALA provided several examples to demonstrate how a large number of workers with severe injuries would face significant reductions in the compensation payable to them under the bill.[175]

2.173 The ALA stated that the proposed algorithmic model for calculating entitlements was inequitable and unfair to injured employees, arguing that the practical effect would be that 'a huge number of workers would be significantly worse off, with a small number of workers being moderately better compensated'. The ALA recommended that the linear model currently used in the calculation of benefits should be retained.[176]

2.174 Several submitters noted that the bill eliminated any lump sum payments for permanent impairment and non-economic loss for those suffering from a secondary psychological condition. The ALA, Slater and Gordon, and ACTU were concerned about the exclusion of secondary psychological injuries noting that this 'will disproportionally harm workers with the most significant and longstanding physical injuries who subsequently develop accepted secondary psychiatric injuries'.[177]

Schedule 15: Sanctions for employee non-compliance

2.175 The bill imposes obligations on both employees and employers, similar to the scheme operating in South Australia. The obligations are set out below:

An employee must:

- seek and accept offers of suitable employment and actively engage in that employment;
- provide any required documentation or information (including medical certificates) within the specified period;
- follow reasonable medical advice provided by a qualified medical practitioner or dentist, including undertaking reasonable medical treatment;
- fulfil their responsibilities under a rehabilitation plan;
- undergo a work readiness assessment as required;

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174 Law Council of Australia, *Submission 29*, pp 10–11.

175 Slater and Gordon Lawyers, *Submission 14*, pp 18–19; Australian Lawyers Alliance, *Submission 3*, pp 10–12; Australian Council of Trade Unions, *Submission 26*, pp 49–50.

176 Australian Lawyers Alliance, *Submission 3*, p. 12; see also Angela Sdrinis Legal, *Submission 13*, p. 8.

177 Australian Lawyers Alliance, *Submission 3*, p. 11; see also Slater and Gordon Lawyers, *Submission 14*, pp 19–20; Australian Council of Trade Unions, *Submission 26*, p. 50.

- undergo a medical examination as required by the relevant authority;
- undergo an assessment of need for household and attendant care services as required; and
- comply with reasonable requests from Comcare if it pursues a common law claim.

An employer must:

- take all reasonably practicable steps to ensure the rehabilitation of the employee including the provision of rehabilitation services;
- take all reasonably practicable steps to comply with the employee's workplace rehabilitation plan;
- provide the employee with suitable employment or assist them to find suitable employment;
- maintain the employee in suitable employment; and
- comply with the WHS Act.

A relevant authority, on behalf of an employer, must:

- pay workers' compensation payments including income replacement;
- make provisional medical expense payments including before a claim is accepted;
- pay an injured workers' ongoing medical treatment expenses; and
- pay for household and attendant care services as required.[178]

2.176 The obligations are accompanied by a sanctions regime for employee non-compliance that 'will be applied in three stages, escalating from suspension or reduction of benefits at stages one and two, to cancellation of benefits at stage three'. The department noted that the sanctions are reviewable at each stage and that a similar regime already exists in Western Australia, South Australia and the Northern Territory.[179]

2.177 The department argued that the amendments will achieve the twin aims of improving health and return to work outcomes through active participation in rehabilitation and also improving system integrity 'by discouraging misuse of the system'.[180]

2.178 TPI welcomed the mutual obligations proposals and new sanctions regime as significant improvements that would improve the rehabilitation and return to work process:

178 Department of Employment, *Submission 22*, p. 18.

179 Department of Employment, *Submission 22*, p. 18.

180 Department of Employment, *Submission 22*, p. 18.

> The introduction of the concept of obligations of mutuality will improve compliance with the key requirements of the Act. The breakdown of the breaches of obligation into (remediable and non-remediable) and the three-stage sanctions regime appears to provide a 'weighting' to the importance of the breach and the sanctions applied looks to give an opportunity to remedy the breach or face a greater level of sanction. The breaches as listed are typically the breaches that slow/reduce the effectiveness and outcomes of the rehabilitation process therefore these changes should improve rehabilitation processes. This is a marked improvement to the current suspension provisions which are difficult to enact and largely ineffective. The requirement for a diagnosis for a psychological or psychiatric ailment or injury (or aggravation of same) to be confirmed by a mental health practitioner (psychiatrist, clinical psychologist or general practitioner who has completed mental health training that has been Comcare approved) in order for weekly incapacity payments to be made beyond an initial 12 week period is welcomed as will enhance the process of ensuring that there is specialized support and review for these cases in the early stages. This supports early return to work and facilitated and effective rehabilitation.[181]

2.179 Ai Group supported 'the policy intent of including specific obligations of mutuality and supporting them with an escalating series of sanctions'.[182]

2.180 However, Ai Group was concerned about the clarity and scope of the sanctions provisions, including the relationship between clauses 29L and 29R, and made specific recommendations to address these issues:

> The inclusion of the clause 29L sanctions within the general sanctions provisions makes it very difficult to follow and clearly interpret. Clarity would be greatly improved if the sanctions associated with clause 29L were separated out from clauses 29W and 29X, and written in a stand-alone clause.
>
> …
>
> In attempting to understand the intended application of clause 29L, we referred to paragraph 561 of the EM [explanatory memorandum]. The reference to a third party created a level of confusion and, specifically, caused us to ask the question 'is clause 29L intended to apply to all offers of suitable employment (including those by the liable employer), or only those made by alternative employers?'
>
> If interpreted as applying only to third party offers (as indicated in the EM), it could be argued that a failure to participate in suitable employment with the current employer would be covered by clause 29R; this would then be seen as a breach that could be remedied by the employee and a different set of sanctions would apply.

181 Transpacific Industries, *Submission 1*, pp 9–10.

182 Ai Group, *Submission 6*, p. 13.

> It is essential that there is no uncertainty about the scope of clause 29L; this needs to be addressed through either amending the bill or the EM and/or providing clear guidance.[183]

2.181 Ai Group also raised concerns about the application of the sanctions in clause 29L and about potential unintended consequences, again suggesting that specific guidance be provided to clarify matters:

> Ai Group is also concerned about the manner in which the clause 29L sanctions would be applied, particularly as they apply to both failing to accept or engage in specific suitable employment, and a more general provision related to failing to seek suitable employment. It is relatively easy to identify when a person fails to accept or engage in suitable employment; it is also relatively easy to identify the quantum reduction of benefits if a specific offer of suitable employment has been rejected or not complied with. However, it is not so clear in relation to a failure to seek suitable employment; it will need to be identified when breach occurs and what potential earnings have been forfeited?
>
> …
>
> A potential unintended consequence of the clause 29L sanctions may be a reduction in the incentive for employees to seek, or participate in, suitable employment in the future when the sanction is designed around a concept that an employee is unable to 'repair' this type of breach (as indicated in the EM). This would particularly be the case if the notice to the employee included such words.
>
> It will be essential that there is clear guidance for employees and employers about the importance of pursuing suitable employment options, even if sanctions have been applied under clause 29L. Such guidance should cover:
>
> > Requirements on the liable employer to provide information within, or supporting, an offer of suitable employment, regarding the potential financial impact of not accepting the offer; and
> >
> > Information within the breach advice provided to the employee about how they can minimise the impact of the sanction, e.g. by actively seeking suitable employment and/or actively considering any future offers of suitable employment.[184]

2.182 Several submitters found the provisions in Schedule 15 to be harsh.[185] While strongly supporting 'initiatives to encourage rehabilitation and return to work', the Law Council disagreed with the new sanctions regime arguing that it was unnecessary and overly punitive 'given a lack of evidence of anything more than isolated instances

183 Ai Group, *Submission 6*, p. 13.

184 Ai Group, *Submission 6*, p. 14.

185 Law Council of Australia, *Submission 29*, p. 11; Australian Lawyers Alliance, *Submission 3*, p. 13; Angela Sdrinis Legal, *Submission 13*, p. 9; Slater and Gordon Lawyers, *Submission 14*, p. 21; Australian Council of Trade Unions, *Submission 26*, pp 54–55; Finance Sector Union, *Submission 16*, pp 16–18.

of non-compliance' which can be dealt with through payment suspension during periods of non-compliance under the present scheme.[186]

2.183 Describing the sanction scheme as 'draconian', the ALA stated that it would undermine 'any meaningful concept of collaboration between injured employer and employee'.[187]

2.184 Slater and Gordon also noted that common law rights are extinguished by new section 29G with adverse consequences for injured workers:

> This means that a permanently and seriously incapacitated worker — injured as consequence of the unlawful wrong doing of others — can lose the rights that every other citizen has to hold the corporation or individual that has harmed them to account. In our submission this is highly discriminatory and punitive.[188]

Committee view

2.185 The weight of evidence presented to the committee during this inquiry clearly indicates that the integrity of the Comcare scheme has been compromised and that, as a result, to continue with the scheme on its current trajectory is financially unsustainable.

2.186 The committee notes a number of concerns raised by submitters about the nature of the reforms contained in the bill. Nonetheless, the committee recognises that all worthwhile legislative reform requires, at times, that difficult decisions be taken. However, the committee is convinced that the changes made in the bill will restore the integrity of the scheme and realign the scheme with what was intended at its inception. Moreover, the committee notes that a number of the proposed amendments are based on the recommendations of the Hawke/Hanks Review commissioned by the former government.

2.187 The committee is of the view that the enhanced focus on vocational rehabilitation will improve return to work rates with consequent benefits for injured employees. The committee also commends the timely and targeted support for injured employees, and in particular, the increase to the permanent impairment lump sum payment.

2.188 The committee notes that several important features of the scheme remain unaltered, including that injured employees will continue to receive income replacement, medical treatment, and rehabilitation, for as long as it is required. In addition, appeal rights for injured employees who disagree with a decision that affects them will continue to be available, and most significantly, the scheme remains a 'no fault' scheme.

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186 Law Council of Australia, *Submission 29,* p. 11.

187 Australian Lawyers Alliance, *Submission 3,* p. 13.

188 Slater and Gordon Lawyers, *Submission 14,* p. 21.

2.189 The committee is therefore persuaded that, on balance, the legislative response is both necessary in terms of ensuring the financial sustainability of the scheme, and equitable in terms of balancing the needs of injured employees with the requirements of employers to fund work-related claims.

Recommendation 1

2.190 The committee recommends that the Senate pass the bill.

Senator Bridget McKenzie

Chair