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AUSTRALIAN SENATE

ECONOMICS LEGISLATION COMMITTEE

CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE

PROVISIONS OF THE INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1996

MAY 1997

Parliament of the Commonwealth of Australia

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Senate Economics Legislation Committee

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Senator J. Collins substituted for Senator Sherry for the Committee's hearing into the provisions of the Industrial Relations Legislation Amendment Bill 1997 on Friday, 21 March 1997.

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Abbreviations

ACTU - Australian Council of Trade Unions
CPSU - Community and Public Sector Union
IWSG - Injured Workers' Support Group
OHS Act - *Occupational Health and Safety (Commonwealth Employment) Act 1991*
SRC Act - *Safety, Rehabilitation and Compensation Act 1988*

Industrial Relations Legislation Amendment Bill 1996

BACKGROUND TO THE INQUIRY

The Industrial Relations Legislation Amendment Bill 1996 contains amendments announced in the 1996 budget to clarify the circumstances in which compensation is payable through the Commonwealth workers' compensation scheme.

The Bill was introduced into the House of Representatives on 11 December 1996 and the second reading adjourned on the same day. Subsequently, on 6 February 1997 the Senate referred provisions of the Bill to the Senate Economics Legislation Committee for inquiry and report by 27 May 1997. The Senate Selection of Bills Committee Report No.1 of 1997 stated that the principle areas of the Bill for the Committee's consideration should be:

> Whether the changes made to administrative arrangements are merely technical, or carry some policy consequences; and
>
> Whether the changes made to the substantive provisions of the act are necessary, and/or appropriate.

The Committee received 6 submissions to its inquiry (see APPENDIX 1) and conducted a public hearing on 21 March 1997 (see APPENDIX 2).

EFFECT OF THE BILL[1]

The Industrial Relations Legislation Amendment Bill 1996 amends the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS Act) and the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

Schedule 1

Schedule 1 of the Bill contains amendments to the OHS Act. The amendments proposed in Part 1 of Schedule 1 relate to the procedure for determining contribution payable by each Department and Commonwealth authority towards the cost of administration of the OHS Act. The amendments propose that Comcare be responsible for determining the amount payable by a Department or authority. There is provision for a Department or authority to seek a review of the amount determined. This review will be conducted by Comcare in the first instance and then if the Department or authority so wishes, by the Safety, Rehabilitation and Compensation Commission.

Part 2 of Schedule 1 proposes a number of other amendments to the OHS Act, including:

- to provide that Comcare shall provide advice on occupational health and safety matters to employers, employees and contractors either on its own initiative or on request;

[1] Drawn from the Industrial Relations Legislation Amendment Bill 1996, Explanatory Memorandum.

- to transfer certain powers in relation to investigations from the Commission to the Chief Executive Officer of Comcare;

- to increase the maximum penalties that can be imposed under the Act;

- to ensure that a document which is cited in the Act's regulations has effect as amended from time to time without the need to amend the regulations;

- to require that a document which is incorporated in a code of practice be available for inspection at the offices of Comcare.

Schedule 2

Schedule 2 of the Bill amends the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). Part 1 of Schedule 2 proposes amendments to the definition of injury and disease in the SRC Act to clarify the circumstances in which an employee is entitled to receive compensation for injury pursuant to the SRC Act.

Part 2 of Schedule 2 proposes a number of other amendments to the SRC Act. These relate primarily to the procedure for determining the premiums payable by each Department and Commonwealth authority under the SRC Act. The amendments correspond to the changes proposed in Schedule 1 in respect of the determination by Comcare of contributions pursuant to the OHS Act.

Part 3 of Schedule 2 also proposes to amend the SRC Act:

- to allow the Chief Executive Officer of Comcare to sub-delegate any of the powers or functions delegated by the Commission;

- to enable Comcare to charge a fee for the provision of claims management services to Class 1 licence holders;

- to reflect an existing administrative arrangement whereby the Northern Territory Government reimburses Comcare for payments of compensation to certain persons and the associated administrative costs; and

- to ensure that compensation benefits are maintained at a minimum level of 70% of indexed normal weekly earnings in all cases.

GENERAL ISSUES RAISED IN EVIDENCE

Amendments relating to compensable injury

By far the bulk of evidence presented to the Committee concerned Part 1 of Schedule 2 to the Bill, containing proposed changes to the legal test linking injury or disease with employment. The Bill's proposed amendments to the SRC Act's definition of both disease and injury are based on the Government's wish to bring increased financial stability to the Commonwealth's workers' compensation scheme. The Government's intentions hinge on stemming the progressive extension of employers' liability for conditions where work is only a minor contributing factor.[2]

Disease

Proposed changes to the definition of disease are designed to strengthen the connection between work and compensable injury. Currently a workplace must make a *material* contribution to a worker's disease before compensation is payable. However, under changes proposed by the Bill, the workplace contribution test will be upgraded from *material* to *significant.*

The *Second Reading Speech* to the Bill explains the Government's rationale for the change:

> By restating the threshold requirement of work-relatedness, the Government is reactivating the original intention of the scheme that for a disease to be compensable, employment must be a significant or substantial cause of the disease. In particular, where a disease is not the result of a clearly distinguishable incident in the workplace or is attributable to multiple causes, the amendments will properly ensure that Commonwealth employees do not bear the cost of something for which they have only limited, or no actual moral responsibility.[3]

The various union groups who gave evidence to the Committee's inquiry were opposed to proposed changes to the definition of disease. Specifically, union groups condemned the concept of *significant* contribution on the grounds that it cannot be subjected to an objective test. Despite subsection 5A(3) of the Bill defining *significant* as "substantially more than a material degree", the Australian Council of Trade Unions submitted that the definition:

> ...is a nonsense - firstly it is a relative upon a relative, which is impossible to measure and secondly, in our submission it mixes two concepts. *Material* goes to the concept of whether the injury is caused by work; *substantially* goes to the quantification of it. To try to say that you have this absolute test and then add something else on top of it which is of a different nature to me is a recipe for some sort of disaster.[4]

Determining the extent of workplace contribution to an employee's disease also will involve evaluation of whether the disease would have occurred in spite of employment. Union groups highlighted this as a particular problem associated with the proposed new definition of disease in that it demands highly subjective consideration which the Community and Public

[2] Industrial Relations Legislation Amendment Bill 1996, Second Reading Speech.
[3] Industrial Relations Legislation Amendment Bill 1996, Second Reading Speech, p.2
[4] Evidence, p.94

Sector Union likens to crystal ball gazing.[5] The Australian Council of Trade Unions adds that the proposal involves:

> ..dangerous speculation to what might happen into the future (something which will be the subject of extensive litigation), it also departs from the well established principle that those susceptible to injury should have as much right to compensation as those that are not.[6]

The indistinct meaning of *significant* was further criticised by union witnesses on the grounds that it would not allow employees to understand the nature and extent of their entitlements and would create an onerous burden of proof. The Workers' Compensation Self Help Network of Stafford QLD submitted that "..for the already ill and injured worker to have to prove work not only caused injury, but was a 'significant contributing factor' imposes an unfair burden which will increase social costs when many genuine work injured persons are left without a safety net.[7]"

The Australian Council of Trade Unions predicted that semantic arguments surrounding the concept of *significant* are likely to prompt protracted litigation and undue legalism. The ACTU warns that this not only undermines the certainty of compensation rights and obligations, it also is likely to add to the amount of money spent on workers' compensation without actually reaching injured workers. Further still, according to the ACTU this is likely to add ".. an inordinate burden on tribunal lists and resources which effectively ensures that legitimate claims are interminably delayed while such issues are resolved. Until this happens, rightful claimants go without."[8]

Injury

Proposed changes to the SRC Act's definition of injury are based on the Government's aim of preventing compensation claims being used to obstruct legitimate management action.[9] Primarily targeted at stress related claims, changes to the definition of injury hinge on the concept of 'reasonable management action'. That is, in circumstances where the injury results from what is deemed to be reasonable management action, employers are not bound to provide workers' compensation. In evaluating management action, a dual test of reasonableness will apply - that is the action must not only be a reasonable type of managerial or administrative action, it must also have been carried out in a reasonable manner.[10]

According to the joint submission of the Commonwealth Department of Industrial Relations and Comcare, the amended definition restores the intended practical operation of the workers' compensation scheme by excluding management action from liability. "At the same time, the amendment will reinforce current Commonwealth policy in relation to the management of occupational stress; and bring increased financial stability to the scheme."[11]

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[5] Submission No.3, Community and Public Sector Union, National Office, p.4.
[6] Submission No. 4, Australian Council of Trade Unions, p. 13.
[7] Submission No.2, Workers' Compensation Self Help Network, Stafford QLD, p. 1.
[8] Submission No.4, Australian Council of Trade Unions, p.6.
[9] Industrial Relations Legislation Amendment Bill 1996, Second Reading Speech, p.2
[10] Industrial Relations Legislation Amendment Bill 1996, Second Reading Speech, p.3
[11] Submission No. 6, Commonwealth Department of Industrial Relations and Comcare, p. 4

The concept of 'reasonable management action taken in a reasonable manner' introduces to the Commonwealth system a principle already in place in numerous State compensation schemes; namely to exclude from liability claims arising from management actions. In contrast to State schemes, however, the Bill does not define reasonable management actions. This point was widely criticised in evidence to the Committee, including by the Australian Council of Trade Unions which submitted that the reasonable management test has the capacity to compromise claims relating to every form of non-physical injury.[12] The National Office of the Community and Public Sector Union added that without a finite list of management actions, "..there is an infinite number of possible management actions which could be used to deny liability for a claim".[13]

The CPSU cited the example of claims in respect of asbestos related cancer as one potentially vulnerable area in the absence of a definition of reasonable management action. The CPSU contends that claims for asbestosis under this provision would be denied where the compensation authority can demonstrate that the actions taken at the time of exposure were reasonable at the time. Subsequent claims for asbestos-related cancer would be denied because the disease was contracted as a result of reasonable management actions taken in a reasonable matter at the time. The CPSU questions:

> Who is to say that there will not be other asbestos-type illnesses in the future which would be excluded from compensation by this open-ended provision in the Bill. A finite list of management actions would restrict the application of this provision to action only relating to human resource activities.[14]

A further concern raised by the Australian Council of Trade Unions regarding the reasonable management test is that it effectively undermines the no fault system which has underpinned workers' compensation arrangements for many years. According to legal advice provided to the ACTU, the effect of the proposed provisions would be "...to deny compensation entitlements to all workers injured in circumstances other than where the employer has acted negligently or unreasonably."[15]

Finally, aside from strong concerns regarding implementation of the reasonable management action test the general principle of targeting stress claims was broadly condemned by union groups. The ACTU cites research indicating that stress is a new and serious threat to occupational health, striking post-industrial society on an international scale. Accordingly, union groups argued against the Bill's deliberate targeting of stress claims, particularly in the light of the CPSU Injured Workers Support Group's (IWSG) view that:

> ..there is no evidence of ease in having a claim for work related stress accepted under the provisions of the Commonwealth Act by Comcare or other administering authority; so much so that the IWSG has reports which show a large percentage of people suffering work-stress problems, with a right to make a claim, do not do so.[16]

[12] Submission No.4, Australian Council of Trade Unions, p. 6.
[13] Submission No.3, Community and Public Sector Union, National Office, p.2
[14] Submission No.3, Community and Public Sector Union, National Office, p.3
[15] Submission No.4, Australian Council of Trade Unions, p.14.
[16] Submission No.1, CPSU Injured Workers Support Group (Vic), p.2

Removal of power of the Safety, Rehabilitation and Compensation Commission to levy occupational health and safety payments from various authorities

Currently the Commission for Compensation, Safety and Rehabilitation is responsible for setting a levy on Commonwealth departments and authorities to cover the expected liabilities for injuries and illnesses sustained during that year of injury. Part 1 of Schedule 1 to the Bill proposes to transfer this responsibility from the Commission to Comcare, and was widely criticised in evidence to the Committee.

According to the ACTU, as the Commission for Compensation, Safety and Rehabilitation regulates the activities of Comcare, denying the Commission the right to levy payments which finance its operations amounts to undermining the ability of the Commission to perform its functions.[17] The ACTU argued that:

> in particular, it would be very strange if Comcare (as the administrator) would be permitted to determine the funds of the Commission (the regulator). It is hard to think of a more inappropriate body to have determining what levies are to be made in relation to these matters...Secondly the proposal represents a fundamental diminution to the commitment to tripartism in relation to the regulation of work compensation and OHS. The move cannot be justified on the basis that these changes are of an administrative nature. The issue of OHS levies is a fundamental policy issue. It not only sets one of the important perimeters to the commitment to effective measures to promote OHS but also provides the means by which individual departments' bottom lines can be expected to promote appropriate action in relation to OHS problems.[18]

In defence of the proposed transfer of power, however, the joint submission by the Department of Industrial Relations and Comcare states that:

> It should be noted that the Commission will hold the power to issue directions as to the form in which determinations are to be prepared. Furthermore, Comcare will be required to have regard to any guidelines issued by the Commission when determining the amount of the contribution payable by a Department or Commonwealth authority.[19]

Financial reasons underpinning Bill

The major rationale underpinning the Industrial Relations Legislation Amendment Bill 1996 is to contain the increasing costs of administering the Commonwealth's workers' compensation scheme. However, evidence to the Committee indicates disagreement concerning the true volume of compensation claims. In reference to the scheme as a whole, the joint submission of the Department of Industrial Relations and Comcare states that the Commonwealth's liabilities as at 30 June 1996 totalled $1.23 billion and despite a decrease in the number of claims, an increase in both the complexity and duration of claims is leading to higher program costs.[20]

[17] Submission No.4, Australian Council of Trade Unions, p.17
[18] Submission No.4, Australian Council of Trade Unions, pp. 17-18.
[19] Submission No.6, Department of Industrial Relations and Comcare, p.8
[20] Submission No.6, Department of Industrial Relations and Comcare, p.13.

With reference to stress claims, however, union groups unanimously rejected the suggestion of an increase in claims. The Community and Public Sector Union stated that:

> The fact is that premiums to Commonwealth employers have decreased from 1.7 per cent of payroll last financial year to 1.6 per cent of payroll this financial year. The number of claims for occupational stress over the past 12 months has decreased, and the cost of those claims for occupational stress is decreasing.[21]

The Comcare Chief Executive Officer, Ms Meryl Stanton, conceded that there had been a reduction in stress claims, however, added that the reduction in the number of claims had not been accompanied by a reduction in stress claims as a proportion of all of Comcare's costs. Ms Stanton stated:

> ..if you look at the 1,040 stress claims that we accepted in 1991-92, that accounted for 14% of our costs. We are down to 932 claims accepted in 1995-96 but stress claims as a percentage of all our costs are now 19%. So although the claims are down, the costs have remained at about 19% of all our costs for the last couple of years.[22]

Prevention

The broader policy principles underpinning the Bill were widely criticised in evidence presented to the Committee. In particular, union groups submitted that the Bill reflected a one-sided approach to occupational stress "..by merely attempting to tighten access to compensation, rather than looking at ways to prevent and manage occupational stress in the workplace."[23]

As a general observation, the Victorian Trades Hall Council submitted that "..the experience of the Victorian system is that the introduction of some limiting provisions on some stress claims, is a major disincentive against making a claim for any stress condition, even when there is no doubt that there is an entitlement under the Act. Many workers believe that all stress related conditions are no longer compensable."[24]

Overriding of section 49A of the *Acts Interpretation Act 1901*

Item 38 of Schedule 1 to the Bill proposes to override the operation of section 49A of the *Acts Interpretation Act 1901*. Section 49A provides that where a regulation applies, incorporates or adopts any matter contained in a document, that matter has effect only as at the date of the regulation which refers to it. The joint submission of the Department of Industrial Relations and Comcare explains that:

> regulations made under the OHS Act incorporate or apply various documents which set out standards or codes of practice on occupational health and safety-

[21] Evidence, p.91
[22] Evidence, p. 98
[23] Submission No.3, Community and Public Sector Union, National Office, p.4
[24] Submission No.5, Victorian Trades Hall Council, p 7.

related topics. These standards or codes of practice are updated and amended from time to time. Item 38 proposes to allow the regulations to incorporate, adopt or apply a code of practice, standard, table or other document as in force from time to time. This avoids the need to amend the regulations whenever an adopted standard or code of practice is updated or amended. The amendment would apply retrospectively to existing regulations.[25]

The Senate Standing Committee for the Scrutiny of Bills has raised concerns with the impact of the proposed item 38. The Committee is waiting on a response to its concerns from the Minister for Industrial Relations.

RECOMMENDATION

The Committee recommends that the bill be passed.

Senator Alan Ferguson
Chairman

[25] Submission No.6, Department of Industrial Relations and Comcare, p.9

Minority Report on the *Industrial Relations Legislation Amendment Bill*

INTRODUCTION

The Senate Selection of Bills Committee Report No.1 of 1997 stated that the principle areas of consideration of the *Industrial Relations Legislation Amendment Bill* should be:

1. Whether the changes made to the substantive provisions of the Act are necessary, and/or appropriate; and

2. Whether the changes made to the administrative arrangements are merely technical, or carry some policy consequences.

We propose to deal with each of these areas of consideration in turn.

CHANGES TO THE SUBSTANTIVE PROVISIONS

The nature of the changes

Part 1 of Schedule 2 of the Bill makes two significant changes to the circumstances in which an employee is entitled to receive compensation for injury pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

First, a disease will only be compensable if the employee's employment by the Commonwealth contributed "to a significant degree" to the disease. This contrasts to the existing legislation which requires a contribution of a lesser standard - "to a material degree".

Second, a disease or other non-physical injury will not be compensable where the injury or disease arises solely or predominantly out of reasonable managerial or administrative action taken in a reasonable manner by the employer in connection with the employee's employment. This is a much broader exclusion of management action then is contained in the existing legislation.

Clearly, the practical effect of each of these changes will be to make it more difficult for Commonwealth employees to obtain compensation for stress and other mental injuries.

The purported necessity for the changes

The Government has consistently stated that these changes are necessary in order to secure the financial viability of the Commonwealth workers' compensation scheme.

In his Second Reading Speech the Minister for Industrial Relations opened by emphasising that "*the amendments will bring increased financial stability to the scheme*". In proposing the amendments he looked at a number of factors, including "*the scheme's current performance*" and "*projections regarding the future liabilities of the scheme*". And he warned that "*the ultimate financial position of the scheme cannot be taken for granted*".

This theme was continued in the Written Submission by the Department of Industrial Relations and Comcare to this Committee. The Submission noted that "*there has been an escalation of costs under the Commonwealth workers' compensation scheme*". According to the Submission the amendments will "*bring increased financial stability to the scheme*". And the Submission noted that "*the cost attached to stress claims arising from management action has grave implications for the future sustainability of the scheme*".

The oral evidence before us by officials from the Department and from Comcare also tended to emphasis the necessity for savings to be made in the interest of preserving the viability of the scheme.

The financial viability of the scheme

A feature of the evidence provided to the Committee by the Department and by Comcare was the lack of any detail about the overall financial viability of the scheme. Whilst their evidence warned of potential increasing costs, there was no effort made to provide a comprehensive overview of the current state of finances of the scheme.

In circumstances where the financial viability of the scheme is being put forward as a central justification for the proposed changes this deficiency was puzzling to say the least.

Indeed, the most significant evidence produced in relation to the viability of the scheme was that provided by the ACTU, referring - ironically - to a report prepared by the Resource Management Division of Comcare in August 1996, and presented by Ms Meryl Stanton, the Chief Executive Officer of Comcare, to the Safety, Rehabilitation and Compensation Commission. As the ACTU's submission noted:

> "*The administration of the scheme indicates that the incidence or duration of claims including stress does not threaten to undermine the continuing viability and efficiency of the scheme. The scheme continues to be in surplus, premium rates are declining, program costs are stable, outstanding liabilities are declining and claims frequency is declining*".

Frankly, it is hard to imagine a report that is further from indicating an impending crisis.

Yet, this evidence was not contradicted by the Department or by Comcare.

Indeed, in the evidence presented to us orally by Ms Stanton there was more than a hint of the satisfactory financial state of the scheme.

Ms Stanton accepted that there had been a reduction in the number of stress claims, but noted that this had not been accompanied by a reduction in stress claims as a percentage or proportion of all costs. She went on:

> "*So although the (stress) claims are going down, the costs have remained at about 19 per cent of all our costs for the last couple of years*" (emphasis added).

Similarly, when Senator Jacinta Collins asked Ms Stanton whether the establishment of the Stress Management Centre had impacted upon the apparent levelling off of costs of stress claims, Ms Stanton said:

> "*In the sense that the expediential increase that was shown before that has been addressed in some way*" (emphasis added).

And later, when referred to a graph demonstrating the same fact, Ms Stanton conceded:

> "*This graph indicates the expenditure out the door in any given year on stress claims. So, it is true that there has been a levelling off*" (emphasis added).

Finally, Mr Stanton volunteered:

> "*I would like to think we are performing very well across the board. It is true that we have a very low premium rate. I believe that the lowering of that premium rate in the last couple of years - and certainly the Safety, Rehabilitation and Compensation Commission has put some of that down at least to our increased attention to prevention across the board, but particularly in relation to manual handling injuries, which still make up the greatest bulk of our injuries - backs and strains and so no - and also to the attention that we have paid to stress claims as part of a package which has various elements to it*" (emphasis added).

This evidence from Ms Stanton is important on several levels.

First, the evidence does little to suggest that there is a pending crisis for the financial viability of the scheme. In this it is consistent with the Report Ms Stanton provided to the Commission.

Second, this evidence clearly shows that the costs of stress claims has plateaued in recent years. Indeed, this is yet another positive aspect of the financial viability of the scheme - for this reason it should probably be added to the list of positives Ms Stanton included in her earlier Report to the Commission.

Third, this positive evidence is particularly significant because, as we have noted above, it is an alleged concern about rising costs, particular of stress claims, that is a primary justification for the proposed changes to the substantive provisions of the Act. Clearly, the evidence tends to substantially cut across that justification.

Finally, the evidence shows a recognition that stress management - that is, stress prevention - has played an important role in contributing to the plateauing of costs.

The Government's cost-cutting agenda

In our view the evidence before us strongly counters any suggestion that the proposed changes to the substantive provisions of the Act are necessary because the financial viability of the scheme is threatened.

The question therefore remains - why does the Government want to make these changes?

The answer quite clearly is cost-cutting.

The Explanatory Memorandum for the Bill makes this cost-cutting agenda abundantly clear:

> "*The amendments to . . . Part 1 of Schedule 2 will, in the first instance, provide savings in Comcare's administrative costs and ultimately provide ongoing savings in administrative costs for Commonwealth agencies to assist them in meeting their running costs savings targets.*
>
> *The savings which will accrue directly to the budget from the amendments in Part 1 of Schedule 2 are estimated to be $3 million in 1996-97, $10 million in 1997-98, $16 million in 1998-99 and rising to $24 million in 1999-2000*".

The Written Submission of the Department to this Committee amply demonstrates that the Government's cost-cutting agenda produced these changes:

> "*The impetus to amend the SRC Act in order to clarify the circumstances in which compensation is payable in respect of an injury arose in the 1996/97 Budget context. The Government requested a submission on possible savings in Comcare costs, with a particular focus on stress-related claims*".

The Written Submission also notes that the changes are consistent with the cost-cutting agenda of the National Commission of Audit Report, which had noted:

> "*the potential for the Commonwealth to overcome the rising cost of stress claims by adopting the approach . . . to tighten the link between work and injury, and to exclude claims based on reasonable management action conducted in a reasonable manner*".

And the evidence provided to us by Ms Stanton reinforced the cost-cutting agenda:

> "*In relation to the estimates that were made about savings in terms of these amendments, it is very difficult to make such estimates. . . The best information we had on the assumptions we made . . . was that we could expect this legislation would probably impact to the extent of $10 million in the first full year of operation, leading up to $24 million in the third year*".

But what was most disturbing about the evidence concerning costs was the emphasis on the apparent greater costs of stress claims.

Most importantly, at one point Ms Stanton candidly stated:

> "*I suppose we always look at the situation where the proportion of claims seems out of whack with the proportion of costs. We have a situation here where we have seven per cent of our claims (stress claims) accounting for 19 per cent of our costs. That seems to indicate something that requires attention. It was for that reason that we took the steps that we have*".

Ms Stanton also said that:

"*Whereas in initial claims only seven per cent - that is only seven out of every 100 - are stress claims, by the time you get to 10 years you are looking at 40 out of every 100".*

This has the consequence that:

"*after 10 years . . . four out of every 10 claims will be stress related claims and, therefore, that would account for about 40 per cent of our liability*".

The clear picture that emerged was that the Government has targeted stress claims because they are the most costly claims. In other words, in a drive to secure budget savings the Government is attempting to legislate away some of its most costly claims.

The substantive changes are flawed and unfair

We believe that the targeting of stress claims because they are more costly claims has produced changes to the substantive provisions of the Act that are fundamentally flawed - and fundamentally unfair.

The central flaw in the changes proposed, and the source of the unfairness, is that the changes do not distinguish between claims on the basis of their legitimacy. Rather, the changes only distinguish between claims on the basis of the type of claim, and more specifically, on the basis that the type of claim is one that may prove expensive for the Government.

In other words, the changes do not challenge the fact that the affected worker is injured - merely whether the worker is entitled to be paid compensation for the injury. This then is not an attempt to isolate the few malingerers who may be ripping off the system. Indeed, the changes do not even pretend to seek to distinguish between injured workers with regard to the extent or genuineness of the injury. They merely establish grounds for lawyers to argue against Commonwealth liability for the consequences of the injury.

This can only mean that many legitimate claims will now be rejected because of the proposed changes. Indeed, this will be so in the case of both the substantive changes that are proposed.

The exclusion of legitimate claims because of no 'significant' connection

It will be recalled that the proposed changes will now require that employment contribute "to a significant degree" to the disease, rather than "to a material degree" as is presently the case.

Clearly this is a substantial increase in the standard of contribution - indeed, this is made explicit by the Bill's definition of "significant degree" which means "substantially more than a material degree".

The Department and Comcare in their evidence before us were quite candid in saying that this change was an attempt to 'tighten up' the necessary connection between employment and the compensable disease. As Ms Davis stated on behalf of the Department:

"*By picking up the 'substantially more than a material degree', we are trying to force a recognition that the existing test has been tightened*".

There can be no doubt this will mean some claims that would otherwise have been successful under the existing law will fail under the new provisions. Indeed, in a written response to questions posed by Senator McKay, the Department identified a number of cases which had been successful under the existing legislation but which would not be successful under the 'tightened' definition.

We believe this fact alone is sufficient to cause us to reject the proposed change, particularly as the only justification for the change is cost-cutting.

But we have an even deeper concern that many of the claims that will now be rejected because of the 'tightened' definition will be legitimate claims for which the Commonwealth should bear responsibility.

There are several related factors which cause us this concern.

First, the proposed change - and indeed the sample cases provided by the Department - do not dispute the fact that the affected worker has a disease. Nor do the changes or the sample cases dispute the fact that employment with the Commonwealth contributed to some degree to the disease. Indeed, this was implicitly recognised by the Department when, in its Written Submission, it said the change was appropriate to:

> "*properly ensure that Commonwealth employers do not bear the cost of something for which they have only limited, or no actual or moral responsibility*".

It is quite clear then that what the proposed change seeks to do is to provide the Commonwealth with a ground to assert that it has no liability for the consequences of the disease - without having to challenge the existence of the disease or the fact of a connection with employment by the Commonwealth.

Second, in the evidence before us there appeared to be considerable doubt about the meaning of the new term "significant degree"; that is, beyond the mantra provided in the Bill of "substantially more than a material degree". Of course, the fact that this mantra is provided tends to show the meaning of the term 'significant' is doubtful. Unfortunately, this mantra does not provide any further clarity as there was as much doubt about the meaning of the term "substantially more".

As Ms Davis candidly admitted:

> "*In relation to what 'significant' means, the first point to make is that obviously it is another one of those terms somewhat akin to 'reasonable' where there is not a fixed definition. . . It is very difficult in the legal sense to actually precisely define what is going to be subsequently held to be the meaning of 'significant*'".

We must say at the outset that we doubt the analogy Ms Davis made to the term 'reasonable'. Unlike the term 'significant' the term 'reasonable' does have a well settled meaning in the law because of its central - and long-standing - importance to the law of negligence.

Nevertheless, we wish to make it quite clear that our concern about the uncertainty of the meaning of the new term 'significant' is not driven simply by a reluctance to legislate a term for which there is no precise meaning. We as legislators are often called upon to do exactly that.

However, it is the context in which the doubtful term will be used that causes us concern. The context is of central importance, because the ultimate meaning of the word will effectively determine whether workers will be entitled to receive compensation, even though there is no doubt they have suffered a disease and no doubt that their employment with the Commonwealth contributed in some degree to the disease.

Third, this strong concern to us is brought into even sharper focus when regard is had to the issue of the onus in these compensation cases. Ms Davis explained the effect of the onus in the following terms:

> "*The onus is on the employee to demonstrate compensable injury - which, in these cases, would be a disease to which employment was a significant contributing factor. . . If Comcare thinks there is a question regarding the work relatedness of the disease or the disease is of a type where there could be multiple causes, so that there is perhaps some query as to whether employment was the substantial cause, then Comcare would, in that situation, after investigation and depending on the facts, possibly deny the claim. <u>That then puts the onus back on the claimant if they wish to appeal that decision to establish why the denial was wrong</u>. But, at first instance, the claimant certainly does not need to demonstrate the reverse*" (emphasis added).

In other words, while the claimant does not in the first instance have to prove that there was a significant connection between employment and the disease, if Comcare disputes the connection the onus is on the claimant to prove it. In legal terms, the ultimate or final burden of proof is on the claimant.

Again, this is not necessarily something to which we automatically object.

But the fact that the claimant must prove there is a 'significant' connection strongly suggests that there must be some certainty about the term.

There is considerable injustice in requiring a claimant to prove a standard of contribution about which there is no certain meaning, especially in circumstances in which there is no doubt the disease is being suffered and that employment with the Commonwealth contributed to it.

In our view, the impact of these three factors raises the very real prospect of claims being excluded in circumstances where the Commonwealth bears an "*actual or moral responsibility*" for the disease suffered.

Of course we do not dispute the contention that the Commonwealth should not be liable where it has little or no responsibility for the disease.

But it is our strong view that the proposed change goes beyond that. We are very concerned that there is no conformity between the Government's stated goal of excluding liability where the Commonwealth has "*limited, or no actual or moral responsibility*" for the disease suffered and the Government's new requirement that there be a 'significant' connection between the disease and employment with the Commonwealth.

Put simply, there is a very real prospect that the Government's insistence on a 'significant' connection between the disease and employment will lead to the rejection of claims for which the Commonwealth has more than "*limited, or no actual or moral responsibility*".

For the Government to be able to argue that it should bear no responsibility even though it has more than limited responsibility for the suffering of a disease by one of its employees is completely unsatisfactory.

This smacks of a Government that wants to take the benefits of the work performed by its employees but does not want to bear the costs.

In its defence of this objectionable outcome, the Government claims the change in the degree of contribution - from a 'material' connection to a 'significant' connection - merely brings the legislation into line with the original intention of the scheme.

We are not convinced by this argument.

In originally introducing a requirement for a material contribution the mischief the Parliament sought to overcome was that liability under the then existing legislation was established for injury with "little, if any, connection with employment". As the then Minister Mr Howe said in introducing the relevant Bill:

> "*the existing Act . . . frequently results in the Commonwealth being liable to pay compensation for diseases which have little, if any connection with employment*".

To overcome this the legislation required that, rather than employment simply being a "mere contributing factor" to the injury, the connection had to be sufficiently material that it could be said the injury was caused by the employment. As the then Minister said:

> "*It is intended that the test will require an employee to demonstrate that his or her employment was more than a mere contributing factor in the connection of the disease*".

And as the latter decision of the Full Federal Court confirmed in *Treloar v Australian Telecommunications Commission* (1990) 97 ALR 321:

> "*It (the definition) has served only to emphasise the action is not brought into play unless it be established by evidence that features of the employment did in fact and in truth contribute to the condition complained of. The causal connection must be established on the probabilities and not left in the area of possibility or conjecture*".

In other words, what the previous legislative change was seeking to ensure was that the contribution of employment to disease was real as opposed to simply incidental. The legislation was not seeking to limit liability only to those circumstances where the contribution of employment to disease was 'significant' or 'substantial'.

To the extent that the proposed change before us seeks to do exactly that, it is clear there is no substance in the argument that those changes are consistent with the original intention of the scheme.

Our conclusion therefore is that this change ought to be convincingly rejected.

The exclusion of legitimate claims because of 'reasonable' management action

It will be recalled the proposed changes also provide that compensation will not be payable in respect of an injury which arises solely or predominantly out of reasonable managerial or administrative action taken in a reasonable manner by the employer in connection with the employee's employment.

It is our quite firm view that this change is even more alarming than that already discussed. Not only will this change again lead to the rejection of legitimate claims for workers compensation, but it also attacks the very nature of Australia's workers' compensation schemes as "no fault" compensation schemes.

This concerning outcome is produced because the proposed exemption has been drawn too wide. Indeed, this is so in two important respects.

First, introduction of an exemption based on the concept of 'reasonableness' necessarily creates the prospect of the Commonwealth escaping liability because of the 'reasonableness' of its actions; that is, because the Commonwealth has not acted negligently.

In fact, this very real prospect was incidentally recognised by the Department in its written response to various questions posed by Senator McKay. Having been asked to explain the meaning of the term 'reasonable' in the new exemption the Department stated:

> "*As is generally the case, the determination of reasonableness will be a question of fact having regard to all the circumstances of a particular case. In practice this will require management to adopt sound workplace management practices, and deal will employees fairly and honestly in every case*".

Implicit in this, of course, is the notion that if the Commonwealth does adopt sound management practices, and is fair and honest to its employees, it cannot be liable.

Quite clearly, this is contrary to the historical and continuing premise on which workers' compensation schemes are based - that workers' compensation schemes are "no-fault" schemes in the sense that employees are not required to prove fault on the part of the employer, be it intent or negligence.

In effect, this new exemption has the potential to deny compensation to all workers suffering from stress-related disease, or indeed any other mental injury, other than where the employer has acted unreasonably or negligently. In this way, the Commonwealth workers' compensation scheme is set squarely on the path towards a negligence-based scheme.

We do not believe that is appropriate.

Second, the new exclusion is drawn too wide because of the introduction of the notion of 'managerial or administrative action'.

The obvious concern is that this concept embraces every kind of instruction or action by the employer, and generally will cover a direction or series of instructions concerning the day-to-day tasks which an employee performs.

The Department, both in its oral evidence before us and in its written submission and answers to questions, resisted this suggestion. We did not find the Department's response convincing.

First, it seems to us that our concern is reflected in the terms of the legislation. The legislation is drafted widely by referring simply, and only, to "reasonable managerial or administrative action". It may be argued that this term is further defined to include employer actions such as disciplining an employee, not promoting an employee or not providing a benefit to an employee. But this definition is expressly inclusive, and so leaves open the prospect of other employer actions such as directions or instructions concerning day-to-day tasks falling within the exemption. It may also be argued that the term is further defined by its use in conjunction with the phrase "in connection with the employee's employment". But we fail to see how this phrase can exclude directions and instructions about day-to-day tasks that are necessarily connected with the employee's employment.

Second, the Department's response to our concerns was, in essence, simply to assert that the Courts will interpret the phrase as being confined to matters relating to the workings or the functioning of the workplace, rather than to the actual tasks performed by the employee.

For example, when asked by Senator Collins why a particular hypothetical case would not be caught by the exemption, Ms David responded:

> "*Because 'reasonable managerial or administrative' action is quite clearly defined to be an action or a decision that relates in some way to the functioning of the workplace or the relationship between employer and employee, as opposed to the mere fact of an employee performing his or her duties*".

Of course, as already noted, there is no definition of the phrase in the Bill beyond an inclusive list of matters that are within its meaning. On being pressed about this, Ms Davis then said:

> "*in our opinion, 'reasonable managerial or administrative action', if a court were asked to define it, would not be defined as applicable to every instruction or action on the part of an employer, that they would quite clearly read an intention that it apply to matters relating to the functioning of the workplace or the relationship between employer and employee*".

Whilst we obviously respect the opinion of the Department in these matters, it seemed to us the prospect existed that these assessments were overly optimistic and that a more conservative assessment would be valuable.

As a result, Senator McKay in her written questions to the Department asked for reference to any Court or Tribunal decisions which the Department believed assist in explaining the meaning of the phrase. The Department responded by referring to just one South Australian case, the decision of Doyle CJ in *Workcover Corporation of SA v Summers* (unreported) SA Full Court, 1995. We were told that his Honour suggested that:

> "*the phrase <u>may be</u> intended to apply to decisions or actions by the employer which are in some way related to the workings or the functioning of the workplace, rather than to the actual task or tasks performed by the worker*" (emphasis added).

Because we have the greatest respect for his Honour we also have respect for the note of caution expressed by his Honour's use of the term "may be".

We can only conclude that there are no other decisions which can possibly give the Department the certainty of opinion it expressed to us.

We wish to make it perfectly clear that we do not doubt the Department may be correct. But the language of the exemption, and the lack of authoritative judicial pronouncement in support, causes us to conclude that the Department may be wrong.

Put simply, we do not want to run the risk that the Department is wrong. We cannot afford to permit an exemption which may be so wide that perfectly legitimate claims are excluded.

A simple example can vividly illustrate the potential width of the new exemption. Take the case of an employer who requests an employee as part of his or her normal duties to take some money for deposit to the Bank. The employee is robbed at gunpoint on the way to the Bank and suffers permanent agoraphobia as a result. There is a strong argument that the employee could not under these new provisions claim compensation. Even if that is not the government's current intention it would certainly be open to a lawyer on behalf of the Commonwealth as employer to mount such an argument - with reasonable prospects of success. Agoraphobia would be a mental injury within the meaning of the provisions and therefore could fall within the new exclusion. The agoraphobia would have arisen solely or predominantly out of reasonable managerial action, namely a direction to the employee concerning his or her day-to-day tasks, and therefore would fall within the new exclusion.

In our view it is obscene to deny an employee workers' compensation in these circumstances - yet that obscene outcome is made possible by the new exemption.

Further examples given by the Department itself also illustrate the width of the new exemption. Senator McKay in her written questions asked the Department to give examples of other actions that are included in a reference to the phrase 'reasonable managerial or administrative action' but are not particularised in the new provision.

The Department responded with two examples:

> "*offering, or not offering, an employee the opportunity to enter an Australian Workplace Agreement; offering, or not offering, a voluntary redundancy package to an employee*".

The Department could not have chosen to more extraordinary examples.

As to the first example, it is absurd that the *Workplace Relations Act* prohibits an employer, including the Commonwealth, from terminating an employee for reason that an AWA was or was not offered, yet the Commonwealth's workers' compensation scheme will not compensate a worker who suffers stress (and presumably is off work) because of exactly the same reason. This opens up the clear prospect of the Commonwealth as an employer circumventing its very own legislation. The Commonwealth could cause an employee uncompensable stress by offering an AWA, and thereby cause the employee to terminate his or her employment.

As to the second example, we can understand in the climate of public service job slashing that redundancy would be an example that would automatically jump to the Government's mind. But even for this Government it is extraordinary that they should seek the benefit of offering voluntary redundancies to its workforce yet refuse to bear the commensurate cost.

The core concern we have then with this new exemption - as was the case with the previously discussed change - is the potential to exclude large numbers of legitimate claims. Unlike the previous change, it is to some extent possible to quantify the numbers.

This can be seen when regard is had to a 1993-94 survey by Comcare of the causes of stress claims, which were as follows:

- interpersonal conflict (24%);
- workload and deadlines (24%);
- organisational change (22%);
- physical and verbal abuse (17%);
- performance counselling and other management processes (7%); and
- forced relocation and organisational restructuring (6%).

The new exemption - even on the basis of the Department's own views about its width - would certainly exclude stress claims caused by performance counselling and other management processes, and forced relocation and organisational restructuring. This amounts to 13% of existing legitimate claims.

But if the Department is wrong in its views the exemption would also exclude claims caused by workload and deadlines, and organisational change. This amounts to a staggering 46% of claims.

Thus, on a cautious estimate the new exemption may cause the exclusion of as many as 59 per cent of stress claims that are currently being accepted.

This is a shocking figure, and one that we are not prepared to countenance. This alone is clearly cause to reject the new exemption.

But further cause is also provided by the significant problems the exemption is likely to have beyond the exclusion of legitimate claims. Put simply, the central reliance on 'reasonableness' will have all the shortcomings of common law processes that the statutory workers compensation scheme sought to avoid.

First, it is capricious. Workers who suffer injury where the effects of their work conditions were not clearly understood at the time are likely not to be compensated because the absence of knowledge would tend to show management action was reasonable.

Second, rather than promoting a culture of cure the new provisions promote a culture of excuse. The provision of an exclusion of liability on the basis of reasonableness may cause management to focus on being able to justify any injury as having been the result of reasonable action, rather than attempting to avoid the injury in the first place.

Third, the vague and subjective notion of "reasonableness" will only lead to an explosion of litigation as employers and employees attempt to define the undefinable.

These features alone make the new exclusion unacceptable. But when coupled with the fact that the new provisions are likely to exclude large numbers of legitimate claims for compensation, and do so by fundamentally undermining the "no fault" basis of the scheme, the provisions deserve to be resoundingly rejected.

The proposed changes are unnecessary, and inappropriate

We have come to the very firm conclusion that the proposed changes to the substantive provisions of the Act are unnecessary and inappropriate, and ought be resoundingly rejected by the Senate.

The Government's position may be neatly summarised as follows. The Government believes the proposed changes are necessary because it wants to make savings to the budget - and if that is at the expense of legitimate claims for workers compensation, then so be it.

We do not accept that contention.

The changes are unnecessary because there is no threat to the future viability of the workers compensation scheme. The changes are inappropriate because they will exclude large numbers of legitimate claims for compensation, even where there is no doubt that the employee is injured and that employment by the Commonwealth contributed in some degree to the injury.

Put simply, we do not believe that employees with legitimate claims for workers compensation should be deprived of benefits simply to improve the budget bottom line.

CHANGES TO ADMINISTRATIVE ARRANGEMENTS

The Bill makes a number of changes in the administrative arrangements concerning the Commonwealth workers' compensation scheme.

We have reviewed those changes and, with one exception to them, have no objections to them.

The exception is an important one. The Bill proposes to make Comcare, rather than the Safety Rehabilitation and Compensation Commission, responsible for determining contributions by departments and authorities to the administrative costs of the scheme.

Our concern with this proposal is that it could leave the Commission - which continues to have an important role in overseeing the scheme, in implementing OH&S programs and in supervising some of Comcare's activities - without the capacity to determine the funds available to it for these purposes. In fact, those funds will be determined by Comcare.

Careful examination reveals that this would be an extraordinary outcome. An independent, tripartite statutory body, with a regulatory role - the Commission - will have its funding determined by the bureaucratic body which it regulates - Comcare.

We raised this concern with the Department and with Comcare during the course of the oral evidence and in the written questions posed by Senator McKay.

We accept that, to a large extent, we received a satisfactory reply.

In substance, the Department notes that under existing subsection 73A(1) of the SRC Act the Commission has a general power to issue to Comcare written policy guidelines in relation to the exercise of Comcare's powers and functions, and that under existing subsection 73(5) Comcare must comply with these guidelines. Further, the Department notes that under

proposed subsection 67C(f) of the *Occupational Health and Safety (Commonwealth Employment) Act* (OHSCE Act) Comcare must have regard to guidelines issued by the Commission in estimating the amount of the contributions to be paid by a department or Commonwealth authority under the Act.

The Department concluded in its answers to us that:

> "*Under proposed subsection 67C(f) Comcare must have regard to guidelines issued by the Commission - in this instance, where the guidelines are issued under section 73A, Comcare must comply with them*".

If this is correct then our concerns are resolved.

We do however have one lingering doubt because of the juxtaposition between the direction under section 73A of the SRC Act that Comcare 'must comply' with the Commission's guidelines, and the direction under proposed section 67C of the OHSCE Act that Comcare 'must have regard to' the Commission's guidelines.

It seems this juxtaposition leaves open a simple submission to the following effect: If the Parliament required that Comcare must comply with guidelines issues by the Commission in estimating the amount of contributions to be paid, it could have said so. It did not, and therefore the Parliament should not be taken to have required that Comcare must comply with such guidelines.

Given this doubt we cannot support the proposal as it is presently drafted. In our view the proposal still presents a real prospect of creating a change in policy - namely, in the financial relationship between the Commission and Comcare - which we cannot accept.

Therefore, we recommend an amendment to the Bill to give certainty to the outcome the Department says is implicit in the existing proposal. At very least, this amendment must expressly provide that Comcare 'must comply' with any guidelines issued by the Commission in respect of contributions payable.

Senator the Hon. Nick Sherry
Senator for Tasmania

Appendix 1

List of Submissions

1	CPSU Injured Workers Support Group	VIC
2	Workers' Compensation Self Help Network	QLD
3	Community and Public Sector Union, National Office	VIC
4	Australian Council of Trade Unions	VIC
5	Victorian Trades Hall Council	VIC
6	Commonwealth Department of Industrial Relations and Comcare Australia	ACT

Appendix 2

Witnesses at hearing

Canberra, 21 March 1997

Australian Council of Trade Unions
Mr John Cairns, Senior Industrial Officer

Community and Public Sector Union
Mr David McKenna, National Industrial Officer

Commonwealth Department of Industrial Relations
Mr Thomas Fisher, Assistant Secretary, Standards Policy Branch
Ms Janette Davis, SOG C, Legal Services Branch

Comcare Australia
Ms Meryl Stanton, Chief Executive Officer
Ms Leone Moyse, Manager, Policy and Planning