# Chapter 2

## Government Senators' Report

2.1 The original purpose of the Safety, Rehabilitation and Compensation Act 1988 (the Act) was to establish a scheme of compensation and rehabilitation for persons who were injured in the course of their employment by the Commonwealth (the scheme). The scheme was intended to minimise the human and financial cost of work-caused injury and disease, while simultaneously providing adequate compensation and support for long-term incapacitated employees.[1]

2.2 Recently, however, the legislative objectives of the Act have been increasingly hindered by what can now be regarded as outmoded applications of the scheme and its excessively generous terms. These problems have arisen primarily as a result of the courts' interpretation of two key terms within the Act: 'disease' and 'injury'. The broad reading of the Act by the courts has resulted in Commonwealth employees receiving compensation benefits anomalously out of line with employees in the mainstream workforce.

### 'Disease' and 'injury'

2.3 The current definition of 'disease' requires an employee's work to have contributed in a 'material degree' to the contraction or aggravation of a compensable disease. 'Material degree' has been broadly interpreted so that the cause of the compensable injury, rather than the extent of the contribution, has been over-emphasised. As a result, employers are being held liable for medical conditions that are minimally work related.

2.4 The current definition of 'injury' is similarly problematic. It excludes medical conditions suffered by an employee as a result of 'reasonable disciplinary action' or failure to obtain a promotion, transfer or benefit in connection with the employee's work. This exclusion is being interpreted very narrowly and employees are thus encouraged to lodge compensation claims for injuries which are not specifically excluded by the Act and which might have resulted from what can loosely be described as legitimate management action. These provisions are in some instances exploited by employees and they expose employers to liabilities in excess of what is contemplated by the Act.

2.5 The committee cites the instance of the case *Canute v Commonwealth of Australia* [2005] FCA 299 where the Federal Court defined 'material degree' to mean

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1 Hon. B Howe MP, Minister for Social Security, *House of Representatives Hansard*, 27 April 1988, p. 2191.

‘a close connection between employment and the disease’. Notwithstanding that this appears to uphold the legislative intention, the committee agrees that amending the Act would be preferable for the avoidance of all doubt.

## The new definitions

2.6 The bill amends 'disease' to mean an injury which was caused or aggravated by work to a *significant degree*. 'Significant degree' is defined as 'a degree that is substantially more than material' and specifies a number of factors which may be taken into consideration in making the necessary determination.[2]

2.7 In submissions to the inquiry, the use of subjective terms has been widely criticised. However, the words, ‘significant’, ‘material’ and even ‘reasonable’ have well known legal meaning. It is unlikely that a great deal of time and money will be spent debating or disputing the meaning of the new definitions.[3] This should ensure that fewer claims are lodged or disputed and result in reduced administrative and claims costs.

2.8 The committee notes that irrespective of interpretive issues, there is support for the reinvigorated approach. Telstra agreed that a clear nexus between disease and employment was an appropriate minimum benchmark.[4]

2.9 The approach adopted by the bill is not novel, being consistent with eligibility requirements in the majority of state workers compensation schemes (excepting the Northern Territory) and follows a recommendation in the Productivity Commission's 2004 report on *National Workers' Compensation and Occupational Health and Safety Frameworks* (the Productivity Commission Report).[5]

2.10 The meaning of 'injury' is also amended by the bill with the extension of the exclusionary provision. Any medical condition suffered by an employee as a result of a ‘reasonable management action’ will no longer fall within the ambit of the scheme. This is consistent with the broader exclusion for 'management actions taken reasonably' which are a feature of legislation in most jurisdictions across the country. The provision is accompanied by a broad but non-exhaustive list of administrative actions which will comprise 'reasonable management actions'. This amendment will prevent abuse of the scheme by employees dissatisfied with management decisions,

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2 Section 5B of the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006*. Examples of the discretionary factors include the duration of the employment, any predisposition of the employee to the disease, any activities of the employee not related to his or her employment, etc.

3 Barbara Bennett, CEO, Comcare, *Committee Hansard*, 31 January 2007, p. 23.

4 Telstra, *Submission 18*, p. 2. Also, see Australian air Express, *Submission 15*, p. 2.

5 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, June 2004.

and help to restrain administrative and claims costs. The provision is also designed to be flexible.

2.11 Australian air Express submitted:

> Supervisors and Managers have a difficult job to do in an ever changing environment and to be held to ransom by employees, who have a contrary view to the employer, makes it very difficult for employers to carry on their business when workers can simply obtain a medical certificate and then lodge a claim for compensation.[6]

2.12 The re-defined key terms do not effect any fundamental changes to the Act; they clarify and reinstate the original objectives of the Act, which appear to have been distorted over time.

## Maintaining viability

2.13 The Act must strike a balance in the achievement of its objectives. The misinterpretation of legislative intention has created a current imbalance and the scheme has consequently come under increasing financial pressure. Premiums as compared nationally have been increasing by not insignificant margins. Over the past three years the premium rate has risen by 0.64 per cent, which is more significant than might appear. Disputation rates within the scheme are quite high at 25.1 per cent.[7]

2.14 The opposition has made much of the argument that the costs factor does not justify the amendments which are proposed in the bill. However, payments to claimants, medical and rehabilitation costs are not one off payments; they often continue over a considerable period, at a time when medical related expenses are rising faster than inflation. Taken out of isolation the current financial indicators paint a grim picture for the future of the scheme.

2.15 Government senators believe that the bill will bolster the viability of the scheme and ensure that genuine claimants to entitlements will be able to avail themselves of the statutory protections. Government senators reject the claim that employees will be unfairly disadvantaged by the provisions of the bill.

## Excluding travel to and from work

2.16 A number of submissions opposing the bill have identified the exclusion of claims resulting from injuries incurred during journeys to work. An injury to an employee is currently treated as having arisen out of, or in the course of, employment if it is sustained while the employee was travelling between his or her place of residence and work place. These injuries may result in considerable time off work and

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6 Australian air Express, *Submission 15*, p. 3.

7 Australian Lawyers Alliance, *Submission 27*, p. 6.

are proportionately costlier than other types of injury.[8] Half the states and territories cover journey claims within their workers compensation schemes even though there is no obligation to provide such coverage.[9]

2.17 The Productivity Commission Report acknowledged that journeys to and from work are a necessary corollary of employment but there are various aspects of such journeys over which an employer exercises no control.[10] The Productivity Commission recommended that coverage for journeys to and from work not be provided within workers compensation schemes.[11] The bill adopts the recommendation of the Productivity Commission but continues to provide cover for travel undertaken for the purpose of employment and at the direction or request of an employer.

2.18 The exclusion of journey claims does not mean that employees will have no remedy if they are injured while travelling to and from work.[12] Compulsory third party schemes exist precisely for this reason and it would be a cost-shifting exercise from the states and territories to the Commonwealth if employers were required to shoulder this responsibility.[13] There is also the option of a common law action and the bill enables Comcare to undertake litigation on behalf of injured employees. Government senators note that Comcare increasingly pursues and recovers litigation costs.

2.19 The provisions of the Act covering journey claims exceed employers' obligations under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the OHS Act). The OHS Act does not regulate an employee's travel to and from his or her usual place of work. There is arguably no sound reason why employers should be obliged to compensate employees for injuries which are sustained neither in the course of employment, nor in relation to which employers are obliged to take reasonable precautionary measures.[14] Nor is there any good reason for continuing to follow this practice in relation to Commonwealth employees when the OHS Act does not mandate it for the mainstream workforce. This is particularly the case when the priority responsibility of the scheme is to apply its funding to compensate and

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8 Telstra, *Submission 18*, p. 3. Also, see Australian air Express, *Submission 15*, p. 3

9 The compensation schemes of Victoria, Western Australia, South Australia and Tasmania do not cover travel to and from work, whereas New South Wales, Queensland, the Australian Capital Territory and the Northern Territory compensation schemes do.

10 For example, the mode and nature of the journey and the location of the workers' residence relative to work.

11 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, June 2004, p. 187.

12 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, June 2004, pp 183-185 and p. 187

13 Australian air Express, *Submission 15*, p.3.

14 Explanatory Memorandum, p. 29. Also, see sub-section 16(1) of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.

rehabilitate those who are injured in the course of what is clearly work-related activity. The bill will align the Act with the OHS Act and eliminate a significant claims cost.

## Restricting cover for recesses and absences

2.20 Another example of perceived disadvantage is that of eliminating coverage for temporary recesses or absences from the workplace. To date the scheme has encompassed injuries sustained during such ventures. The bill adjusts this position and the scheme will in future cover injuries sustained during an ordinary recess at the workplace or while in attendance at an employer-sanctioned event.[15] Employers' liability will be limited to circumstances where they have occupational health and safety obligations or an element of control. It would be unreasonable to make employers liable for all manner and form of injury sustained by their employees independent of the employment relationship and regardless of misguided precedent.

2.21 This is a straightforward amendment and should be readily understood by both employers and employees. Government senators note that recess break claims represent only 1.5 per cent of total claims costs within the scheme. Government senators do not believe that employees will perceive any disadvantage notwithstanding the scheme's generosity to date.

## Adjusting the weekly incapacity benefit

2.22 An important element to the bill is the change to formulas for the recalculation of benefits. The result should be an improvement to the administration and provision of benefits within the scheme. The changes will result, on the whole, in improved benefits. This and following sections of the report explain the detail of the improvements proposed in the bill.

2.23 An injured employee's weekly incapacity benefit is currently determined with reference to the employee's normal weekly earnings (NWE). The Act provides for the adjustment of earnings following any wage increase the injured employee would have received had the employment continued. It is increasingly difficult to forecast the proper adjustment and the bill resolves this problem by prescribing an index for those situations in which earnings cannot be adjusted. This should clarify the adjusted entitlement and simplify the administrative processes involved in the payment of the benefit. Payments will then be made more expeditiously.

## Increasing funeral benefits

2.24 Another legislative amendment which passed with little comment was the proposed increase in funeral benefits under this Act and the Military Rehabilitation and Compensation Act 2004 (MRC Act). The funeral benefit under these acts is not in

15 For example, a social activity approved or arranged by the employer or an event which the employer asks or directs the employee to attend.

accordance with actual funeral costs, and consumer price indexation has failed to achieve a realistic parity.[16] It is illogical to require employers to pay funeral costs which are wholly inadequate for that purpose. Government senators also recognise that it is not reasonable, and it would be heartless, to then require a deceased employee's next of kin or estate to cover the shortfall of funeral costs.

2.25 Government senators note that this positive amendment was commented on in only one submission.[17] Families of employees in most states and territories should benefit from the increase, as will the families of military personnel, and employers will more readily ascertain their liabilities in this regard.

## Correlating the weekly incapacity and superannuation benefits

2.26 The committee also notes the correction of an anomaly whereby weekly incapacity benefits are reduced under the Act if injured employees are simultaneously receiving superannuation benefits. The judicial interpretation of a key phrase, 'being incapacitated for work', has unintentionally created a distinction between employees who are injured on the day of their retirement, and employees who are injured the day before or after their retirement.[18] The latter employees would not have their weekly incapacity benefits reduced on account of the superannuation entitlement. It was never the intention of the legislation to discriminate between employees in this manner and the bill clarifies and corrects the relevant provision within the Act.

## Calculating compensation

2.27 The bill proposes new formulas for the calculation of compensation for permanently incapacitated employees who retire. Weekly compensation payments will be reduced by the combined superannuation amount (which may include deemed interest on the superannuation lump sum) and five per cent of an employee's normal weekly earnings. The new formulas will re-establish the original intent of the Act that retired employees on incapacity benefits who are in receipt of superannuation amounts receive 70 percent of normal weekly earnings. The bill will not act retrospectively.

2.28 Government senators note that there was considerable concern expressed in submissions regarding the deemed interest rate. Comcare acknowledged that the current deeming rate had been established nearly 20 years ago and was out of step with current market realities. Government senators accept that the flexible method to be employed under the bill will correct that situation. They also note that the deemed interest rate will be determined in accordance with the consumer price index, which is less complex and more consistent than the formulas adopted by other government

16 Hon. Kevin Andrews MP, Minister for Employment and Work Relations, *House of Representatives Hansard*, 30 November 2006, p. 3.

17 Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 13.

18 See *Lonergan v Comcare* [2005] FCA 377

agencies. Comcare was able to assure senators that most people will experience little change or be better off with the new deeming rate.[19]

2.29 Another issue in submissions was that the deemed interest rate would be applied toward gross payments rather than net payments. This is to ensure consistency throughout the Act, and other Commonwealth legislation, and it would be anomalous for the bill to treat recipients under the Act differently from any other beneficiary. The bill is intended to simplify and expedite the payment of benefits in a more transparent manner than is currently the case.[20] Government senators reject any notion that the new formulas are an attempt to reduce current levels of benefit to injured employees.

## Directly paying medical providers

2.30 The bill will also enable Comcare to pay the cost of an employee's reasonable medical treatment direct to the medical provider. Alternately, if the account has been paid, then Comcare will be able to reimburse the cost of the medical treatment to or at the direction of an employee. This amendment recognises current practice whereby the majority of medical accounts are lodged direct with Comcare for payment. More importantly, the amendment allows Comcare to expeditiously discharge its statutory payment obligations.

## '**Suitable employment**'

2.31 Under the current definition of 'suitable employment', claimants whose employment has been terminated but who choose not to obtain available and suitable employment continue to receive an unadjusted amount of workers' compensation. This is unlikely to assist a claimant's rehabilitation and does nothing to encourage injured employees to re-enter the workforce. It is therefore an unnecessary drain on the financial reserves of the scheme.[21] For this reason amendments contained in the bill enable employers to take potential earnings into account in calculating employee's weekly incapacity benefits.

## Providing rehabilitation services

2.32 Finally, the bill will allow a delegated case manager to implement a rehabilitation return to work program without referral to a Comcare approved rehabilitation provider. Australian air Express supported the proposal arguing that the Act currently imposes an unnecessary administrative and financial burden on employers, especially when an employee's injury is clearly minor.[22]

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19 Barbara Bennett, CEO, Comcare, *Committee Hansard*, 8 February 2007, pp 2 -4.

20 Department of Employment and Workplace Relations, *Submission 22*, p. 7.

21 Department of Employment and Workplace Relations, *Submission 22*, p. 9. Also, see Telstra, *Submission 18*, pp 3-4.

22 Australian air Express, *Submission 15*, pp 5-6.

## Consultations

2.33 The committee notes that in drafting the amendments put forward in this bill, the government has consulted various stakeholders through the Safety, Rehabilitation and Compensation Commission. This is reflected in the submissions of several organisations commenting on the bill.

**Recommendation**

**Government senators recommend that the bill be passed by the Senate without amendment.**

**Senator Judith Troeth**

**Chairman**