Chapter 3

Opposition Senators' Report

3.1 The primary objective of the Safety, Rehabilitation and Compensation Act 1988 (the Act) is to establish the Commonwealth Workers Compensation Scheme (the scheme). The scheme provides compensation and rehabilitation to Commonwealth employees, ACT public service employees, and employees of certain private-sector corporations if they suffer work-related fatalities, injuries and illnesses during the course of their employment. The Act is an essential piece of legislation designed to safeguard employees.

3.2 The Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006 (the bill) intends to amend the Act. In this inquiry the committee received numerous submissions which expressed concern with the intent of the legislation.

3.3 Some submissions questioned the broader policy issues, such as the submission from the Australian Council of Trade Unions:

> Workers compensation frameworks and the national consistency of legislation and systems are currently the subject of considerable national debate. We also note the rapid recent expansion of the coverage of Comcare to non-traditional Government employees and the zealous encouragement of the Government for multi-state employers to leave State schemes for the Commonwealth system…Rather than seeking to mould the Comcare scheme into a national system that suits the needs of a limited number of private sector employers, the Government should commission the urgently required study into the injury profile a national system should fairly compensate and legislate accordingly for a scheme separate to Comcare.[1]

3.4 The Community and Public Sector Union State Public Services Federation Group believes that the bill will inhibit or limit consensus on a national workers compensation scheme.[2] This view was supported by the Australian Manufacturing Workers' Union which argued that the bill would, lower standards throughout the scheme, as was its intention.[3] The majority of submissions focussed instead upon the bill's stated objectives.

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1 Australian Council of Trade Unions, *Submission 26*, p. 2. Also, see Australian Lawyers' Alliance, *Submission 27*, p. 4 arguing that the scheme itself is structurally endangered.

2 Community and Public Sector Union State Public Services Federation Group, *Submission 25*, p. 10.

3 Australian Manufacturing Workers' Union, *Submission 13*, p. 2.

Financial viability

3.5 The Explanatory Memorandum states that the bill is necessary to maintain the financial viability of the scheme, which is increasingly under pressure.

3.6 It is however apparent from the Comcare Annual Report 2005-06 that a few types of claim to be eradicated by the bill are not financially significant. These claim costs are also currently decreasing.[4] There appears to be little financial benefit in removing these claims from the operation of the scheme. They will almost certainly have little impact upon the scheme's viability but will undoubtedly have a potentially devastating impact upon those employees who as a result of the bill will lose existing entitlements.

3.7 Other types of claim result in significant costs upon which the bill is predicated.[5] Arguably, these claims are increasing because of the rising numbers of employees covered by the scheme, and because of societal and workplace trends. There is no evidence that the scheme will have any difficulty meeting these costs in the future.

3.8 Various statistics from the 2006 Comparative Performance Monitoring (CPM) Report were cited in a number of submissions.[6] Some of the general conclusions presented in these submissions were that:

- The Commonwealth jurisdiction has one of the best Assets to Liabilities Ratio;
- The Commonwealth jurisdiction has the lowest premium rate of any Australian jurisdiction;
- The scheme does not have escalating claims numbers or costs;
- The incidence rate and frequency rate of compensated claims in the Commonwealth jurisdiction is decreasing; and
- An actual analysis of claims costs for the Commonwealth jurisdiction shows little overall change.[7]

4 Comcare, *Annual Report 2005-06*, pp 23-24. For example, injuries caused while employees were having a break represented only 2.1 per cent of claims in the last financial year.

5 For example, 'Other & unspecified mechanisms of incident', including motor vehicle accidents represented 15.4 per cent of claims, and injuries occurring while employees travelled to/from work represented 14.7 per cent of claims in the financial year ending 30 June 2006.

6 Workplace Relations Ministers' Council, *Comparative Performance Monitoring Report*, Eighth Edition, September 2006.

3.9 From these statistics the scheme appears to be operating on a perfectly acceptable cost basis and it cannot be claimed that the scheme is in financial jeopardy.

> There is no compelling economic argument for amendments to the [Act] that limit access to workers' compensation as proposed in the Bill because neither the Commonwealth Government nor corporations eligible for a license as self insurers are subject to unacceptable cost pressures.[8]

3.10 Although the bill will reduce and limit benefits under the Act, there has been no commitment to pass on an appropriate proportion in the anticipated savings by way of a reduction in premiums.[9] Furthermore, the bill will not ultimately effect 'savings' in a number of other areas.

Lack of 'savings'

3.11 It was argued in submissions that the real intention of the bill is to externalise or shift costs from employers to employees, private insurers, tax payers and public health service providers, such as Medicare and Centrelink.

> It's not that the costs will disappear; it's simply that they will be transferred to someone else. And it's not that the relevant workplace injuries and/or illnesses will disappear either; it's simply that the employer will, by legislative fiat, no longer have any responsibility to contribute to their cure (despite the work contributing to the cause).[10]

3.12 This cost-transfer is untenable as the Act charges employers with responsibility for the safety, rehabilitation and compensation of their injured employees, including the financial responsibility. It is equally objectionable given that the bill will have the effect of increasing the costs to be transferred away from employers.

3.13 Opposition senators suggest that in order to maintain the credibility of employers and the scheme, the bill must be redirected toward the needs of those whom the Act purports to protect.

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7 Communications Electrical Plumbing Union, *Submission 24*, p. 1. Also, see Community and Public Sector Union, *Submission 16*, p. 9; Australian Council of Trade Unions, *Submission 26*, p. 4; Bicycle Federation of Australia, *Submission 11*, p. 2 noting that Comcare's standard workers' compensation premiums are lower than some State schemes that exclude journey claims and The Law Council of Australia, *Submission 19*, p. 3 observing that the scheme is not the most generous scheme in terms of either the level of statutory benefits paid to injured employees or access to common law remedies.

8 Community and Public Sector Union - State Public Services Federation Group, *Submission 25*, p. 10.

9 Law Council of Australia, *Submission 19*, p. 3.

10 Australian Rail, Bus and Tram Industry Union, *Submission 4*, p. 5. Also, see Superannuation Commonwealth Officers' Association, *Submission 9*, p. 5.

> What is a financial "cost of operation" to an employer is personal, intimate, family focused and frightening to the employee faced with injury or disease and associated psychological consequences.[11]

3.14 Therefore, Opposition senators conclude that the bill is misguided in its focus. It will save money for employers without reference to broader, and not necessarily financial issues, such as increasing the burden on taxpayers, injured employees and their families.

Key terms re-defined

3.15 The bill proposes two fundamental changes to the Act which will significantly alter the nature of the legislation. These two changes re-define key terms, 'disease' and 'injury', which determine whether injured employees are entitled to safety, rehabilitation or compensation under the Act. It is argued that the two changes will clarify to whom the Act applies, and was always intended to apply, by strengthening the connection between work and eligibility under the scheme. The changes however go much further.

'Disease'

3.16 The proposed change to the meaning of 'disease' effectively introduces a new statutory threshold. To be entitled to workers compensation an injured employee will now need to establish that the injury was caused 'to a significant degree' by the employment.

> Substituting significant degree in place of material degree and specifying the matters to be taken into account in determining significant degree tighten the employment contribution test to the point where many work related injuries will be excluded.[12]

3.17 The new test also evidences a lack of proportional responsibility. If work contributes to a health condition, but is not the primary cause of that condition, then an employer will not be required to provide any compensation to an employee.[13] A number of submissions argued that the element of proportional responsibility was both fair and encouraged employers to maintain a safe and healthy workplace.[14]

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11 Community and Public Sector Union and State Public Services Federation Group, *Submission 25*, p. 3.

12 Communications Electrical Plumbing Union, *Submission 24*, p. 2. Also, see Community and Public Sector Union, *Submission 16*, p. 9.

13 Superannuated Commonwealth Officers' Association, *Submission 9*, p. 6. Also, see Law Council of Australia, *Submission 19*, p. 4 and Community and Public Sector Union, *Submission 16*, p. 4.

14 For example, see Australian Federation of Disability Organisations, *Submission 21*, p. 2.

3.18 The bill was also criticised for its effect upon certain employees, especially those with mental illness, pre-existing genetic dispositions or any underlying disease. There were three main arguments in this regard:

- That the new test might exclude such employees from the statutory protections and prevent them from obtaining help and treatment
- That employees might not disclose the nature of an illness for fear of workplace discrimination
- That the exclusions could result in a significant loss of productivity and experienced workers.[15]

3.19 The suggestion that the new test could lead to discrimination against people with mental illness was further advanced in the context of employers' Occupational Health and Safety (OH&S) responsibilities: if there were no liability for such injuries, then employers might not provide affected employees with a work environment necessary for successful employment.[16]

3.20 OH&S arguments were presented throughout a number of submissions. The Australian Council of Trade Unions submitted that the government should take a lead role in the development of OH&S solutions to the causes of psychological injury rather than seeking to deny entitlements to workers.[17] The Australian Rail, Tram and Bus Industry Union argued that OH&S matters would suffer neglect if employers' workers compensation payments were to diminish on account of the bill.[18]

3.21 Most importantly, the new test is fundamentally flawed. As the Community and Public Sector Union described the problem:

> The test presumes that it is possible to weigh the relative causes of an injury and arrive at some sort of quantitative assessment of the relative importance of each event. We believe this presumption is misconceived and extremely problematic, especially so in the context of mental illness. Mental and psychological illnesses often have multiple causes, and it is very difficult to determinatively assess the relative weight of each cause.[19]

3.22 The Construction Forestry Mining Energy Union argued:

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15 Mental Health Council of Australia, *Submission 17*, p.3. Also, see Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 9 noting that the incidence of psychological illnesses has become a serious issue in the workplace; Community and Public Sector Union and State Public Services Federation Group, *Submission 25*, p. 10 and Beyond Blue, *Submission 2*, p. 1

16 Mental Health Council of Australia, *Submission 17*, p. 3.

17 Australian Manufacturing Workers', *Submission 13*, p. 9.

18 Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 5. Also, see Superannuated Commonwealth Officers' Association, *Submission 9*, p. 6.

19 Community and Public Sector Union, *Submission 16*, p. 9.

> [The new test] heavily tips the balance in favour of employers and insurers in the litigation that will follow. Most disease related injuries aggravated by work will raise complex medical questions on cause and effect but under the new legal "test" put up by the Bill it will be practically much more difficult to find any medical consensus. The end result will be many workers will unfairly miss out on compensation.[20]

3.23 In short, the new definition of 'disease' will adversely affect employees covered by the scheme. In many instances the scheme will no longer apply, regardless of whether employment contributes to an employee's injury. In other instances it will be difficult for an employee to prove eligibility to be covered by the scheme. The bill will therefore eliminate or reduce injured employees' current statutory entitlements, as well as sanction discrimination among employees.

3.24 Even more reprehensible is that a piece of legislation designed to protect employees will absolve employers from certain OH&S liabilities, which are at the very heart of employment and industrial relations law. Opposition senators believe that this particular amendment is contrary to the primary objective of the Act: the safety, rehabilitation and compensation of injured employees. Opposition senators also suggest that the amendment is unnecessary in view of the recent decision of the Federal Court in *Canute v Commonwealth of Australia* [2005] FCA 299 in which the Court affirmed the requirement for a 'close connection between the employment and the disease'.[21]

'Reasonable administrative decision'

3.25 The second fundamental change to the Act is the re-definition of 'injury'. It is claimed that this shall prevent workers' compensation claims being used to obstruct legitimate administrative action by excluding claims where an injury has arisen as a result of such action.[22] Two specific aspects of the new definition caused considerable concern: what comprises a 'reasonable administrative action', and might therefore give rise to non-compensable injuries, and that determination by employers with reference to a non-exhaustive list of actions.

3.26 A number of submissions found fault with the bill's effect of placing employers' managerial behaviour beyond reproach. The Australian Manufacturing Workers' Union argued that the width of the 'reasonable administrative action' exception will break the nexus between employers' behaviour and the consequences of their action.[23] The Australian Rail, Tram and Bus Industry Union concurred, adding:

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20 Construction Forestry Mining Energy Union, *Submission 20*, pp 1-2.

21 Law Council of Australia, *Submission 19*, p. 2.

22 Explanatory Memorandum, p. 11.

23 Australian Manufacturing Workers' Union, *Submission 13*, p. 5. Also, see Community and Public Sector Union, *Submission 16*, p. 11 and Communications Electrical Plumbing Union, *Submission 24*, p. 2.

> With appropriately trained and qualified management, a proper disciplinary policy, clear and well-articulated policies and procedures and the right of employees to representation, the possibility of incurring an injury as a result of disciplinary and other matters of conflict should diminish.[24]

3.27 The Law Council of Australia questioned the clarity of the provision:

> The extension of the exclusionary provision to reasonable "administrative action" takes this exclusion too far. On one interpretation, it might be considered that all Government actions (and not just disciplinary ones) can be regarded as "administrative action". Another danger of excluding all injuries arising from all "reasonable administrative action" under a no fault scheme is that certain judgements about fault must be imported. The basic premise upon which various Australian workers compensation schemes are based is that "reasonableness" of a particular action or omission is excluded (hence, the term 'no-fault'). The aim historically was to provide workers with a defined benefit in the event of incapacity. Questions of fault have historically been handled by the courts.[25]

3.28 Opposition senators cannot see how a question of fault can be impartially decided by employers within the scheme.

3.29 It is equally questionable how 'reasonable' will be interpreted. What is reasonable depends entirely upon circumstance and perspective. If an injured employee disagrees with an employer's assessment of the reasonableness of an action, then it would be difficult to contest. Employees do not necessarily have sufficient resources to match and effectively challenge employers, regardless of the merits of a case. It is not fair in such circumstances to require employees to prove that their statutory rights have been breached.

'Injury'

3.30 The re-definition of 'injury' is a provision which has the potential for abuse over time.[26] The Act clearly specifies a limited number of specific circumstances in which employees cannot have recourse to workers compensation entitlements. The legislation, arguably, was never intended to entirely exclude all manner of injuries which employees might incur as a result of employers' managerial decisions. The breadth of the exclusionary provision, regardless of any particular interpretation, is not appropriate.

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24 Australian Rail, Tram and Bus Industry Union *Submission 4*, p. 11. Also, see Community and Public Sector Union State Public Services Federation Group, *Submission 25*, p. 9 advocating greater resource allocation focussed on prevention and rehabilitation and Australian Physiotherapy Association, *Submission 14*, p. 4.

25 Law Council of Australia, *Submission 19*, p. 4.

26 Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 11 and Community and Public Sector Union, *Submission 16*, p. 10.

3.31 The exclusionary provision could also undermine the primary objectives of the Act. A rejected claim could result in an employee being absent on sick leave or leave without pay. An employee on extended unpaid sick leave would probably access the social welfare system and the public health system. This could be ongoing if the employment were terminated owing to non-rehabilitation.[27]

3.32 As with the new definition of 'disease', there was apparent concern with how the new definition of 'injury' will affect employees with disabilities and/or mental illnesses. It was argued that it is wrong in principle to distinguish these types of injury from physical injury, and discriminate against certain professions, occupations and injured employees.[28] The Australian Federation of Disability Organisations questioned whether the list of variable considerations could ever operate equitably.[29]

3.33 In passing, Opposition senators note the insinuation that a significant number of employees are abusing the scheme. No clear and convincing evidence was offered to the committee to support this assertion. If there is a legitimate concern about abuse, then, if not already provided, the Act should provide for appropriate civil or criminal offence penalties.

3.34 The Act affords employees a level of protection in circumstances where they have been injured at work and require a guaranteed level of assistance from their employer. It is not legislation aimed at protecting employers at the expense of injured employees.

Lack of clarity

3.35 Ambiguity in the interpretation of the Act is cited as one justification for the bill. The re-defined key terms do nothing to remedy that apparent problem. Not only is there no evidence to suggest that once enacted the bill will result in the lodgement of fewer claims, indeed the contrary is likely as many injured employees will not be able to determine whether they are covered by the scheme. Perhaps an ulterior motive of the bill is to discourage injured employees from lodging a claim.

3.36 A self-insurer under the Act submitted:

> The use of subjective terms…is likely to create confusion amongst stakeholders and result in an increase of disputes, ultimately driving workers compensation claims cost higher. Accordingly, we suggest the amendment provide greater clarity or an objective test to determine liability; greater clarity ensuring workers are aware of their rights and entitlements and employers to more effectively manage their risk…We

27 Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 11.

28 Community and Public Sector Union State Public Services Federation Group, *Submission 25*, p. 8.

29 Australian Federation of Disability Organisations, *Submission 21*, p. 3.

> foresee an inevitable situation of incurring legal costs in order to defend and/or clarify our interpretation of the proposed definition of '*significant*'.[30]

3.37 The bill remains ambiguous and will probably result in much the same problem as is currently the case. The amendment is therefore pointless and does nothing to improve the administration and provision of benefits within the scheme.

3.38 To claim that the bill is required to correct legislative ambiguities is misleading and implies that the Act has been poorly drafted. This is not the case. The Act is clear in its intent and is being interpreted consistently by the courts.

Non coverage of journey claims

3.39 That the real object of the bill is to eliminate or curtail employees' rights is evidenced by this particular amendment. The bill revokes an existing entitlement on the basis that injury sustained in accidents that occur on the way to and from work cannot be attributed to employers.

3.40 The approval given to journey claims over the past 19 years has given rise to the understanding that journey claims are an entitlement. It would be unjust to disallow journey claims when they have been readily available and encouraged for many years, especially since employees significantly rely upon the coverage. The elimination of journey claims is bound to cause great discontent because it is an erosion of a fundamental and traditional condition of employment, as is clear from the number of submissions received on this point.[31]

3.41 Proponents of the bill argue that travel to and from work is not undertaken in the *course of employment* and consequently, injuries sustained during such travel should not be compensable. Almost without exception, submissions received by the committee disagreed.

3.42 The Community and Public Sector Union State Public Services Federation Group stated:

> Getting to and from work is an activity closely connected with employment and it is not correct to say that it is an activity entirely beyond or outside of the employment relationship.[32]

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30 Thales Australia, *Submission 3*, p. 2. Also, see Australian Rail, Tram and Bus Industry Union, *Submission 4*, pp 8-9 and Law Council of Australia, *Submission 19*, p. 4 noting that in jurisdictions applying tests of 'reasonableness' there has been increased litigation and greater uncertainty as to entitlements.

31 Superannuated Commonwealth Officers' Association, *Submission 9*, p. 7. Also, see Australian Council of Trade Unions, *Submission 26*, p. 7, Jeremy Coleman, *Submission 5*, Nicholas Covey, *Submission 6*, Gilbert Logan, *Submission* 8, Pedal Power ACT Inc, *Submission 10*, Bicycle Federation of Australia, *Submission 11*, Jeff Ibbotson, *Submission 12*.

32 Community and Public Sector Union State Public Services Federation Group, *Submission 25*, p. 5.

3.43 Employees, like employers, do not exercise ideal control over travelling to and from work and it is iniquitous to require employees to bear all responsibility for injuries caused on the way to and from work.[33]

3.44 The Construction Forestry Mining Energy Union (CFMEU) told the committee:

> The CFMEU has seen many examples where its members have been seriously hurt, maimed or even killed going to work or coming home from work when fatigued from long hours of overtime or after arduous work or as a result [of] being required to travel outside "normal" work hours. In these situations the worker and their family often have no rights to under [sic] other compensation schemes.[34]

3.45 It has been suggested that employees injured on the way to and from work can avail themselves of alternate forms of coverage. Private insurance would however require the injured employee to establish fault on the part of another person or entity, which might require an action at common law.[35] There is also no rehabilitation scheme for transport other than by private motor vehicle or for persons who are involved in catastrophic accidents.[36]

3.46 The Community and Public Sector Union State Public Services Federation Group additionally remarked upon the primacy of individual agreements:

> This breakdown in support of collective representation broadens the inequities already existing and lessens the prospects that most employees will have to achieve insurance coverage necessary to protect them and their dependants against misadventure while traveling [sic] to and from work.[37]

3.47 Opposition senators agree that the no fault workers compensation scheme is the most effective and suitable option for the rehabilitation and early return to work of injured employees.

3.48 The lack of control has been cited as a primary reason why employers should not be required to cover journey claims via the scheme. Again, most submissions to the committee rejected the argument.

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33 For example, see Jeff Ibbotson, *Submission 12*, p. 1; Jeremy Coleman, *Submission 5*, p. 1; Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 12; Community and Public Sector Union, *Submission 16*, p. 12; Australian Manufacturing Workers' Union, *Submission 13*, p. 8; and Superannuated Commonwealth Officers' Association, *Submission 9*, p. 7.

34 Construction Forestry Mining Energy Union, *Submission 20*, p. 2.

35 Community and Public Sector Union State Pubic Services Federation Group, *Submission 25*, p. 6 and Mr David Perkins, Federal Industrial Officer, Community and Public Sector Union State Pubic Services Federation Group, *Committee Hansard*, 30 January 2007, p. 18.

36 Australian Manufacturing Workers' Union, *Submission 13*, p. 5.

37 Community and Public Sector Union State Public Services Federation Group, *Submission 25*, p. 6.

3.49 The Australian Rail, Tram and Bus Industry Union argued:

> The claim about "control" misses the point about the connection with work and why the employee was doing what he/she was doing at the time of the injury/illness. This claim is part of a broader campaign by employers to avoid their responsibilities to their employees by alleging the absence of control. The aim here is to transfer responsibility for accidents in the workplace from the employer to the employee.[38]

3.50 The Communications Electrical and Plumbing Union added:

> Workers Compensation is beneficial legislation with an underlying premise of "no fault". Arguments to exclude compensation on the basis that the employer has no control or fully complies introduces concepts which if extended would exclude many compensable claims and undermine the whole social framework of workers compensation legislation.[39]

3.51 The Law Council of Australia submission submitted that the proper rationale was risk rather than control:

> The original rationale for allowing journey claims under the English Acts of the early twentieth century was that travel to work outside the house substantially increased the risk to workers. The Law Council believes that this rationale has not diminished in importance in the present working environment and journeys undertaken as part of or in relation to employment or study should be covered.[40]

3.52 Employees injured travelling to and from work have a reasonable expectation that the no fault scheme will provide them with rehabilitation and compensation in time of need. A legislative change of heart is poor justification, and indeed reward, for eliminating the most expeditious means of providing that protection. It also rather inconveniently ignores the benefits to employers of maintaining a healthy and productive workforce and undermines the foundations of workers compensation legislations in the interests of short-term fiscal benefit for those obliged to provide the protection.

3.53 A theme of the bill appears to be discouraging employees from getting out and about both during the work day and on the way to work.

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38 Australian Rail, Tram and Bus Industry Union, *Submission 4*, pp. 12-13.

39 Communications Electrical Plumbing Union, *Submission 24*, pp. 2-3. Also, see Australian Manufacturing Workers' Union, *Submission 13*, p. 7; Community and Public Sector Union, *Submission 16*, pp. 6-7; Financial Sector Union of Australia, *Submission 28*, p. 2.

40 Law Council of Australia, *Submission 19*, p. 5. Also, see Australian manufacturing Workers' Union, *Submission 13*, p. 5 and *Submission 16*, p. 12 where it is noted that "peak hour" is part of the working lives of the majority of employees and is a more dangerous time to be travelling.

Physical activity

3.54 There was strong concern expressed about the effect of the journey claim changes on employee health and fitness. Submissions indicated that employees enjoyed riding or cycling to work in the knowledge that they were covered by the no fault scheme. These submissions also noted the benefits employers derived from having a healthy workforce: invigorated employees, quick recovery rates, and less reliance upon the public health system. It was noted that these benefits have been recognised by employers with the encouragement and implementation of various health initiatives.[41]

> I was injured in an accident in October 2004…I was covered by workers compensation and was able to easily and quickly have my medical bills paid and my income uninterrupted. The changes proposed…place a further work related burden on workers. Certainly it is possible to pursue recovery of costs for personal injury through the court system however this is expensive, slow and leaves the employee vulnerable to financial hardship at a time when he or she is likely to be in pain, shock and stress from the trauma suffered.[42]

> My rehab doctor told me I made a pretty quick recovery, due in no small measure to my overall fitness from riding regularly to work…In the end I was back at work fairly quickly…I think that if I'd had to worry about whether I should incur some of the medical expenses I might have either returned to work before I was fully fit (posing an OH&S risk to myself and others) or I'd have taken longer to recover fully.[43]

3.55 There did not appear to be any hard data or empirical studies supporting the claim that a lack of workers compensation would discourage employees from getting to work under their own steam. Submissions were, however, clear on this point with Fitness Australia Inc. stating that the bill will discourage employees from attempting to incorporate incidental activity into their daily lives.[44]

3.56 In addition to health concerns, several of these submissions noted that petrol prices, road congestion and global warming were further considerations for encouraging them to use public transport, bicycle or walk to and from work.[45] There is no sound reason to exclude journey claims from the ambit of the Act. Indeed, it is

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41 Mr Jeff Ibbotson, *Submission 12*, p. 1; Community and Public Sector Union, *Submission 16*, p. 8; Pedal Power ACT Inc, *Submission 10*, p. 1; Bicycle Federation of Australia, *Submission 11*, p. 1.

42 Ms Gilbert Logan, *Submission 8*, p. 1.

43 Mr Jeff Ibbotson, *Submission 12*, p. 1. Also, see Community and Public Sector Union, *Submission 16*, p. 8.

44 Fitness Australia, *Submission 1*, p. 2.

45 Mr Nicholas Covey, *Submission 6*, p. 1. Also, see Bicycle Federation of Australia, *Submission 11*.

contrary to employees' expectations and the no fault scheme currently existing in the majority of state based workers compensation schemes.

Off site recess breaks

3.57 The bill will remove employees' coverage for injuries which occur outside the work place or at off site events which are not sanctioned by employers. It is highly questionable whether this provision is at all necessary to sustain the scheme's financial viability. It is also inconsistent with the majority of state based workers compensation schemes.[46] In the context of health and fitness activities, the Superannuated Commonwealth Officers' Association suggested that the provision discriminates against employees.[47]

3.58 There was also interest in possible exceptions to the general rule. A specific example explored by the committee was that of mobile work places.[48] Opposition senators are not convinced that in practice the provision will be so simple to apply. It is likely that there will be some disagreement about what constitutes a 'recess break' or place of work. These issues were illustrated to the committee during the inquiry.

Senator MARSHALL—I just want to come back to the breaks, in relation to some of the questioning I did with Telstra. Let us look at a lunch break, for instance. They were of the view that, if you stayed within the employer's confines or workplace and had lunch, you were covered. That probably goes to your issue about providing a healthy and safe workplace and having some control over it. So are employers required to provide somewhere to have lunch?

Ms Bennett—No.

Senator MARSHALL—They are not. Okay. Are they required to provide a break for lunch?

Ms Bennett—That goes to industrial legislation but, yes, my understanding is that there are hours worked after which breaks are required. Also, on the safety side, we look at that as safety about fatigue and reasonable working hours. But, as to whether a tearoom is provided, I do not know. When I worked in industrial relations, it was not a requirement that tearooms were provided. But hours of work are set out in industrial relations legislation.

Senator MARSHALL—Employers are responsible for administering those arrangements, aren't they? So we make the assumption that everyone is required to have a lunch break if they are working full time.

Ms Ryan—Yes.

Senator MARSHALL—So if you are out on the road as a Telstra technician—and this is the proposition I put to Telstra—and you pull over because it is your lunch break and you are required to have a lunch break by the employer, you sit in the park and eat your sandwiches and you are injured in the course of that process, are you covered?

Ms Bennett—No. Outside the workplace on a lunch break, you are not covered.

Senator MARSHALL—Why not? It seems inconsistent because you said that if the employer requires you to do a course of study, that is fine; you are covered for the journey and you are covered at the place of the education. But if you are required to have a break, why would you not be covered?

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46 Communications Electrical Plumbing Union, *Submission 24*, p. 3 noting only South Australia and Tasmania limit recess break coverage to on worksite injuries. Also, see Community and Public Sector Union State Public Services Federation Group, *Submission 25*, p. 7.

47 Superannuated Commonwealth Officers' Association, *Submission 9*, p. 8.

48 Mr Richard Coleman, Telstra, *Committee Hansard*, 31 January 2007, pp. 10-11.

Ms Parker—It is no different than if I am at work here in Melbourne and leave and go into the park. The employer has no control over that environment. It is the same for a truck driver. If they go to the park, there is no control over that site. They could be doing anything.

Senator MARSHALL—So if the employer requires the employee to have a lunch break, it would be reasonable to expect the employer to require the employee to come back to a place that the employer has control over for them to exercise that lunch break?

Ms Parker—That would be the only way the employer could have control over the facilities and ensure a safe workplace, yes.[49]

3.59 The opposition does not accept the government's position that this is an issue of control; it is about the employment relationship. The Act is and has always been based on the premise of no fault or as the Communications Electrical Plumbing Union stated:

> It is a beneficial piece of legislation. It has to take into account all of the work life and the employment relationship that exists, not just the bits where the person is sitting under the direct eye, as it were, of the employer and doing what they are told.[50]

3.60 The Act is about people. One of the administrative changes to the Act will be the introduction of a new deeming rate for the calculation of weekly incapacity benefits. It would be impossible to ignore the practical effects of the new deeming rate and notional superannuation contribution due to the number of submissions received on point.

Deeming rate

3.61 The bill proposes to allow the Minister to issue an instrument each year setting the deemed interest rate for the following 12 months. The rate is expected to be based on the 10 year government bond rate for the previous 12 months.

3.62 The Australian Rail, Tram and Bus Industry Union was sceptical that this proposed means of determining the deemed rate would produce a fair result:

> The problem here is that the index is to be contained in Regulations and will be as determined by the Minister for Employment and Workplace Relations. Given the attitude of the Federal Government on wage increases and benefits to employees generally, it would be difficult to have any confidence that the indexes, if used, will provide for other than marginal increases.[51]

3.63 The existing 10 per cent deemed interest rate already produces unfair results. As Comcare told the committee:

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49 *Committee Hansard*, 31 January 2007, p. 34.

50 Ms Sharelle Herrington, Divisional Assistant Secretary, Communications Electrical Plumbing Union, *Committee Hansard*, 30 January 2007, p. 5.

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

> It was set in 1988. In the mid-90s, as other financial indicators such as bond rates and interest rates changed, it moved out of step and it probably has been too high since the late 90s.[52]

3.64 For many years then the deemed interest rate has grossly disadvantaged injured employees receiving benefits under the scheme. Injured employees have no doubt been keenly aware of this disadvantage and some have sought to draw the government's attention to the inequity inherent in the fixed deeming rate.

3.65 A particular example provided to the committee was that from Mr Ian Emery. Different calculations indicate that Mr Emery has been penalised somewhere between $63 000 - $175 000 over the course of nearly 13 years. While there might be some disagreement concerning the precise extent of this disadvantage, the salient point is that the fixed deeming rate has clearly caused Mr Emery considerable disadvantage. Up to 200 other injured employees may have been similarly affected.

3.66 The government for its part has taken scant notice of the concerns, notwithstanding that it is the only party capable of addressing the inequity. The fixed deeming rate has not only been blatantly applied without regard to principles of equity, it has also failed to achieve the legislative objective of delivering a minimum safety net income of 75 per cent of NWE. The bill should be amended to immediately address this gross injustice.

3.67 Another criticism found in many submissions argued that the proposed method of determining the deemed interest rate was unique to the scheme and was discriminatory. The Communications Electrical Plumbing Union submitted that the deemed interest rate should reflect actual interest rate expectations, or the deeming rate used for other legislative payments (pensions, veterans affairs), and should not be manipulated to intentionally reduce benefits or give a better return to the scheme to the detriment of individuals.[53] Opposition senators agree that in retrospect the deeming rate has disadvantaged individuals, which is neither appropriate nor fair and that it is incumbent upon the government to remedy the situation to meet the objectives of the Act.

Recommendation 1

3.68 That the bill be amended to address the retrospective inequity in the deeming rate.

3.69 Another common criticism of the deemed interest rate was that it will apply to gross lump sum payments, which effectively increase the deeming rate.[54] The Department conceded that all formulas in the bill are based on gross amounts. The bill

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52 Ms Barbara Bennett, CEO, Comcare, *Committee Hansard*, 8 February 2007, p. 2.

53 Communications Electrical Plumbing Union, *Submission 24*, p. 3. Also, see Mr Ian Emery, *Submission 7*, p.3 and Superannuated Commonwealth Officers' Association, *Submission 9*, p. 9.

54 Superannuated Commonwealth Officers' Association, *Submission 9*, p. 9.

amends the formulas only in relation to injured employees drawing lump sum payments upon retirement. The Department argued that it would be anomalous for the bill to make a distinction between these employees and injured employees drawing weekly incapacity benefits.[55]

3.70 The comments of the Law Council of Australia are worth noting in this regard:

> Although the Comcare scheme claims to provide incapacity benefits at 75%, incapacitated employees who are retired on incapacity grounds or who receive a redundancy package contribute to this sum by way of deduction of any pension or by deducting an amount from any lump sum. As the object of superannuation is to provide a retirement income (post 65), the effect of these provision is that injured employees must subsidise the Commonwealth's obligation to provide incapacity payments using their superannuation entitlements.
>
> [In the case of lump sum payments] the formula of dividing by 520 essentially means that the lump sum is applied instead of compensation for that 10 year period such that it may be exhausted prior to reaching 65 years of age and becomes a negative if retirement occurs prior to age 55. This approach also provides a real incentive for statutory corporations…to use retirement as a means of relieving their premium burden rather than redeployment, which is contrary to the intention of the Act.[56]

3.71 Opposition senators consider it unfair to use a formula which is less generous than it appears and then determine on this basis what benefit will be grants. This is iniquitous. The purpose of the formulas should be to ensure that injured workers are provided with a fair payment, not one which is deemed to be adequate from the government's fiscal point of view.

3.72 Opposition senators also note that injured workers receiving lump sum payments are subject to the application of the then deemed interest rate. Under the bill this rate could vary so that an injured worker receiving weekly incapacity benefits could have either more or less deducted from his or her payment than an injured worker in an identical situation who retires with a lump sum payment. It is also highly possible that this fluctuating rate will increase the burden of administering weekly incapacity payments.

Notional superannuation contributions

3.73 The second element of the formulas which drew sharp criticism from all quarters was the five per cent deduction for notional superannuation contributions. The criticisms canvassed a variety of issues.

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55 Mr Alex O'Shea, Comcare, *Committee Hansard*, 31 January 2007, pp. 29-30.

56 Law Council of Australia, *Submission 19*, pp. 5-6.

3.74 The Communications Electrical Plumbing Union submitted:

> There is no legitimate reason to reduce the NWE of retired claimants by 5% to 70% rather than the 75% entitlement of other claimants. No actual superannuation contribution is made so there is no return to the claimant, unlike the situation with ordinary claimants whose personal contribution to superannuation is returned to them with interest; nor is there generally any notional employee contribution in most superannuation funds.[57]

3.75 Comcare indicated to the committee that the five per cent notional superannuation deductions will in future be invested in personal accounts of behalf of injured employees.[58] Opposition senators are encouraged by this advice for two important reasons: the new approach will ensure that monies notionally deducted are actually credited, and ultimately paid, to those people entitled to the monies and the investment will enable injured employees to effectively make superannuation contributions and plan for their financial future.

3.76 A further concern was that the notional superannuation deduction effectively reduces the income safety net at a time when injured employees' income is already substantially less than what it was prior to the employee's injury. This can cause hardship to beneficiaries under the scheme. Opposition senators suggest that monies deducted should be re-paid to the injured employees.[59]

3.77 A third concern was that the notional five per cent appears to be a figure simply plucked out of thin air. Nowadays not all superannuation schemes require personal contributions and those that do have varying levels of contribution. Again, superannuation monies should be returned to those who need them.

3.78 On a different note, the Community and Public Sector Union submitted:

> [The 70% of NWE] has been a continuing cause for discontent and resentment by CPSU members…By reducing the amount of weekly benefits from 75% to 70% of applicable salary, the Commonwealth will be paying different levels of benefits to public servants compared to the benefits payable to members of the Australian Defence Force.[60]

3.79 Opposition senators see no need for the continuation of this discrimination and recommend that it be resolved without delay.

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57 Communications Electrical Plumbing Union, *Submission 24*, p.3. Also, see Mr Ian Emery, *Submission 7*, pp. 6-7 and Superannuated Commonwealth Officers' Association, *Submission 9*, pp. 8-9.

58 Ms Barbara Bennett, Comcare, *Committee Hansard*, 31 January 2007, p. 27.

59 Superannuated Commonwealth Employees' Association, *Submission 9*, p. 9. Also, see Mr Ian Emery, *Submission 7*.

60 Community and Public Sector Union, *Submission 16*, pp. 17-18.

3.80 Opposition senators suggest that while the formulas themselves might not require clarification, their rationale is less clear. The purpose of the benefits should be to ensure that injured employees are provided with a certain level of income for both their short and long-term needs. Instead, the formulas appear designed to reduce the amount of income actually paid to employees with scant regard to their interests. The logic offered in support of these changes is at best convoluted and at worst woefully ignorant. There can be no justification for preventing injured employees from taking care of themselves and increasing their dependency upon the government and public health system. Instead, the formulas should work toward increasing employees financial independence.

'Suitable employment'

3.81 The bill will allow for a reduction in the weekly incapacity benefit based on an employee's actual or potential earnings from employment with the Commonwealth or any other type of employment.

3.82 The Communications Electrical Plumbing Union argued that rather than reduce the weekly incapacity benefit, it would be more effective to enhance alternate employment opportunities as occurs in other jurisdictional schemes.[61] It is preferable to provide injured workers with opportunities to re-enter the work force rather than penalise them for being unable to obtain alternative employment and reliant upon other forms of assistance.

3.83 This is particularly so in relation to those injured workers who are affected by disability. As noted by the Australian Federation of Disability Organisations, people with disability face substantial direct and indirect discrimination in the workforce, which severely restricts their opportunities to find employment. They are also more vulnerable to retrenchment and are extremely unlikely to ever re-enter the workforce.[62] For people with disability, 'potential earnings' might operate to their distinct disadvantage.

3.84 Opposition senators do not agree with this amendment as it has the potential to discriminate against injured workers, does nothing whatsoever to rehabilitate injured workers and is a short-sighted fiscal measure which penalises injured workers.

Lack of consultation

3.85 There was some indication of dissatisfaction with the process of consultation:

> The only consultation that has occurred has been at the level of the [Safety Rehabilitation and Compensation] Commission. If, according to the Federal Government, that should suffice to fulfil its obligations on consultation,

61 Communications Electrical Plumbing Union, *Submission 24*, p. 3.

62 Australian Federal Disability Organisations, *Submission 21*, p. 3.

> then it falls a long way short of what most people would regard as reasonable.[63]

3.86 The Communications Electrical Plumbing Union concurred:

> The proposed amendments were the subject of a commission paper, which outlined the Government and Comcare's views with a union response to each proposal. There was no discussion or consultation on the proposed amendments, either before or after that paper was presented to the Commission.[64]

3.87 Opposition senators suggest that the lack of consultation indicates the fundamental problem with the bill. As two submissions noted:

> There is no sense of balance in this Bill. The amendments solely favour the employer and, in this case, the Federal Government as employer. They are amendments that appear to be motivated by cutting the cost of the workers compensation to employers that apply to the Comcare workers compensation scheme. The result is that employees with legitimate workers compensation claims will be denied an entitlement.[65]

> These amendments frustrate even the stated ambitions of the Government itself. They frustrate workplace safety, rather than encouraging improvements, diminish the adequacy of compensation, and go no way to achieving goals of early intervention, rehabilitation or return to work.[66]

Conclusion

3.88 In conclusion, opposition senators believe the primary purpose of the bill is to reduce existing employee entitlements. The opposition does not support these amendments to the Act. It is unfortunate that the government has simultaneously used the bill to address inequities in the deeming rate, which administrative adjustment opposition senators do support. On balance the opposition must oppose the bill. If the bill is unsuccessful in the Senate, the government should immediately move to legislate the adjustment to the deeming rate as a matter of course.

Recommendation

Opposition senators recommend that the Senate not pass the bill.

Senator Gavin Marshall
Deputy Chair

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63 Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 14

64 Communications Electrical Plumbing Union, *Submission 24*, p. 4.

65 Australian Rail, Tram and Bus Industry Union, *Submission 4*, p. 2.

66 Australian Manufacturing Workers' Union, *Submission 13*, p. 3.