Senate Employment, Workplace Relations and Education References and Legislation Committee

Inquiry into the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006*

CPSU (PSU Group) Submission

January 2007

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Submission Recommendations

1. That the linkage of employment to disease be maintained as a “material contribution”.
2. That the scope of “reasonable administrative action” be limited to the specific examples.
3. That workers’ compensation coverage of travel between the employee’s residence and the employee’s usual place of work be maintained.
4. That workers’ compensation coverage of the employee when they are temporarily absent from the employee’s place of work be maintained.
5. That incapacity payments be maintained at 75% of normal weekly earnings on redundancy or invalidity and not be reduced by a nominal superannuation contribution.

Executive Summary

The *Safety Rehabilitation and Compensation Act 1988* has been in force for some time and the CPSU believes it is necessary to make some minor technical adjustments to the legislation to ensure that it continues to provide a fair and effective workers' compensation scheme. Accordingly the CPSU supports the proposed changes to methods of calculation of benefits, the inclusion of potential earnings from suitable employment, allowing direct reimbursement to health care providers and increases to the maximum funeral benefits payable.

The CPSU believes, however, that a number of the amendments represent a significant shift away from the original intent of the legislation. These amendments threaten the integrity of the no-fault workers' compensation system created by the legislation. This will not only dramatically increase the hardship suffered by Commonwealth employees during times of injury or illness, it also presents broader societal concerns regarding cost shifting, the responsibilities of employers and the recognition of psychological injury.

The changes proposed to the definition of "injury", from that which work has a material contribution to significant contribution, will shift costs from the employer to the community and lessen employers' commitment to prevention and rehabilitation. There is no public policy reason to make such a change given that Comcare performs extremely well in the areas of prevention and rehabilitation.

The exclusion of injuries arising from reasonable administrative action is open ended and dramatically changes the "no fault" nature of the scheme generally and specifically to psychological injury. Such an approach is regressive, discriminatory and counter to broader public policy regarding mental illness. In addition the approach will lead to increased disputation and consequential delays in rehabilitation outcomes.

The exclusion of travel between the employee's residence and the employee's usual place of work from workers' compensation coverage is regressive and shifts the cost of insurance from the employer to the community. Travel to work is an integral part of the employment arrangement and employers' responsibilities in this area should be maintained. The assumption that employees will have access to other forms of insurance is flawed particularly in the case of cyclists and pedestrians. The costs to employers can be minimised through the proper use by Comcare of the existing cost recovery mechanisms.

The exclusion of temporary absences from work from workers' compensation coverage is also regressive and shifts costs to the community. The use of work breaks for health promotional activities will be compromised and the changes are therefore inconsistent with broader Government policy in support of health lifestyles. Such an approach will also increase disputes about when breaks start and finish and whether injuries did or didn't occur during the break.

The reduction of incapacity payments on invalidity or redundancy fails to take into account the need for incapacitated employees to save and plan for their retirement. In addition it shifts the cost of the employee's retirement from the employer onto the community.

Introduction

The PSU Group of the Community and Public Sector Union ("CPSU") represents workers in the Australian Public Service, the ACT Public Service, the Northern Territory Public Service, the telecommunications sector, call centres, employment services and broadcasting.

As the principal union covering both Commonwealth and ACT public servants, the CPSU has considerable knowledge of and experience with the *Safety, Rehabilitation and Compensation Act 1988*. We believe that we are uniquely placed to provide a valuable insight into the operation of the current framework and the potential impact of the proposed amendments.

In preparing this submission, the CPSU has been informed by the experience and opinions of our members

Purpose of amendments to the *Safety, Rehabilitation and Compensation Act 1988*

The purpose of the *Safety, Rehabilitation and Compensation Act 1988* is to establish a no-fault scheme of rehabilitation and compensation for employees who are injured in the course of their employment. The Explanatory Memorandum accompanying the Bill reinforces the importance of this aim, stating that the Government's primary objective is to:

> "minimise the human and financial cost of work-caused injury and disease while at the same time providing appropriate compensation and support for employees injured or made ill through employment".

The CPSU believes that the proposed amendments to the *Safety, Rehabilitation and Compensation Act* will fail to achieve the balance the Government desires and will unreasonably shift the cost of injuries caused in circumstances involving employment onto individual employees. In doing so,

the amendments will undermine the operation of the workers' compensation as a no-fault scheme and, in so doing, undermine the original purpose of the legislation.

The proposed changes focus on benefits and cost savings, both financial and administrative, to employers (licensed self-insurers) and premium payers (Commonwealth and ACT Government).

The proposals, however, do nothing to address the rehabilitation and compensation of employees who are injured at work and would not result in any benefit to the employees.

Instead they represent an erosion of employees' entitlements to rehabilitation and compensation and may result in delays in them returning to work and increasing medical costs both for the employee individually and for taxpayer funded health and other social service costs.

Performance of Commonwealth workers' compensation system

The workers' compensation system engendered by the *Safety, Rehabilitation and Compensation Act 1988* is amongst the most effective in Australia. The Commonwealth already has:

- the best return to work rates
- low levels of workplace injury and disease
- lowest incidence of claims resulting in 1-2 weeks compensation since 2001
- effective rehabilitation schemes
- lowest standard premiums[1].

In the *Comparative Performance Monitoring 8th Report on Australian and New Zealand Occupational Health and Safety and Workers' Compensation*

[1] Comments made by Deputy CEO of Comcare, 8th December 2006 in Melbourne at Comcare public presentation on changes to the Occupational Health and Safety (Commonwealth Employees) Act 1991

Schemes (which covers the 2004-05 financial year) it is reported that the Australian Government scheme continues to demonstrate good results compared with other Australian jurisdictions. For 2004-05 the scheme reported the lowest incidence of compensated injury and disease claims resulting in one or more weeks of compensation and 12 or more weeks of compensation.

Comcare recorded an increase in the durable return to work rate from 79 % in 2003-04 to 85 % in 2005-05. This was the second highest reported rate of all participating jurisdictions and well above the Australian average of 76 per cent. This performance is noteworthy when set against the scheme's comparatively high statutory entitlements structure, with the potential for long-term payments to injured employees.

The Bill's apparent concerns with the financial sustainability of the workers' compensation scheme are inconsistent with the system's performance against those in other Australian jurisdictions. There appears to be a clear conflict of interest for the Government between saving money and compensating employees properly for their injuries.

Comments on specific amendments

Definition of disease

The Bill proposes a new definition of disease. The definition limits disease to those to which the employees' employment contributed "to a significant degree"; this in contrast to the current test which requires the employee's employment to contribute "to a material degree".

It is the CPSU's view that the new standard is too restrictive. The proposed test represents a far higher threshold and will make it difficult for employees to prove a compensable injury exists, even where there is undeniably a causal relationship. This will result in significant cost shifting to individual employees and to tax-payer funded health and other social services.

In injuries where multiple causes are identified, employees would have to establish that the employment connection was indisputably a significant cause. This is considerably harder and will reduce the number of instances for which an injury is compensable. Basically, the new test will mean that claims will be rejected, even though work has materially contributed to an injuries' occurrence.

The determination of liability will no longer be a question of whether work has contributed in a real way to the sustaining of the injury, rather some notional assessment of how much it has contributed. 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.

Definition of injury

The proposed definition of injury excludes "a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable

manner”. This exclusion potentially encompasses a wide range of actions that were never intended to be excluded. The CPSU believes that this proposed amendment represents a significant shift from the original intention of the legislation.

The existing exclusion is for disciplinary action or failure to obtain a promotion, transfer or benefit in connection with the employee’s employment. The amendment broadens this so as to exclude a far wider array of employer conduct, including:

- appraisal of an employee’s performance;
- counselling action;
- suspension action; and
- anything done in connection with any of the above actions.

The above list of what is taken to include reasonable administrative action is not exhaustive, so it is not clear to employees what will be covered and what will not. This uncertainty will be compounded because it is also open to employers to extend the list, by arguing a range of other conduct should be considered as reasonable administrative action. If arguments to expand this list are successful, employees’ eligibility for compensation will continue to narrow over time and potentially beyond what was ever intended.

Similarly the amendments are silent as to the correct interpretation of “reasonableness”. As two CPSU members from ACT and NSW (respectively) highlight what is considered reasonable in the context of a disciplinary or performance matter is often disputed:

> *“Having just been subject to what I consider to be an extremely unfair piece of performance feedback I do wonder how 'reasonableness' will be defined in future.” (December 2006)*
>
> *“Given the way that [management] conducts any interactions re counselling, appraisals etc, I would challenge the "reasonableness" of*

the management here and anticipate that they would argue that "reasonable" means they have a reason for doing so rather than it being fair, just or conscionable! "Reasonable" has to be defined…….. " (December 2006)

An employer's conduct in investigating and handling complaints and managing performance issues would also be exempt if it is done in connection with these other matters. There is simply no public policy justification for this blanket exemption. Although everything will be done to avoid this happening, an employee may well suffer from stress and anxiety by virtue of the inept handling of a performance issue. The proposed amendment allows poor performance by an employer that causes injury to an employee to be without remedy.

In a number of instances this type of injury could have been avoided by a better handling of the situation; however under the proposed amendments an employer will have a reduced incentive to ensure that these processes are conducted in a way that acknowledges their responsibility to avoid harm to employees. The current scheme is a no fault scheme and is designed to provide compensation and rehabilitation where there is a connection between work and injury/illness.

The amendments discriminate against psychological illness, such as depression, as this is the group of injuries that will most likely to arise in the context of disciplinary or performance matters, and therefore be limited by the new exclusion. Thus psychological illness is effectively losing its "no fault status" and claimants will have to prove that management was unreasonable before claims are accepted. Given the Government's current policy to decrease the stigma associated with psychological illness this is extremely disappointing.

Claims for non work-related journeys and recess breaks

The bill proposes to remove claims for non-work related journeys (including to and from work) and recess breaks where the employer has no control over the activities of the employee.

Travelling to and from work is inevitably part of work; it is misleading therefore to characterise such journeys as non work-related. Such travel is a fundamental part of the employment contract and removal of employer liability simply shifts the cost to the community. The simple reason employees travel to and from work is that their employer requires them to attend work at certain times. "Peak hour" is part of the working lives of the majority of employees and is a more dangerous time to be travelling. The incentive for employers to actively rehabilitate workers injured travelling to and from work will also be diminished.

Concerns that it is unreasonable for employers to have workers' compensation liability for these journeys because of a "lack of control" are unreasonable. The employer can minimise accidents through education and through strategies to minimise fatigue. Furthermore other travel, such as between work locations, continues to be covered even though an employer may have little to no control over that journey.

Concerns over the cost of journey claims are exaggerated. In 2005-2006 journey claims only represented 14.7% of Comcare claims and 11% of total costs[2]. Furthermore claims that the exclusion of journey claims will promote national consistency are misleading; currently five schemes, including Comcare, cover journeys while only four do not.

These changes work against more environmentally friendly forms of transport, such as bicycle riding and walking, as employees travelling in cars or on public transport can claim compensation through motor vehicle insurance or public liability insurance. As a CPSU member in SA highlights:

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[2] *Comcare Annual Report 2005-2006* p23

“I reckon this change may prove to be counter-productive to making savings on OH&S. I ride a bicycle to work to keep fit, as do a lot of other employees. Riding the bicycle carries more risk than catching public transport, but it keeps me fit and that contributes to less time off work due to illnesses. If I don't have compo coverage for going to and from work (which covers my risk of an accident), I may not take the risk, and just take the bus instead.” (December 2006)

Some agencies hold health and wellbeing events, such as Ride to Work Day. These events may no longer be held if liability is excluded.

Accidents while driving to and from work can be devastating as these stories from CPSU members in Victorian and Queensland (respectively) highlight:

“I was in the unfortunate position of being involved in a car accident on the way home from work … the accident involved a third party driver failing to give way at a roundabout … the damage cost $24500 to repair …I suffered quite serious whiplash injuries to my upper back and neck and bruising to both arms, these injuries caused me to be off work full time for 2 months …I am still currently undergoing physio …if I had been working in any other sector (private or State Government), I would have had the huge expense of trying to find the ‘excess’ amount you are liable to pay before the TAC will begin to pay for medical expenses. I therefore found it highly comforting to know, as a Commonwealth employee, that they cover employees for injuries sustained travelling to and from work and that Comcare would cover these expenses immediately …” (December 2006)

“I ride a 50cc scooter (top speed about 53km/h). I have been hit by cars twice this year (my bike was written off each time) … both of these accidents occurred during rush hour … I was only travelling during rush hour because I had to get to work or to get home from work. That seems to me to be the reason why compo covered travel - you wouldn't be out on the road with all of those maniacs if you didn't have to be …

that's why it should continue to cover travel to and from work" (*December 2006)*

The proposed changes will fragment the current arrangements which ensure consistent compensation coverage from the time the individual leaves home until they return. This is likely to increase disputation and litigation.

The amendments propose to exclude liability for recess breaks where the employer has no control over the activities of the employee. The recess break change favours employees where the employer has refreshment facilities on their premises and discriminates against employees who use this time to exercise. The importance for employees to have continuity of coverage during their working day is made by this CPSU member in Queensland:

"Having sprained my ankle 2 metres from the front door of our old building when going out for a lunch break, I wouldn't want that cover to end." (December 2006)

In some situations, it will not be easy to draw the line between work and recess breaks. A CPSU member asks:

"In the small rural town I live in, I frequently run into clients on my walk down the street, and there is a "grey area" as to whether I am at lunch or at work, if I have to deal with a query en route. If myself and a client get hit by a passing semi trailer while I am technically "at lunch" – would I be covered?"

In day to day working life there would be many similar grey areas, such as attending a work lunch, taking a work call whilst on your lunch break or having a coffee with your supervisor in a café. At this stage it is entirely unclear whether these situations would be covered, this therefore creates uncertainty and will lead to disputation and litigation.

This amendment would also run contrary to a number of initiatives in workplaces to advocate healthy and active lifestyles. These activities are often encouraged by the employer, as they improve employees' general health. When we asked our members what sort of exercise they participate in in their lunch-breaks, we got a whole range of responses. Some examples include:

- Department of Education, Science and Training employees participate in a lunch-time walking club;
- Department of Defence employees, including Defence, Science and Technology Organisation employees, use onsite gyms, badminton courts and pool facilities, participate in lunchtime competitions, including volleyball, touch football, basketball and softball and participate in lunchtime classes, including aerobics, weights, resistance training, tai chi and ballroom dancing;
- Department of Veteran Affairs' employees have access to a gym;
- Comcare employees participate in lunch time netball, a weekly walking club and salsa lessons; and
- Tax Office employees participate in a number of activities, including pilates, tai chi, walking clubs and fitness classes.

In the Department of Defence certain levels of fitness are not just encouraged but required, as a CPSU member reminds us:

> *"lunch time team sports activities are encouraged for uniform personnel because of their fitness regimes and requirements" (January 2007)*

The proposed amendments to the legislation will put all of these activities at risk. Employees will be more reluctant to participate in them if their participation is not covered by workers' compensation and employers will be reluctant to support them. A CPSU member in South Australia highlights this point:

"With health & well being I walk at lunch time, I have done yoga, some people use the gym, others play sport. My area wants to do a fun paintballing session. This would all stop. What a miserable lot we would become and I am sure stress claims would increase." (December 2006)

The CPSU has a number of members employed as Protective Service Officers by the Australian Federal Police. At times these employees are stationed overseas, often in areas that are experiencing turmoil and civil unrest. In such a scenario the risk of sustaining injury increases with the level of surrounding violence. Despite the fact these employees are stationed in high risk areas, it would seem if they sustain an injury whilst on a break they would not be covered for the purposes of workers' compensation.

It is important to remember that under section 50 of the *Safety, Rehabilitation and Compensation Act 1988* Comcare can recover damages where legal liability exists. This is particularly relevant to motor vehicle accidents as Comcare can recover damages via third party insurance arrangements. This casts doubts on the projected savings and premium reductions, as it is not clear if such recovery has been included in the analysis.

Calculation of retirees' incapacity benefits

The bill proposes to amend the calculation of retirees' incapacity benefits to take account of changes in interest rates and superannuation fund contributions.

Following concerns raised by CPSU members about the deemed interest rates the CPSU wrote to the Department of Employment and Workplace Relations expressing concern about the unfairness of a fixed deeming rate of 10%. The CPSU concluded:

"… that the circumstances supporting the original deeming rate of 10% have changed and there is a serious inequity for incapacitated employees who have accessed lump sums funded by the employer

component of superannuation. Such a situation is inconsistent with the intention of section 19 of the SRC Act that Comcare compensation be 75% of normal earnings." (January 2003)

The amendments will allow the rate to be determined by the Minister by legislative instrument. However it is disappointing that the proposed reduced deeming rate is still several percentage points above the rate applicable to persons who receive Centrelink and Veterans' Affairs pensions.

In view of this long-standing disadvantage to persons resulting from the 10% deeming rate the CPSU supports additional amendments to provide for the application of any reduced rate to be made retrospective to the time scheme commenced.

As previously stated the intention of the current scheme is for long term incapacity payments to be reduced to 75% of normal weekly earnings. Currently on redundancy or invalidity this may be further reduced to 70% depending on the superannuation arrangements. The amendments will remove the statutory requirement to reduce weekly benefits by the notional superannuation contribution that the former employee would otherwise have had to make and reduce everyone's benefits to 70% of that salary[3]. This has been a continuing cause for discontent and resentment by CPSU members and in January 2003 the CPSU wrote to the Department of Workplace Relations concluding that:

"as the superannuation framework has changed significantly since 1988 a nominal superannuation contribution is no longer appropriate. The SRC Act must treat incapacitated workers equally and must allow these workers to have the capacity to provide for their age retirement."

It is also relevant to note that by reducing the amount of weekly benefits from 75% to 70% of applicable salary, the Commonwealth will be paying different

[3] Amendments to s20(3), s21(3) and s21A(3)

levels of benefits to public servants compared to the benefits payable to members of the Australian Defence Force. Under section 131 of the *Military Rehabilitation and Compensation Act 2002*, a person receiving weekly benefits under that Act is entitled to up to 75% of their normal weekly earnings.

Calculation of benefits for employees

The CPSU supports the proposal to update measures for calculating benefits for employees, including the definitions of "normal weekly earnings" and "superannuation scheme".

Potential earnings from suitable employment

The amendments seek to ensure that potential earnings from suitable employment can be taken into account when determining incapacity payments[4].

In the Federal Court decision of *Lonergan v Comcare*[5], Justice Heerey found that only if the incapacity for work existed at the same point as the retirement would the payments be reduced. The amendments reverse this decision and make it clear that the incapacity payment is reduced for all employees who retire. This was never the intention of the legislation and the CPSU supports the closing of this loophole.

Directly reimbursing health care providers

The amendments propose a technical change to allow determining authorities to directly reimburse health care providers for the cost of their services to injured employees. The CPSU supports this amendment.

Increase the maximum funeral benefits payable

The CPSU supports the amendment increasing the maximum funeral benefits payable.

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[4] Amendments to s20(1), s21(1) and s21A(1)
[5] [2005] FCA 377

Conclusion

The majority of amendments seek to reduced premium costs to the employer by shifting responsibility for work injuries from employers to individuals and the community. The CPSU believes that these proposals are short-sighted and bad policy. The approach is fragmented and will result in increased disputation and legal costs. Rehabilitation outcomes for injured employees will decrease as the responsibility for many injured workers shifts from the employer to the community. The introduction of broad reasonable management action exclusion is discriminatory towards psychological injury and is regressive public policy. Cyclists and pedestrians are particularly disadvantaged and will be discouraged from riding/walking to and from work. The capacity of invalid workers to plan and save for their retirement is also being compromised. The majority of these amendments will undermine the operation and integrity of the workers' compensation system and should therefore be rejected.