

Mr John Carter
Secretary
Senate Employment, Workplace Relations and Education Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Carter,

RESPONSES TO QUESTIONS ON NOTICE

Thank you for the opportunity to comment on the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006* (the Bill).

During the public hearings into the Bill, Senator Marshall asked the following question, to which the Law Council offered to respond on notice:

"You have talked about the legal problems and the difficulties of 'material' versus 'substantial'. You have quoted some experience from other jurisdictions. I am wondering whether you agree with that two per cent figure or whether you think it will be higher?"

The query refers to an assertion in the Regulation Impact Statement, provided with the Explanatory Memorandum accompanying the Bill, which states (on page v):

"It is estimated that the financial impact on Comcare annually of these 'disease' and 'injury' claims which the legislation had not originally intended to be eligible for compensation is some 2.5% of total claims costs or \$5 million for 2004/05."

The Law Council is unable to corroborate or contradict this statement. It would appear that this information has been provided to the Department of Employment and Workplace Relations by Comcare, which may be in the best position to comment on the process used to calculate this figure.

However, the Law Council is concerned that this figure is not representative of the true cost savings involved, as it has no regard for the costs-shifting inherent in any legislative proposal designed to restrict benefits under a personal injury compensation scheme.

Assuming the figure is correct, 2.5% of those covered by a Commonwealth scheme or self-insurance policy, who suffer injury or disease connected with their employment, will no longer be covered. Of those excluded, some may claim for treatment expenses against a health insurance policy, if they subscribe, while others may claim against Medicare and bear

the difference themselves. Those who are compulsorily retired or who must resign may claim social security benefits and may also depend on family members for support.

Whatever the case, the cost of caring for those who are injured will not diminish or disappear simply because they cannot claim workers compensation. The cost is simply shifted from the broader community to the individual concerned and their family, the social security system and the public health system. If the individual concerned is unable to continue productive employment, this may also diminish the amount of income tax paid by that individual.

If this is considered, any claim that the public will derive a \$5 million saving from restricting 'injury' and 'disease' claims is misleading, as the saving will be offset to a substantial degree by increased expense to other Commonwealth schemes and reduced taxation.

There will also be an inestimable cost for the lives of those who are excluded. The SRC scheme is designed to ensure injured employees rehabilitate and return to work as quickly as possible. Those excluded will not only suffer financial and personal hardship, but they will be unable to benefit from programs designed to precipitate their swift recovery and return to productive employment.

Further submissions

The Law Council noted in its written submission to the Inquiry, and in oral statements before public hearings into the Bill, that it believed the proposed amendments to the definition of 'disease' were unnecessary in light of recent Federal Court decisions that affirm the requirement for a 'close connection between the employment and the disease' (*Canute and the Commonwealth of Australia* [2005] FCA 299).

Canute overruled the earlier decision in *Treloar and Australian Telecommunications Commission* (1990), in which the Federal Court took the view that, once a causal connection was established, it did not matter whether the connection between the employment and disease was large or small.

The Law Council is now advised of a more recent decision, *Comcare v Sahu-Khan* [2007] FCA 15 (19 January 2007), in which the Federal Court has regarded the approach in *Canute* as authoritative. Briefly, it was argued that the definition of 'disease' under the present SRC Act reflected a deliberate decision by Parliament to impose a more exacting requirement of "contribution" by an employee's employment to the ailment before compensation could be paid.

Finn J considered the effect of *Treloar* and the subsequent decision in *Canute* and commented [at paragraph 13]:

"The modern approach to statutory interpretation, as is now well accepted, attributes a greater significance to context and legislative purpose than previously was the case... That approach was adopted unexceptionally by French and Stone JJ in *Canute* in their treatment of the legislative definition of "disease" in the SRC Act. I agree with what their Honours have said and, in particular, in their conclusion that the inclusion of the word "material" now imposes an "evaluative threshold" below which a causal connection may be disregarded."

The Law Council submits that the decision of Finn J in *Sahu-Khan* reflects the approach that has been adopted by the Federal Court since *Canute* and clearly indicates that legislative

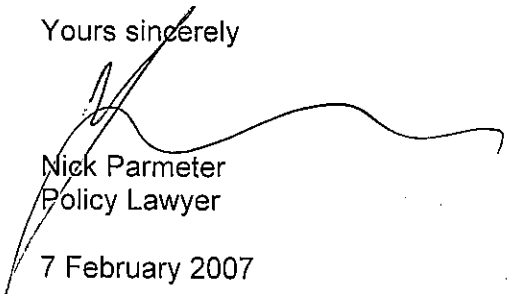
intent will be a decisive consideration in any matter before the court, whether it relates to the SRC Act or any other enactment.

The Law Council is concerned that the current Bill will result in the "evaluative threshold" being raised higher than Parliament intends. It is submitted that the common law has already achieved the appropriate balance in respect of the interpretation of 'disease'. If the definition is now changed to require a 'significant contribution' and the approach in *Canute* and *Sahu-Khan* is applied, there will be a significant 'overcorrection' that may result in a substantial number of workers compensation claims being rejected.

Accordingly, the Law Council repeats its earlier submission that a better approach would be to simply define "material degree" as meaning "a close connection between the disease and his or her employment."

Please contact me on (02) 6246 3715 or nick.parmeter@lawcouncil.asn.au if there are any queries regarding these submissions or any other matter of interest to this inquiry.

Yours sincerely



Nick Parmeter
Policy Lawyer

7 February 2007