Australian Government

Department of Employment and Workplace Relations

Senate Employment, Workplace Relations and Education Committee

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

Submission by the Department of Employment and Workplace Relations
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Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006

OVERVIEW

The Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006 (the Bill) was introduced into the House of Representatives on 30 November 2006 and passed by the House on 7 December 2006. The provisions of the Bill were referred by the Senate to its Employment, Workplace Relations and Education Committee on 7 December 2006.

The *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) covers all Commonwealth employees (except members of the Australian Defence Force who are covered by the *Military Rehabilitation and Compensation Act 2004*) who are injured in the course of their employment. It also covers employees of certain private sector corporations, which are licensed self insurers, and Australian Capital Territory public sector employees.

RATIONALE FOR AMENDMENTS

The rationale supporting the amendments to the SRC Act is to maintain the integrity of the scheme by:

(i) restoring Parliament's original intention of providing benefits to employees for work-related injuries, illnesses and fatalities, where there is a close connection to the employment; and

(ii) giving effect to recommendations made by the Productivity Commission in its March 2004 *Report on National Workers' Compensation and Occupational Health and Safety Frameworks* particularly in terms of bringing about greater consistency with relevant provisions in a number of State and Territory workers' compensation schemes.

The amendments will also improve the administration and provision of benefits.

OBJECTIVES

The proposed amendments aim to:

- strengthen the connection between work and eligibility for workers' compensation, in particular in regard to disease claims;
- remove workers' compensation coverage for non-work related journeys and, where there is a lack of employer control over worker activity, from recess breaks;
- reinstate the original policy intention behind the calculation of retirees' incapacity benefits by accommodating changes to interest rates and superannuation schemes;
- for claimants who are no longer employed by the Commonwealth, provide for their capacity to work outside Commonwealth employment to be taken into account when calculating incapacity benefits;
- increase the maximum level of funeral benefits payable; and
- correct anomalies in the SRC Act to improve its administrative efficiency and ensure the original policy intentions behind particular provisions are maintained.

PRINCIPAL AMENDMENTS

The principal amendments will:

1) amend the definition of 'disease' to strengthen the connection between the disease and the employee's employment;

2) amend the definition of 'injury' to exclude injuries arising from reasonable administrative action taken by the employer in a reasonable manner;

3) remove claims for non work-related journeys and recess breaks where the employer lacks control over the activities of the employee;

4) amend the calculation of retirees' incapacity benefits to take account of changes in interest rates and superannuation fund contributions;

5) update measures for calculating benefits for employees, including the definitions of 'normal weekly earnings' and 'superannuation scheme';

6) ensure that all potential earnings from suitable employment can be taken into account when determining incapacity payments for claimants who are no longer employed by the Commonwealth;

7) enable determining authorities to directly reimburse health care providers for the cost of their services to injured employees; and

8) increase the maximum funeral benefits payable and provide a mechanism for the amount to be increased by regulation should indexation adjustment not keep pace with real costs.

The Bill also includes minor technical amendments to the SRC Act, including a substantial number of amendments which are consequential on the commencement of the *Legislative Instruments Act 2003* on 1 January 2005.

In addition, an amendment to the funeral benefit provisions of the *Military Rehabilitation and Compensation Act 2004* is proposed to maintain parity with benefits under the SRC Act.

POLICY RATIONALE: PRINCIPAL AMENDMENTS

1 - *Amend the definition of 'disease' to strengthen the connection between the disease and the employee's employment*

Rationale
This amendment seeks to ensure Parliament's original intention that there be a close or causal connection between the employee's work and the contraction or aggravation of a disease for that disease to be compensable.

Detail
It was the original intention of the SRC Act that an employee's eligibility for compensation payments for a disease suffered by the employee should require a close causal connection between the employee's work and the contraction or aggravation of the disease. The causality

test requires an employee's employment to have contributed in a material degree to the contraction or aggravation of the disease. When referring to this provision in his second reading speech to the 1988 Bill, the then Minister for Social Security, the Hon Brian Howe MP, said that the causality test :

> *will require an employee to demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease. Accordingly, it will be necessary for an employee to show that there is a close connection between the disease and the employment in which he or she was engaged.*

However, since the commencement of the SRC Act in 1988, "material degree" has been interpreted in court and tribunal decisions so as to have significantly eroded the extent to which employment must have contributed to the contraction or aggravation of the disease for it to be compensable.

For example, in *Re Treloar and Australian Telecommunications Commission (1990)*, the Full Federal Court discussed the use of the word 'material', albeit in relation to the 1971 Act. It found that a causal connection between the injury and employment must be established on the probabilities and not left in the area of possibility or conjecture, but once the link was established, it did not matter whether the contribution was large or small. This interpretation of 'material' has since been used by courts and tribunals in relation to the SRC Act.

In *Re Peters and Comcare (2004)*, the Administrative Appeals Tribunal found that marriage breakdown, family deaths and a history of abuse were "more significant" factors in the later development of the worker's condition but that the worker's continuing depression "was still contributed [to] in a material degree by employment-related issues".

In the decision, *Canute and Commonwealth of Australia* [2005] FCA 299, the Full Federal Court discussed the meaning of "material contribution" in terms that employment should be more than a mere contribution and the requirement to demonstrate a close connection between employment and the disease that was consistent with the intention of the SRC Act when introduced. These comments may reduce the erosion in the original intention, however the impact is uncertain.

The SRC Act has a weak employment contribution test compared to most other Australian jurisdictions. In Victoria and Queensland, for example, employment must be "a significant contributing factor" for a disease to be compensable. In Western Australia, employment must be "a contributing factor and contribute to a significant degree". In Tasmania, employment must be "the major or most significant contributing factor".

Commonwealth and State Workplace Relations Ministers (through the Workplace Relations Ministers' Council) have supported a nationally consistent approach towards employment contribution tests and exclusionary provisions for determining eligibility for workers' compensation.

This amendment will require that an employer's employment has contributed in a significant way to the contraction or aggravation of the employee's ailment. This will ensure that coverage is limited to genuinely work-related diseases as originally intended by the legislation. This is consistent with the Productivity Commission's comments in its 2004 Report that effective tests of work-relatedness were essential if workers' compensation schemes were to operate as intended.

The amendment will apply only to future claims, that is, where the injury occurs after the day the proposed changes receive Royal Assent.

2 -Amend the definition of 'injury' to exclude injuries arising from reasonable administrative action taken in a reasonable manner

Rationale
This amendment seeks to restore the original intention of the SRC Act by preventing compensation claims being used as a means of obstructing legitimate management action. The amendment excludes claims where an injury, usually a psychological injury, has arisen as a result of reasonable administrative action, for example a reasonable appraisal of the employee's performance or reasonable counselling action taken in respect of the employee's performance.

Detail
The existing definition of 'injury' excludes any disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee, or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

A number of court and tribunal decisions have very narrowly interpreted the term, 'disciplinary action', to mean disciplinary action formally specified under the *Public Service Act 1999* (or prior to this the *Public Service Act 1922)* or action taken pursuant to an award or certified agreement.

As a result of this narrow interpretation, investigations undertaken to determine whether, for example, a probationary appointment of an employee should be annulled; formal disciplinary proceedings against an employee should be instituted; or management counselling provided to an employee have been found not to constitute 'disciplinary action'. Consequently, claims for injuries purportedly arising in these circumstances have been allowed, and as a result SRC Act employers are exposed to liability for workers' compensation in a much wider range of circumstances than was originally intended when the legislation was enacted in 1988.

The SRC Act's exclusionary provisions are currently more limited than those applying in any of the State or Territory workers' compensation schemes.

The new definition retains all the elements of the existing definition of 'injury' under the SRC Act but extends the exclusionary provisions. It makes it clear that the exclusions will extend to all reasonable administrative activities. The definition will provide that a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment is excluded from the definition of 'injury'.

It will provide a non-exhaustive list of matters that may be taken to come within the term 'reasonable administrative action'. These include:

- a reasonable appraisal of the employee's performance;
- a reasonable counselling action taken in respect of the employee's performance;
- a reasonable suspension action in respect of the employee's performance;
- a reasonable disciplinary action taken in respect of the employee's performance;
- a reasonable action done in respect to any of the above; and
- a reasonable action done in connection with an employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.

The new provisions will bring the Commonwealth scheme more closely in line with the State and Territory schemes.

The provisions will apply only to future claims, that is, where the injury occurs after the day the proposed changes receive Royal Assent.

3 - *Remove claims for non work-related journeys and recess breaks where the employer has no control over the activities of the employee*

Rationale
This amendment seeks to remove employers' liability for injuries sustained by employees during non-work related journeys and recess breaks in circumstances where the employer lacks control over either:

a) the environment in which the injury occurs
or
b) the behaviour of the employee.

Detail
Section 6 of the current SRC Act provides, among other things, that an injury to an employee is to be treated as having arisen out of, or in the course of, their employment if it is sustained while the employee was travelling between his or her place of residence and place of work.

The current SRC Act also provides that an injury sustained while an employee 'was temporarily absent from that place [of work] during an ordinary recess in that employment', will be an injury 'arising out of, or in the course of" that employment.

The effect of this provision is to generally provide workers' compensation coverage to employees from the time they leave their homes to travel to work until the time they return from work. It would include, for example, where an employee sustains a motor vehicle or public transport related accident travelling to or from work or while shopping or playing sport during a lunch break, despite the fact that the employer lacks control over either the activities of the employee or the environment in which the employee engages in those activities.

The Productivity Commission in its 2004 Report recommended that coverage not be provided for journeys to and from work because, while such journeys are an inevitable part of meeting employment commitments, they are not matters over which the employer usually exercises any control. Furthermore, in many instances alternative cover such as compulsory third party motor vehicle insurance is available.

Journey claims are currently not permitted under the Victorian, South Australian, Western Australian and Tasmanian workers' compensation schemes. They are permitted under the New South Wales, Queensland, Australian Capital Territory and Northern Territory schemes.

For the same reasons, the Productivity Commission also recommended that coverage for recess breaks be restricted to those taken at workplaces and at employer sanctioned events.

In addition, the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS Act) obliges employers to take all reasonably practicable steps to protect the health and safety of the employer's employees **at work.** In these circumstances, the extension of workers' compensation coverage to journey claims and recess activities away from the workplace does not fit well with the obligations of the OHS Act.

Because the employer, for all practical purposes, would have had no control over the circumstances of such journeys or such recess activities, it is inappropriate that an employer could be held financially accountable for injuries sustained by an employee in these situations.

Workers' compensation will continue to be payable in respect of injuries arising from circumstances where an employer is able to take reasonably practicable steps to protect an employee, for instance, when an employee remains at the workplace during a recess break or leaves the workplace for the purposes of his or her employment, for example to attend a meeting at the employer's direction, including those which require the employee to travel either locally or interstate.

This amendment will be applied only to future claims, that is, where the injury occurs after the day the proposed changes receive Royal Assent.

4 - *Amend the calculation of retirees' incapacity benefits to take account of changes in interest rates and superannuation fund contributions*

Rationale
This amendment seeks to introduce a more realistic and flexible calculation to deem the weekly earning potential of a lump sum superannuation amount by replacing the current fixed rate of 10% with a rate aligned with the current market interest rate. This will be to the advantage of claimants who have retired early as a result of their work-related injuries.

The amendment also seeks to achieve the maximum benefit of 70% of a retired claimant's pre-injury normal weekly earnings in a simpler, more efficient and more transparent way than is currently the case.

Detail
The current legislation provides that the interest rate on the employer-contributed component of a claimant's lump sum superannuation payout is 10%. This amount is then deducted from the claimant's incapacity benefits to reflect an annual earning capacity of 10% from the lump sum, when duly invested.

In 1988 when the rate was set at 10%, interest rates were high. The fixed rate does not reflect the fall in interest rates since the legislation was enacted. Consequently a deduction based on a deemed interest rate of 10% is too high and currently disadvantages these claimants. For this reason, it is proposed that the deemed rate of 10% be replaced with a rate which the lump sum could be expected to earn in the current financial market. This rate will be based on the 10-year Government bond rate (currently about 5.6%) and will be set each year by the Minister for Employment and Workplace Relations by legislative instrument effective 1 July.

When proclaimed, this amendment will apply to current and future retirees.

A further intention of the SRC Act was to set the incapacity benefits payable to claimants who retire early due to compensable injuries at 70% of pre-injury normal weekly earnings by subtracting the superannuation contribution amount from the amount payable. At that time all Commonwealth employees contributed a minimum of 5% of salary to the Commonwealth Superannuation Scheme (CSS). By contrast, claimants who do not retire early as a result of their work-related injuries, receive benefits at 75% of their pre-injury normal weekly earnings.

Since 1988 there have been significant changes to superannuation schemes offered by the Australian Government and licensed corporations. While this has provided employees with greater flexibility, it has also meant that different schemes have different minimum contribution rates. Consequently, incapacity benefit rates may range from anywhere between 70% and 75% of pre-injury earnings due to the mechanism of deducting the superannuation contribution amount. For example, in cases where employees were required to contribute 5% of their salary into superannuation, the formula in the Act calculates incapacity benefits to be 70% of pre-injury earnings, but where an employee elects not to contribute part of his or her salary into superannuation, the current SRC Act calculates the incapacity benefit to be 75% of pre-injury earnings. These present arrangements have resulted in confusion, complexity and inequity for employees.

This amendment will simplify the current arrangements by deducting a standard 5% of normal weekly earnings. It will ensure equity for future retirees in receipt of superannuation benefits by explicitly setting incapacity benefits at 70% of pre-injury normal weekly earnings of the retiree. This amendment will not apply to current retirees who will be maintained on their existing benefit calculation.

5a - *Update the definition of 'normal weekly earnings' for the purpose of calculating benefits for employees*

Rationale
This amendment seeks to provide a simple and equitable mechanism which enables incapacity payments to be increased over a period of time by extending the definition of 'normal weekly earnings', so that an incapacitated employee's normal weekly earnings can be increased using an appropriate index, namely the Wage Cost Index.

Detail
The legislation provides that an injured employee's incapacity benefits be adjusted in accordance with changes in their normal weekly earnings (NWE). The current legislation deals with how a person's NWE is to be adjusted following general wage increases where the person continues in employment.

These provisions were drafted when wage increases predominantly came through promotion and/or general wage increases and there was normally no difficulty in identifying the wage increase applicable to the employee. However, since then employees have benefited from greater flexibility in remuneration arrangements and wages are now predominantly enterprise or individually based. As a result, the current provisions of the SRC Act have become less relevant and more difficult to apply.

Under the proposed amendment, a current employee's NWE will be able to be updated by reference to a prescribed index, in cases where the NWE cannot otherwise be updated under the existing provisions of the Act.

5b - *Update the definition of 'superannuation scheme' to include retirement savings accounts*

Rationale
The definition of 'superannuation scheme' will be updated to include retirement savings accounts which will ensure equity of treatment between injured retirees with different retirement savings arrangements.

Detail
Under the current legislation, incapacity payments are reduced for retirees in receipt of employer-contributed superannuation benefits. However, if the retiree's employer contributes to a non-defined superannuation scheme such as a retirement savings account, these superannuation benefits are not taken into account. Extending the definition of superannuation scheme will ensure equity in the way in which incapacity payments are calculated for retirees receiving superannuation payments.

This change will not be applied to existing claimants who have already retired.

6 - *Ensure that all potential earnings from suitable employment can be taken into account when determining incapacity payments*

Rationale
This amendment seeks to re-define 'suitable employment' to ensure that for all claimants who are no longer employed by the Commonwealth, their capacity to work outside the Commonwealth can be taken into account when calculating their weekly incapacity benefits.

Detail
Under the legislation, the amount of compensation payable to an incapacitated employee whose employment is terminated is reduced by the amount the employee would be able to earn in 'suitable employment'. Currently, 'suitable employment' for a permanent employee (at the date of injury) who did not subsequently resign from that employment is interpreted as employment with the Commonwealth or with a licensed corporation within the Commonwealth scheme.

For permanent employees who remain employed by the Commonwealth or a licensed corporation, it is appropriate that 'suitable employment' be interpreted as suitable employment with the Commonwealth or the licensed corporation. However, where a permanent employee is separated from their employment by management action (eg through invalidity retirement or some other method), the courts have held that 'suitable employment' continues to mean suitable employment in the Commonwealth.

As a result of this narrow interpretation, claimants whose employment has been terminated by the Commonwealth but who choose not to work in available and suitable non-Commonwealth employment continue to receive the full amount of workers' compensation payments because the Act does not permit Comcare to adjust their benefits to take into account their potential earnings from such employment opportunities. Consequently, a claimant may be disinclined to seek other suitable employment, preferring to rely on the maximum compensation benefit. This may be detrimental to the claimant's rehabilitation as well as impacting negatively on the financial capacity of the fund.

The enactment of this amendment will ensure that an injured claimant's capacity to work outside Commonwealth or licensee employment in these circumstances is taken into account when calculating weekly incapacity benefits.

7 - Enable determining authorities to directly reimburse health care providers for the cost of their services to injured employees

Rationale
This amendment seeks to improve efficiency by enabling Comcare to pay health care providers directly for approved medical services to injured employees.

Detail
The current provision under the SRC Act requires Comcare to pay for the cost of medical and other approved health care services to, or in accordance with the directions of, the injured employee. The majority of medical accounts, however, are lodged directly with Comcare by medical practitioners themselves or by employees in the expectation that they will be paid but without any direction by the employee to this effect.

These amendments will provide that, if the employee has paid the account, reimbursement of the cost of medical treatment will be at the direction of the employee, which may be to the employee. If the cost of the medical treatment has not been paid, then Comcare may make the payment direct to the person to whom the cost is payable, without needing to seek a direction from the employee.

8 - *Increase the maximum funeral benefits payable*

Rationale
This amendment seeks to increase the amount payable for funeral benefits under the SRC Act and *Military Rehabilitation and Compensation Act 2004* (MRC Act) from $4,761 and $5,117 respectively to a maximum of $9,000.

Detail
Since the introduction of the SRC Act in 1988 the cost of funerals has risen considerably and the present benefits provided under the SRC and MRC Acts do not reflect actual funeral costs, nor the more generous rates for this benefit payable under State and Territory workers' compensation schemes.

This amendment will increase the maximum amount of benefit payable, provide a mechanism to allowing the base amount to be increased by regulation should indexation not keep pace with the real costs of funerals in the future and align the Commonwealth provision to that in New South Wales, while avoiding the open-ended funding provided by the schemes in Victoria, Queensland and Tasmania.