Committee Majority Report

Reference

1.1 On 26 November 2009, the Hon Julia Gillard MP, Minister for Employment and Workplace Relations, introduced the Occupational Health and Safety and Other Legislation Amendment Bill 2009 (the bill) in the House of Representatives. On 30 November 2009, the Senate referred the provisions of the bill to the Senate Standing Legislation Committee on Education, Employment and Workplace Relations for report by 25 February 2010.

Conduct of the inquiry

1.2 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper, calling for submissions by 29 January 2010. The committee also directly contacted a number of interested parties, organisations and individuals to notify them of the inquiry and to invite submissions. Four submissions were received as listed in Appendix 1.

1.3 The committee conducted a public hearing in Canberra on 18 February 2010. Witnesses who appeared before the committee are listed at Appendix 2. The committee thanks those who assisted with the inquiry.

Purpose of the bill

1.4 The bill amends the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) to:

- introduce time limits for claim determinations;
- reinstate workers' compensation coverage for injuries arising from off-site recess breaks;
- allow for medical expenses to be paid where payment of other compensation is suspended; and
- restore Comcare's access to the Consolidated Revenue Fund (CRF) to pay compensation claims in respect of certain diseases with a long-latency period.[1]

1.5 The Department of Education, Employment and Workplace Relations (DEEWR) advised that the measures proposed in the bill are designed to:

> …improve the Comcare scheme by increasing benefits for injured workers; strengthening the focus on rehabilitation and return to work; and ensuring that long-latency disease claims are funded appropriately.[2]

---

1 Comcare's access to the consolidated revenue fund was closed off as an indirect result of a Federal Court decision in 2006.

1.6 The bill also amends the *Occupational Health and Safety Act 1991* (OHS Act) to provide that 'lifts' are interpreted as being within the definition of 'plant' for the purposes of the Act. In addition, it makes technical amendments to the SRC Act, the OHS Act, the *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Seafarers Rehabilitation and Compensation Act 1992* to cater for new arrangements and terminology introduced by the *Legislative Instruments Act 2003*.

Background to the bill

1.7 The SRC Act and the OHS Act set the framework for a workers' compensation and OHS scheme within the Commonwealth's jurisdiction. Known as Comcare, this scheme provides workers' compensation and occupational health and safety arrangements for government employees and, since 1992, for the employees of certain private corporations licensed to self-insure their workers' compensation liabilities under the scheme.[3]

Self-insurance arrangements

1.8 Self-insurance under the SRC Act allows certain corporations to apply to the Safety, Rehabilitation and Compensation Commission (SRCC) for a licence to self-insure and/or manage their workers' compensation responsibilities.[4] Self-insurers under the Comcare scheme are subject to the OHS Act as amendments to the OHS Act in 2007 extended Commonwealth OHS coverage to all self-insurers. However, some differences in the coverage of the OHS and SRC Acts remain.[5]

1.9 There are currently 29 self-insurers under the Comcare scheme.[6] Two are Commonwealth authorities, six are former Commonwealth authorities and the rest are private sector corporations.[7] The SRCC advised that access to the self-insurance arrangements is limited to:

---

2 DEEWR, *Submission 1*, p. 2.

3 DEEWR, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, (released 25 September 2009), p. 2.

4 The Safety, Rehabilitation and Compensation Commission, *Submission to the Review of Comcare self insurance arrangements*, p. 4.

5 The Safety, Rehabilitation and Compensation Commission, *Submission to the Review of Comcare self insurance arrangements*, pp. 4-5.

6 DEEWR, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, p. 8.

7 The Safety, Rehabilitation and Compensation Commission, *Submission to the Review of Comcare self insurance arrangements*, p. 4.

> …Commonwealth authorities, former Commonwealth authorities and corporations in competition with a Commonwealth authority or a former Commonwealth authority.[8]

1.10 Organisations that self-insure under Comcare must satisfy the SRCC that they have in place the necessary health and safety management systems to meet the standards and requirements set by the Commission. When outlining the mechanisms to ensure compliance with regulatory obligations, among others, the Commission drew attention to the unique requirement among regulators to report on the performance of each self-insurer in its Annual Report.[9]

Review of self-insurance arrangements

1.11 On 11 December 2007, the government announced a moratorium on corporations joining the Comcare scheme and a review of the self-insurance arrangements which provide for the entry of private sector corporations into the Comcare scheme.[10]

1.12 On 23 January 2008, the Hon Julia Gillard MP, Minister for Employment and Workplace Relations, announced the terms of reference for the review. The purpose of the review was to ensure that the Comcare scheme has suitable OHS and workers' compensation arrangements for self-insurers and their employees. With the expansion of the types of industries covered by the Comcare scheme in 2006, the government was concerned to ensure that all employees covered under the scheme are protected by appropriate OHS safeguards and workers' compensation benefits. The review examined a range of issues including safety, compensation, consultation, financial viability, access to the scheme and governance arrangements.[11]

Issues raised

1.13 The review received 73 submissions. A number of issues were raised in submissions to the review and during consultations. These included the prerequisites for self-insurance licensing, the suitability of the OHS Act for self-insurers, benefits offered by the scheme, Comcare's performance in OHS enforcement and claims management practices.[12]

---

8 The Safety, Rehabilitation and Compensation Commission, *Submission to the Review of Comcare self insurance arrangements*, p. 4.

9 The Safety, Rehabilitation and Compensation Commission, *Submission to the Review of Comcare self insurance arrangements*, p. 11.

10 The Hon Julia Gillard MP, 'Government announces moratorium on new companies joining Comcare', media release, 11 December 2007.

11 The Hon Julia Gillard MP, 'Minister announces Terms of Reference for Comcare Review', media release, 23 January 2008; DEEWR, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, (released 25 September 2009), p. 2.

12 DEEWR, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, (released 25 September 2009), p. 2.

1.14 Some submissions to the review questioned the ability to allow some employers to self-insure under Comcare. Andersons Solicitors, for example, stated that the Australian Lawyers Alliance (which facilitated their response) is 'fundamentally opposed' to self-insurance as an element of workers' compensation schemes due to what it perceives as a conflict of interest between the competing interests of an employer and an insurer. The ACTU also indicated its in-principle opposition to self-insurance and explained that it did not agree with allowing a group of employers to opt out of a system. It argued that self-insurance should only be available in very limited circumstances as a privilege due to superior performance and it should not be a right.[13]

1.15 The Law Society of NSW pointed out that the effect of allowing companies to self-insure means the employer has effectively removed itself from the state OH&S systems of regulation which generally impose a higher standard than the OHS Act.[14] The ACTU questioned the operational capacity of Comcare to ensure that self-insurers provide safe workplaces. It argued that companies may join the scheme to avoid the stricter investigation and enforcement regime, as well as greater union involvement, in the states. [15]

1.16 Andersons Solicitors also questioned the cost effectiveness of the arrangements:

> Enormous infrastructure currently exists in all the states to support state schemes, and rather than re-inventing the wheel through a Commonwealth structure, at significant cost to stakeholders, it would be far more logical and cost effective to genuinely resolve the common administration issues in the state schemes and move towards harmonisation.[16]

1.17 The Transport Workers Union of Australia noted that 'there are significant questions over whether Comcare has the capacity to prosecute primary contractors for breaches engaged in by subcontractors whereas this is possible under various state schemes'.[17]

1.18 The Law Council of Australia argued that Comcare is not adequately designed to provide coverage for workers employed by self-insurers. It pointed out that Comcare was designed to manage workers' compensation and OH&S arrangements

---

13 ACTU, *Submission to the Review of Comcare self insurance arrangements*, pp. 6-7.

14 The Law Society of NSW, *Submission to the Review of Comcare self insurance arrangements*, p. 1.

15 ACTU, *Submission to the Review of Comcare self insurance arrangements*, p. 2; Andersons Solicitors, *Submission to the Review of Comcare self insurance arrangements*, pp. 2-3.

16 Andersons Solicitors, *Submission to the Review of Comcare self insurance arrangements*, p. 3. Available from: http://www.deewr.gov.au/WorkplaceRelations/Policies/ComcareReview/Pages/publishedsubs.aspx (accessed 4 February 2010).

17 TWUA, *Submission to the Review of Comcare self insurance arrangements*, p. 4

for Commonwealth public servants and workers in statutory corporations who work in white-collar, low risk occupations. High levels of disputation and slow resolution of claims were also raised in submissions.[18]

1.19 However, self-insurers argued that inefficient and inconsistent arrangements across states and territories made Comcare attractive. The National Council of Self Insurers Inc claimed that 'the resistance to self-insurance at the state and territory level is based on unsubstantiated claims about its impact on premium pools and premium rate stability'. It concluded that:

> If these jurisdictions were more accommodating towards self insurance by reducing the high regulatory compliance and financial burdens, Comcare self insurance may become less attractive.[19]

1.20 The operational capacity of Comcare to undertake inspections was supported in submissions such as the one from K&S Corporation which argued that access to national safety and workers' compensation arrangements has led to 'dramatically improved workplace safety and injury management outcomes'.[20] In its submission to the review, the SRCC advised that it believes it has sufficient resources to ensure that self-insurers provide safe workplaces:

> The ratio of inspectors to employees in the Comcare scheme is comparable with the ratios of state and territory OHS jurisdictions. Comcare's investigator capacity is capable of being enhanced, when required, by the engagement of external experts.[21]

Findings of the review

1.21 The review report was published in January 2009. DEEWR found that, overall, the scheme's range of compensation benefits and approach to OHS regulation were comparable with other Australian workers' compensation schemes. The provision of self-insurance licences to private sector corporations was not seen as placing them or their employees at a disadvantage. DEEWR also found no evidence that licensing posed risks to the scheme's viability or the viability of state and territory schemes.[22]

---

18 Law Council of Australia, *Submission to the Review of Comcare self insurance arrangements*, p. 3; See also NSW Government, *Submission to the Review of Comcare self insurance arrangements*, p. 3.

19 National Council of Self Insurers Inc, *Submission to the Review of Comcare self insurance arrangements*, p. 2.

20 K&S Corporation, *Submission to the Review of Comcare self insurance arrangements*, p. 1.

21 The Safety, Rehabilitation and Compensation Commission, *Submission to the Review of Comcare self insurance arrangements*, p. 13.

22 DEEWR, *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, (released 25 September 2009), p. 2.

1.22 Given the issues raised during the review process, on 25 September 2009, the Minister announced a number of improvements to the Comcare scheme and released the DEEWR Report on the Comcare Review. The department made a range of recommendations to improve the regulation of the scheme, and this bill implements the government's initial response to the review.

1.23 The committee majority notes that the moratorium on new entrants will be maintained until 2011, by which time it is intended that uniform occupational health and safety laws will have been implemented in all jurisdictions. Following the implementation of uniform occupational health and safety laws, the government intends to transfer occupational health and safety coverage of Comcare self-insured licensees to state and territory jurisdictions.[23]

Provisions of the bill

Amendment of the Occupational Health and Safety Act 1991

1.24 Schedule 1 of the bill contains amendments to the *Occupational Health and Safety Act 1991* (OHS Act). The principal amendments concern broadening the definition of 'plant' to include 'lift'. Lifts are not currently included in the definition of 'plant' under the OHS Act and they are not covered by any other relevant regulations. Item 2 of Schedule 1 amends the OHS Act by inserting a definition of 'lift' in existing subsection 5(1). Item 3 inserts an example at the end of the definition of 'plant' so that it is clear that any references to plant in the OHS Act will include a reference to a lift. Item 13 inserts proposed subsection 19(4) to remove the supply of a lift in a workplace from the operation of that section.[24]

1.25 Schedule 1 also makes a number of technical amendments to the OHS Act as a result of the commencement of the *Legislative Instruments Act 2003*.[25]

Reinstatement of claims arising from off-site recess injuries

1.26 Proposed Item 1 of Schedule 3 will amend paragraph 6(1)(b) of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) to allow claims to be made which arise from injuries that occur off-site during recess breaks. This type of coverage was removed in April 2007 by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007*.[26] The Hon Jason Clare MP,

---

23 The Hon Jason Clare MP, Parliamentary Secretary for Employment, *House of Representatives Hansard*, 26 November 2009, p. 1.

24 Paula Pyburne, *Bills Digest* no. 78 2009-10, Occupational Health and Safety and Other Legislation Amendment Bill 2009, 6 January 2010, p. 7.

25 *Explanatory Memorandum*, p. 2.

26 *DEEWR, Submission 1*, p. 3. For more background on this aspect see the committee's report, *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006 [Provisions]*, February 2007.

Parliamentary Secretary for Employment, explained the reasons for this amendment in the second reading speech:

> This will realign the Comcare scheme with most jurisdictions and remove the inequity in coverage for employees whose employers do not provide on-site facilities for meal breaks.[27]

1.27 DEEWR informed the committee of the practical difficulties that have resulted from the 2007 removal of coverage for off-site recess break claims:

> One concern was the difficulty in determining what would and what would not constitute an off-site recess break where, for example, employees worked off-site or where no facilities were provided for lunch breaks. Another concern was the inconsistency between the fact that an employee would be covered when attending employer-sanctioned courses at educational institutions either within or outside normal working hours but not necessarily during lunch breaks.[28]

1.28 The majority of state and territory jurisdictions already provide coverage for off-site recess breaks.[29] DEEWR reported that the reinstatement of this coverage in the Comcare scheme would have no net effect on the budget and only a minimal financial effect on premium payers ($1.7 million per year, which would represent about a 0.7 per cent increase in premiums paid) and self-insurers ($1.5 million per year and a similar percentage increase for licensees for their self-insured costs).[30]

1.29 While appreciating that the reinstatement of this provision is intended to realign the SRC Act with state legislation, K&S Corporation submitted that there is a loss of control over what happens to employees, and the activities they undertake, while they are off site having a meal break.[31]

1.30 However, in verbal evidence to the committee DEEWR clarified that there are other provisions in the SRC Act that would limit the circumstances in which compensation would be payable for injuries incurred during off-site recess breaks:

> The SRC Act currently contains provisions that make it clear that compensation is not payable in respect of self-inflicted injuries and that would clearly carry over to recess breaks as well as any injuries that are a result of serious or wilful misconduct on the part of the employee. There are other provisions that actually come to bear on this.[32]

---

27 The Hon Jason Clare MP, Second Reading Speech, *House of Representatives Hansard*, 26 November 2009, p. 12963.

28 DEEWR, *Submission 1*, p. 3.

29 The only exceptions are South Australia and Tasmania.

30 DEEWR, *Submission 1*, p. 3.

31 K&S Corporation *Submission 2*, p. 1.

32 Mr Henry Lis, DEEWR, *[Proof] Committee Hansard*, 18 February 2010, p. 5.

1.31 DEEWR further noted:

> …there is an additional provision that excludes cases of an employee sustaining an injury because he or she voluntarily and unreasonably submitted to an abnormal risk of injury.[33]

Committee majority comment

1.32 The committee majority views this proposed amendment as an important reinstatement of workers' rights that were removed under the 2007 changes to the act. Not all workers have access to on-site recess break facilities, and it is inequitable to deny such workers coverage during their breaks. It is also inconsistent with the majority of state based workers' compensation schemes.

Payment of medical expenses

1.33 Proposed Items 2, 3 and 4 of Schedule 3 will amend subsections 36(4), 37(7) and 50(5) to exclude from the suspension provisions a claimant's right to compensation for medical treatment under section 16. Currently, the right to compensation under the SRC Act is suspended if a worker refuses or fails without a reasonable excuse to undertake a rehabilitation program. Under the SRC Act, compensation includes medical and related benefits.

1.34 DEEWR explained that the suspension of medical benefits under the act can be counterproductive:

> The way the act is currently structured, when those benefits are suspended it suspends all benefits. It suspends weekly compensation benefits as well as payments for medical expenses. The rationale is that in fact that might be counterproductive to a person's recovery and effective return to work by penalising an employee by also suspending the medical expenses. So the bill would provide that in such a case it is only the weekly compensation benefits that are suspended, but a person would continue to have their ongoing medical expenses paid for.[34]

1.35 The purpose of this amendment is to remove such counterproductive effects.[35] It would protect the payment of medical and related benefits to claimants notwithstanding the suspension of their weekly compensation benefits. DEEWR indicated that similar arrangements are already in place in Victoria, Tasmania and the ACT and that 'the financial impact of this measure on the Comcare scheme would be negligible'.[36]

---

33 Ms Flora Carapellucci, DEEWR, *[Proof] Committee Hansard*, 18 February 2010, p. 5.

34 Ms Flora Carapellucci, DEEWR, *[Proof] Committee Hansard*, 18 February 2010, p. 3.

35 *Explanatory Memorandum*, p. 5.

36 DEEWR, *Submission 1*, p. 4.

1.36 K&S Corporation supported this amendment to ensure that there is continuing medical progression on suspended rehabilitation cases. It noted that this is in line with the values of K&S Freighters of supporting injured employees in their recovery.[37]

Committee majority comment

1.37 The committee majority believes that rehabilitation of an injured worker should be a clear priority of the Comcare scheme and welcomes this amendment, which will promote ongoing medical recovery even in cases where a claimant's compensation benefits are suspended.

Time limits to determine a claim

1.38 Proposed Items 5 and 6 would allow for the setting of time limits for the determination of a claim and for the making of a reconsideration of a determination. The actual time limits will be set by regulation.[38] DEEWR noted that currently under the SRC Act there is no requirement for workers' compensation claims to be acted on within a specific time. However, all state schemes apply statutory time limits for claims to be determined. DEEWR reported that submissions to the Comcare review were concerned that this absence provided scope for delays and argued that claims which are determined quickly tend to be shorter in duration and less costly because injured workers are able to commence their medical treatment and rehabilitation more quickly.[39]

1.39 Data from the SRCC Annual Report 2008-09 indicated that the average time taken by Comcare to determine new claims is 24 days for injuries and 65 days for disease, which is longer than most state schemes.[40]

1.40 The committee majority notes that the actual time limits and how they will be applied are still under consideration.[41] The Bills Digest pointed out that there is no indication regarding the length of the proposed period in the Explanatory Memorandum or the second reading speech.[42] However, it noted that in the review report DEEWR envisaged that statutory limits could be imposed along the following lines:

> Time would start to run from lodgement of a claim with the determining authority, with scope for extension of that time frame to accommodate later lodgement or supporting evidence (say, 20 business days for injuries). A

37 K&S Corporation *Submission 2*, p. 1.

38 Explanatory Memorandum, pp. 5-6.

39 DEEWR, *Submission 1*, p. 2.

40 DEEWR, *Submission 1*, pp. 2-3.

41 DEEWR, *Submission 1*, p. 3.

42 Paula Pyburne, *Bills Digest* no. 78 2009-10, Occupational Health and Safety and Other Legislation Amendment Bill 2009, 6 January 2010, p. 9.

> longer time frame (to be determined after consultation) could apply to the determination of disease claims, bearing in mind that these can be more difficult to assess.[43]

1.41 The Bills Digest also noted the lack of sanctions for failure to meet the proposed statutory time limits and commented:

> As the primary focus of the Comcare scheme is rehabilitation and return to work, the absence of sanctions for a failure to meet statutory time limits for decision making may detract from the achievement of this goal.[44]

1.42 Regarding statutory time limits to determine claims, K&S Corporation reported that it currently monitors the performance of its claims manager in determining claims and ensuring that claims are determined within the targeted time frames set down by the SRCC. It is concerned that the proposed amendment does not indicate a possible timeframe or penalties for non-performance. It cautioned that for specific claims, such as stress, the evidence of a psychiatrist is best practice and it can be difficult for people to obtain an appointment with specialists in a short time frame.[45]

1.43 DEEWR confirmed to the committee that the government is still considering the length of the time limits to be set. Officials explained the reason why it is preferable not to put these limits in the act:

> The time limits will be set out in regulations rather than in the act itself. This will provide flexibility to modify time limits in the future in response to ongoing improvements in the jurisdictions' claims determination process.[46]

1.44 DEEWR also provided a rationale for why it is unnecessary to include sanctions for failure to meet statutory time limits:

> …there are other levers which will encourage compliance. Once adopted, the time limits will set the standard against which the scheme regulator, the Safety, Rehabilitation and Compensation Commission, the SRCC, will monitor the performance of Comcare and the self-insurers in relation to the timeliness of determining claims. The SRCC will report on performance against that benchmark through its annual report. As well, for those workers compensation claims which are processed by Comcare, it will be necessary for Comcare to provide information yearly, in its annual report, on its compliance with statutory obligations. Comcare's chief executive officer will be accountable for ensuring that Comcare meets its obligations with

---

43 DEEWR, Report of the Review of Self-insurance arrangements under the Comcare Scheme, January 2009, p. 22.

44 Paula Pyburne, *Bills Digest* no. 78 2009-10, Occupational Health and Safety and Other Legislation Amendment Bill 2009, 6 January 2010, p. 9.

45 K&S Corporation *Submission 2*, p. 1.

46 Ms Michelle Baxter, DEEWR, *[Proof] Committee Hansard*, 18 February 2010, p. 1.

> regard to statutory time limits for processing claims. For those workers compensation claims which are processed by the self-insurers, the SRCC has a tier structure for regulating self-insurers whereby failure to meet their obligations results in stepped-up regulatory requirements. The ultimate sanction against a self-insurer for failure to meet their obligations would be not to renew their licences, which come up for renewal every three years.[47]

Committee majority comment

1.45 The committee majority supports the intent of this amendment to accelerate rehabilitation and return to work. However, the committee majority notes that the time taken to determine claims will vary from case to case—for example, due to unavoidable delays in obtaining appointments with specialists. Therefore, the process of setting time limits must take into consideration that some claims will necessarily take longer to resolve than others.

Access to the Consolidated Revenue Fund

1.46 Proposed Item 7 of Schedule 3 of the bill contains the amendment to enable Comcare to access the Consolidated Revenue Fund (CRF) to pay compensation claims in respect of diseases with long latency period (such as asbestos related disease) where the employment period was pre-1 December 1988 but where the condition did not manifest itself until after that date.[48]

Background

1.47 The *Commonwealth Employees Rehabilitation and Compensation Act 1988* (later renamed as the SRC Act in 1992) included provisions to deal with claims pre-dating the introduction of the premium system in 1988. It established funding frameworks for 'premium' claims[49] and 'pre-premium' claims[50]. DEEWR advised that it was the intention that, where Comcare was liable for pre-premium claims, it would have direct access to the CRF, 'thus preserving the integrity of the premium system'.[51]

1.48 Section 128 of the SRC Act:

> …transferred undischarged pre-premium liabilities and deemed them to be Comcare's liabilities or the liabilities of the relevant licensee under a corresponding provision of the SRC Act. These section 128 liabilities were understood to cover both actual and contingent liabilities attributable to

---

47 Ms Michelle Baxter, DEEWR, *[Proof] Committee Hansard*, 18 February 2010, pp 1-2.

48 *Explanatory Memorandum*, p. 5.

49 Premium claims are lodged by agencies' employees for injuries or diseases attributable to employment from 1 July 1989, when the premium system began.

50 Pre-premium claims are those claims attributable to employment before 1 December 1988 that had not been fully or partly discharged by this date.

51 DEEWR *Submission 1*, pp 4-5.

> employment before 1 December 1988 and were to be payable by Comcare through access to the CRF.[52]

1.49 In 1992 sections 90A, 90B, 90C and 90D were inserted into the SRC Act to provide that Comcare would have access to the CRF to pay for its section 128 liabilities (liabilities that would have arisen under the Acts repealed by the SRC Act).[53] This occurred between 1988 and 2006 but, due to a court finding (see paragraph 1.50), since 2006 Comcare has had to draw on premium funds to pay for long-latency disease liabilities.[54]

1.50 As an indirect result of references to section 128 by the Full Federal Court in *Comcare v Etheridge* [2006] FCAFC 27 (15 March 2006), Comcare's access to the CRF under section 90B to discharge its liabilities for long-latency injuries claims was closed off. The amendment in new paragraph 90B(ab) would restore Comcare's access to the CRF to pay for these claims.[55] DEEWR emphasised that the proposed amendments restore funding arrangements that the SRC Act intended to authorise and that, but for the Etheridge decision, would have continued.[56]

1.51 The Senate Standing Committee for the Scrutiny of Bills provided the following comment on this proposed amendment:

> Although paragraph 90B(ab) appears to have retrospective effect, in fact it merely enables liability to be met upon commencement of the bill. The explanatory memorandum clearly explains (at page 6) the need for Comcare to have access to the CRF to pay for all of its undischarged liabilities, and associated expenses, for claims attributable to employment before 1 December 1988. New paragraph 90B(ab) would simply restore Comcare's access to the CRF to pay for these claims (its access to the CRF under section 90B was indirectly closed off following a decision by the Full Federal Court in 2006).[57]

1.52 To address the invalidated drawings, item 10 sets up a mechanism for the recovery and off-setting of these drawings. The Alert Digest explained the mechanism:

---

52 DEEWR, *Submission 1*, p. 5.

53 DEEWR, *Submission 1*, p. 5.

54 DEEWR, *Submission 1*, p. 6.

55 *Explanatory Memorandum*, p. 6.

56 DEEWR, *Submission 1*, p. 7.

57 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No 1 of 2010*, 3 February 2010, p. 29.

> Item 10 provides for money that was previously invalidly paid to Comcare to be recovered as a debt to the Commonwealth (subitem 10(2)); Comcare will then be paid an equivalent amount from the CRF (subitem 10(3)).[58]

1.53 The Standing Committee for the Scrutiny of Bills drew attention to the lack of a limitation on the amount of funds that may be so appropriated and the lack of a sunset clause which would ensure the appropriation cannot continue indefinitely without any further reference to parliament. The Scrutiny of Bills Committee has sought the Minister's comment on any limitation to be placed on the appropriated amount and on how parliamentary scrutiny of the appropriation will be secured.[59]

1.54 DEEWR noted the query raised by the Scrutiny of Bills Committee and provided the following explanation:

> Item 10 sets up a mechanism to validate certain CRF drawings by Comcare between 1989 and 2006 which were retrospectively invalidated as a result of a Federal Court decision. As unauthorised drawings these constituted debt owed to the Commonwealth. The validation mechanism works in this way: it confers on Comcare a notional one-off entitlement to CRF moneys equivalent to Comcare's unauthorised CRF drawings between 1989 and 2006 which is then offset against the debt owed to the Commonwealth. Because the two amounts are the same, the debt is reduced to zero. This mechanism precludes the need for an actual recovery of the unauthorised drawings by the Commonwealth.
>
> It is not possible to estimate reliably the drawings from CRF that have been retrospectively invalidated, and thus it is not possible to quantify the amount appropriated by item 10(5) of the bill. This is due to the difficulty in identifying the relevant payments over an almost 20-year period. Comcare has therefore disclosed the drawings as an unquantifiable contingent liability in its annual report 2008-09, and these amendments have been drafted on legal advice from the Australian Government Solicitor.[60]

1.55 In further evidence to the committee, DEEWR characterised this mechanism as a 'one-off notional transaction' which will not actually require any exchange of moneys.[61]

---

58 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No 1 of 2010*, 3 February 2010, p. 29.

59 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No 1 of 2010*, 3 February 2010, pp. 29-30.

60 Ms Michelle Baxter, DEEWR, *[Proof] Committee Hansard*, 18 February 2010, p. 2.

61 Mr Henry Lis, DEEWR, *[Proof] Committee Hansard*, 18 February 2010, p. 9.

Conclusion

1.56 Noting DEEWR's explanation of the mechanism to validate Comcare's CRF drawings, as well as DEEWR's evidence that the proposed amendments in relation to coverage of off-site recess injuries and payment of medical expenses will have minimal financial impacts on the Comcare scheme, the committee majority is satisfied that the amendments contained in this bill will lead to affordable and useful improvements to the *Safety, Rehabilitation and Compensation Act 1988*. The committee majority therefore recommends that this bill be passed.

Recommendation 1

1.57 The committee majority recommends that this bill be passed by the Senate without amendment.

Senator Gavin Marshall

Chair