

# **Coalition Senators Minority Report**

## **Occupational Health and Safety and Other Legislation Amendment Bill 2009**

### **Introduction and summary of position**

1.1 On 30 November 2009 the Senate referred the Occupational Health and Safety and Other Legislation Amendment Bill 2009 (OHSOLA Bill) for inquiry and report.

1.2 The OHSOLA Bill proposes amendments to the Comcare scheme.

1.3 The Comcare scheme provides workers' compensation and occupational health and safety arrangements for Australian Government employees and for employees of certain private corporations.

1.4 The *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and the *Occupational Health and Safety Act 1991* set up the framework for the Comcare scheme.

1.5 In December 2007, the Government announced a review of the Comcare scheme (the Review).

1.6 On 23 January 2008, the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, announced the terms of reference for the Review.

1.7 The Review was undertaken by the Department of Education, Employment and Workplace Relations (Department). The Department published its report entitled "Report of the Review of Self-Insurance arrangements under the Comcare Scheme" in January 2009 (the Report).

1.8 The OHSOLA Bill implements the legislative aspects of the Government's response to the Report. If passed by the Parliament in its current form the OHSOLA Bill will:

- enable Comcare to access the Consolidated Revenue Fund to pay compensation claims in respect of diseases with a long latency period where the employment period was pre-1 December 1988 but where the condition did not manifest itself until after that date;
- re-instate claims arising from off-site recess injuries;
- allow for compensation for medical expenses to be paid, where payment of other compensation is suspended; and
- allow for time limits for claim determination.

1.9 On the evidence presented to the Inquiry, Coalition Senators have concerns relating to:

- the reinstatement of claims arising from off-site recess break injuries;
- the introduction of time limits for claim determination; and
- amending the suspension provisions set out in section 36(4) of the SRC Act.

## **Inclusion of off-site recess breaks**

### ***Proposed change***

1.10 The OHSOLA Bill proposes the reinstatement of workers' compensation coverage for injuries arising from off-site recess breaks. This is achieved by repealing current section 6(1)(b) of the SRC Act and replacing it with:

(b) while the employee was at the employer's place of work, for the purposes of that employment, or was temporarily absent from that place during an ordinary recess in that employment;

### ***Off-site recess breaks – history***

1.11 Coverage for off-site recess break claims was removed from the SRC Act in April 2007 through the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007*.

1.12 The Department in its Report at paragraphs 4.24 and 4.25 set out the then reasoning for this removal:

4.24 The removal of this coverage from the SRC Act in April 2007 adopted a recommendation made by the Productivity Commission in its 2004 report. The principle underlying that recommendation is that employers should be liable only for injuries and illnesses resulting from activities which they are in a position to control.

4.25 Employers cannot control circumstances associated with journeys to and from work or with recess breaks away from employers' premises. It was therefore decided by the previous Government that it is not appropriate for injuries sustained at these times to be covered by workers' compensation.<sup>1</sup>

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1 Department of Education, Employment and Workplace Relations (DEEWR), *Report of the Review of Self-insurance arrangements under the Comcare Scheme*, January 2009, (released 25 September 2009), p. 25.

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***Department's recommendation (the Report)***

1.13 The Department's recommendation to the Government as set out at Recommendation 13 of its Report was:

...claims arising from injuries sustained during...off-site recess breaks continue to be excluded.<sup>2</sup>

1.14 At the Senate Inquiry held on Thursday 18 February 2010 (the Inquiry), in response to questioning from Senator Cash, Ms Carapellucci, an officer of the Department, confirmed that this was the recommendation provided by the Department to the Government:

**Senator CASH:**...In the Comcare review report the Department actually recommends against the reintroduction of the off-site recess breaks.

**Ms CARAPELLUCCI:** Yes, that is right.<sup>3</sup>

1.15 Coalition Senators note that this recommendation was made notwithstanding a number of submissions to the Review being received, the majority being from unions, which argued for the reinstatement of coverage for off-site recess breaks.

1.16 Ms Carapellucci gave evidence to the Inquiry that the basis for the Department's recommendation to continue to exclude off-site recess breaks from coverage went to the issue of employer control.

1.17 Ms Carapellucci agreed in her evidence that there is no way an employer can achieve 100% risk management control for an employee who leaves the workplace for an off-site recess break.

1.18 In response to questioning by Senator Back during the Inquiry, the Department gave evidence confirming that if during their lunch break, an employee went snorkelling and dived into the water and hit their head, they would be covered under the proposed amendment:

**Senator BACK:** So what if the person in their lunch break decided they were close enough to the beach, went snorkelling, dived into the water and hit their head? Under this proposed amendment would they actually be covered for that activity?

**Ms CARAPELLUCCI:** Yes, they would.<sup>4</sup>

1.19 Coalition Senators consider that this evidence from the Department reinforces the principle underlying the Productivity Commission's 2004 recommendation that

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

3 [Proof] *Committee Hansard*, 18 February 2010, p. 3.

4 [Proof] *Committee Hansard*, 18 February 2010, p. 4.

employers should be liable only for injuries and illnesses resulting from activities which they are in a position to control.

1.20 Further in questioning from Senator Cash during the Inquiry the Department was unable to provide any compelling information as to what had changed since both the Productivity Commission and the Department made their recommendations that off-site recess breaks not be covered by the scheme.

1.21 In their submission to the Inquiry K&S Corporation stated that they were “strongly against” the re-inclusion of off-site recess breaks, due to the loss of control by the employer over the employee:

**Off site recess breaks**

Appreciating that the reason for re-instatement of this provision was to re-align the SRC Act with State legislation, the original reason for the exclusion still remains an issue for K&S in that there is a loss of control over what happens to employees (and the activities that they undertake) whilst they are off site having a meal break. K&S are strongly against this change.<sup>5</sup>

1.22 The evidence of K&S Corporation is consistent with the Productivity Commission’s 2004 recommendation and the Department’s recommendation in the Report.

***Coalition Senators’ conclusion – off-site recess breaks***

1.23 Based on the evidence to the Inquiry, Coalition Senators have formed the opinion that there is insufficient reason to merit the changes proposed by the OHSOLA Bill.

1.24 Coalition Senators agree with Recommendation 13 of the Report that “claims arising from injuries sustained during off-site recess breaks continue to be excluded.”<sup>6</sup>

1.25 Coalition Senators consider that an employer’s liability to an employee should continue to be limited to circumstances where the employer has an element of control. It would be unreasonable to make employers liable for all types of injury sustained by their employees independent of the employment relationship.

1.26 Coalition Senators note that the continued exclusion of off-site recess breaks will not preclude an employee from pursuing a remedy in the event that they are injured.

1.27 As acknowledged by the Department in questioning by Senator Cash during the Inquiry there are other avenues available to an employee depending on the nature

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

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

of the injury, including common law action, third party insurance and public liability insurance.

1.28 Coalition Senators consider that the evidence relied upon by the Government to substantiate the reintroduction of off-site recess breaks is not justified and should not prevail over the recommendation by the Department in its Report and the 2004 recommendation by the Productivity Commission that employers should be liable only for injuries and illnesses resulting from activities which they are in a position to control.

1.29 Coalition Senators recommend that off-site recess breaks continue to be excluded from the SRC Act.

### **Introduction of statutory time limits for determining claims**

1.30 The OHSOLA Bill proposes to introduce time limits for claim determination.

1.31 Currently there is no requirement under the SRC Act for workers' compensation claims to be determined within a specified time period. The OHSOLA Bill proposes the inclusion of an explicit power in the SRC Act to prescribe time limits by regulation.

1.32 Coalition Senators note that the Parliamentary Library's Bills Digest of 6 January 2010 and K & S Corporation's submission to the Inquiry have both raised issues in relation to the proposed introduction of statutory time limits for processing workers' compensation claims.

1.33 One issue raised relates to the fact that there is no indication provided by the Government as to the length of the proposed time limits. Another issue raised is the lack of any sanctions in the OHSOLA Bill for failure to comply with the time limits.

1.34 The Department gave evidence to the Inquiry that the Government is currently considering the length of the proposed time limits for process workers' compensation claims. The Government proposes that the time limits will be set out in regulations rather than in the SRC Act. The Government claims that this will provide the flexibility to modify time limits in the future in response to ongoing improvements in the jurisdiction's claims determination process.

1.35 Coalition Senators acknowledge the flexibility of setting the time frames through regulation. However Coalition Senators are concerned that the time frames must be realistic and do not work against an insurer's process of factual and medical review prior to the determination of a claim, particularly in relation to high impact claims, for example stress.

1.36 Coalition Senators recommend that any time frames set by regulation must recognise the difference between the determination of a new injury claim and the determination of a new disease claim recognising that new disease claims are more difficult to assess.

1.37 Coalition Senators note the recommendation by the Department at paragraph 4.11 of the Report that:

....a 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.<sup>7</sup>

1.38 The Department's recommendation at paragraph 4.11 of the Report is supported by evidence in their submission to the Inquiry that :

...according to data from the Safety, Rehabilitation and Compensation Commission's Annual Report 2008 – 2009, the average time taken by Comcare on behalf of premium paying agencies to determine new claims under the scheme is 24 days for injuries and 65 days for disease. For self insurers the average time to determine new injury claims for the same period was nine days and the average time to determine new disease claims was 21 days.<sup>8</sup>

1.39 This is further confirmed by the evidence of Ms Carapellucci to the Inquiry that:

There is certainly a recognition that the disease claims are generally more complex to determine and there is a range of evidence and so on that needs to be collected in order to properly determine those claims.<sup>9</sup>

***Coalition Senators' conclusion – setting statutory time periods for determination of claims***

1.40 Coalition Senators recommend that in setting time limits for claim determination a clear distinction be made between the determination of a new injury claim and the determination of a new disease claim, recognising that new disease claims are more difficult to assess.

1.41 Time limits should also recognise the factual and medical review process that is required to be undertaken by an insurer when determining a claim. This is supported by K & S Corporation's submission to the Inquiry which states:

...it is important to note that in regards to specific claim types, such as stress claims, the evidence of a psychiatrist (not psychologist) is best practice in regards to seeking information to determine these claims. It can be very difficult to get an appointment with medical specialists within short-term timeframes.<sup>10</sup>

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

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

9 [Proof] *Committee Hansard*, 18 February 2010, p. 11.

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

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## Amending suspension provision in the SRC Act

1.42 Currently section 36 of the SRC Act provides that the right to compensation under the SRC Act is suspended if an employee refuses or fails without reasonable excuse to undergo a medical examination or to undertake a rehabilitation program. Compensation includes both medical and related benefits.

1.43 The OHSOLA Bill proposes to limit the suspension to weekly benefits only and not medical and related expenses.

1.44 Coalition Senators note that based on the answers given by the Department to a Question on Notice by Senator Cash, no other State or Territory law contain such a provision:

**Senator CASH (On notice):** In terms of the provisions on the payment of medical expenses, do the laws of other states or territories contain a similar provision?

**Department:** No other state or territory legislation specifically allows for continued payment of medical expenses when the worker's right to compensation and/or weekly payments is suspended.<sup>11</sup>

1.45 On this basis any argument put forward by the Government that this amendment is required to ensure legislative consistency between the Commonwealth and the States and Territories is void.

1.46 As set out in the Bills Digest for the OHSOLA Bill, the rationale behind section 36 of the SRC Act (being where the injured worker refuses to be assessed, or fails to attend the assessment without 'reasonable excuse', his or her right to compensation is suspended in accordance with subsection 36(4) of the SRC Act) is that it is intended to act as an incentive to claimants to comply with the requirement.

1.47 Coalition Senators agree with this rationale.

1.48 The aim of the SRC Act is to facilitate the timely return to work of injured workers. Both employers and employee have obligations which they must discharge under the SRC Act.

1.49 Coalition Senators are concerned that the amendments proposed by the OHSOLA Bill to the suspension payments provision under the SRC Act may facilitate a culture of non-compliance by rewarding employees who do not comply with their obligations. Amendments or changes that have the effect of detracting from ensuring an employee or an employer discharges their obligations, or reward non-compliance under the SRC Act, should not be condoned.

1.50 Coalition Senators recommend that if the Bill passes in its current form, in relation to this proposed amendment the Government reassess the effectiveness of this

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11 DEEWR, *Answers to questions taken on notice*, Question 7, p. 4.

amendment after a 12 month period. If there has been no improvement in the return to work statistics of injured employees, Coalition Senators recommend that the Government consider returning to the status quo in relation to the suspension of compensation as set out in current section 36(4) of the SRC Act.

### **Coalition Senators' recommendation**

#### **1.51 Coalition Senators recommend that:**

- **consistent with the recommendation 13 of the Department's Review and the Productivity Commission's 2004 recommendation, the OHSOLA Bill 2009 be amended to continue to exclude claims arising from injuries sustained during off-site recess breaks.**

**Senator Michaelia Cash**  
**Deputy Chair**

**Senator Chris Back**