Inquiry into the Safety, Rehabilitation and Compensation (Improving the Comcare Scheme) Bill 2015

ACTU Submission to the Senate Standing Committee on Education and Employment Legislation

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ABOUT THE ACTU

The Australian Council of Trade Unions is the peak body representing almost two million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.

INTRODUCTION

1. We welcome the opportunity to make this submission in relation to the Senate Inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (the Bill).

2. The Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 was introduced into Parliament on the 25th of March 2015 and referred to the Senate Education and Employment Legislation Committee on the 26th March 2015 for inquiry and report by the 16th June 2015.

3. Australian unions were involved in confidential briefings with DEEWR last year during which we were made aware of the broad scope of changes that the Government wished to pursue.

4. With the introduction of the Bill before Parliament, our fears have been realized, and it has become increasingly apparent that this Bill is not designed to improve the Comcare scheme, as its name would suggest. Rather, it is designed to reduce scheme liabilities at any cost, and it will be workers who shoulder those costs.

KEY PRINCIPLES

5. The following principles are drawn from the ACTU's Union Charter of Workplace Rights, endorsed at the 2012 ACTU Congress. These principles are based on ILO Conventions No. 155, 161 and 187, which provide a framework for best practice on occupational health

and safety matters, including a commitment to genuine consultation on occupational health and safety matters.

6. The ACTU believes that all workers have the right to a healthy and safe work environment, and that any worker injured at work should have access to appropriate levels of compensation and rehabilitation.

7. Whilst the ACTU supports the establishment of nationally consistent workers injury compensation standards, workers must not be adversely affected by any change in jurisdiction or insurer.

8. Any changes to OHS and workers' compensation law should only take place after genuine consultation and agreement with workers and their representatives, with opportunity given for members of the general public to participate in the review process.

9. Employers have an absolute duty of care to provide a safe working environment, and workers' compensation laws and processes must acknowledge this duty of care and operate under the assumption that workers' compensation is a no-fault jurisdiction.

10. All workers have the right to fair and equitable compensation and effective rehabilitation n in the event of any physical or psychological injury at work.

11. Claims should be resolved, and benefits provided, in a speedy, efficient and fair manner, noting that any delay in payment and treatment will result in prolonged suffering and unnecessary financial hardship for the injured worker.

12. Claim determination should be conducted in a timely manner with an appropriate appeals process in place where claims are rejected.

13. Where companies seek to self-insure, this should not be used as a cost-cutting method to erode workers' rights to compensation entitlements.

14. Workers should be compensated for the total cost of their medical rehabilitation, with fair lump sum payments for permanent disability or death.

15. Accident pay should be based on the 100% replacement of loss of income, noting the complete lack of evidence to suggest that reducing wages acts as any kind of 'incentive' for a worker to return to work at the appropriate time.

16. All workers have the right to return to safe and suitable employment with their original employer, following the provision of quality rehabilitation services, and with workplace modifications and adaptations available where required.

17. Workers have a right to privacy and confidentiality in the management of all medical records, and have a right to choose their own medical provider and rehabilitation service.

18. Finally, there is a strong expectation within the community that workers should be fairly compensated in the event of a workplace injury, and this community expectation should be a major consideration when considering any potential changes to the existing legislation.

SUMMARY OF THE BILL

19. The Bill proposes radical changes to the Comcare scheme with most of the measures designed to exclude injured workers from the scheme or to reduce compensation benefits for those who remain eligible.

20. Through this Bill, the Government proposes to re-introduce fault as a means to bar injured workers from compensation. It has 'cherry picked' the harshest measures from state schemes, without including any of the beneficial aspects of those schemes.

21. The Bill will result in:

    a) Denial of compensation to thousands of injured workers by changing eligibility rules and introducing a strict 'sanctions regime' for workers. The extraordinarily punitive sanctions are to apply for breaches of 'obligations of mutuality" which lead to the cancellation of all rights to compensation.

    b) Large reductions in the amount of compensation that can be paid to the injured workers who manage to retain eligibility for Comcare.

    c) The opinions of medical practitioners being overridden by employer directives, with Comcare and the rehabilitation process becoming employer-, rather than doctor-directed.

22. If the Bill is passed, it would make Comcare the most punitive, and the most disadvantageous to injured workers, of any workers compensation scheme in the country, and by a long way. All but minor sections of the Bill are to the detriment of injured workers.

23. Some minor sections in the Bill may appear beneficial to workers, but when examined closely they are not.

24. Older workers, disability related injuries and psychiatric injuries receive particularly harsh treatment in the Bill.

25. The schedules of the Bill are summarised below:

Schedule 1: Changes to eligibility rules in Schedule 1 of the Bill provide a range of new tests and exclusions from compensation. Regulations foreshadowed in the Bill, but not yet released, will provide Comcare with further and sweeping powers to change eligibility rules without review by Parliament. Therefore the full impact of Schedule 1 on injured workers cannot be accurately estimated. The known changes are:

a) 'Designated injuries' and illnesses including aggravations, for example to the heart and blood vessels; brain and blood vessels associated with the brain; and intervertebral (spinal injuries); will face higher, and in some cases, impossibly onerous tests of proof for workers to access the Comcare scheme.

b) The current exclusionary provision for injuries caused by 'reasonable administrative action' will be broadened by the term 'reasonable management action'. This will exclude any physical or psychiatric injury or illness resulting from a directive of management unless an injured worker can prove unreasonableness. Therefore injuries at work in a wide variety of everyday work settings will be excluded.

c) Vulnerability or susceptibility to injury or disease would count against any injured worker, but will have a particularly discriminatory effect upon older workers and workers with disabilities.

d) Catch-22 changes to the test for psychiatric injuries. The new test requires employees suffering from psychiatric injury to demonstrate that they suffer from a condition outside the bounds of normal mental functioning, yet at the same time, paradoxically, they must also show a "reasonable belief or interpretation" of the incident or state of affairs that led to their injury.

e) 'Compensation Standards' to be made by Comcare regulations will allow Comcare to further limit eligibility for compensation.

26. Schedule 2: A proposed new 'Workplace Rehabilitation Plan Framework' set out in Schedule 2 will make rehabilitation employer-driven rather than doctor-directed.

    a) Workers face a new sanctions regime if the employer judges them non-compliant with rehabilitation plans which ultimately leads to compensation rights in relation to an injury (and associated injuries) being abolished. Treating doctors are to be consulted by the employer but their opinions are able to be ignored by the employer or Comcare.

    b) Work capacity tests will be undertaken by the employer as the 'designated agency'. If the employer determines the worker has a capacity to work, the worker will be directed by the employer to undertake duties the employer considers suitable. If the employer says they do not have suitable employment to offer the employer can direct the injured worker to search for work with any employer or engage in self-employment. If an injured worker does not follow these directions, they will be in breach of the 'Obligation of mutuality' and their rights to compensation can be cancelled.

27. Schedule 3: Right of an injured worker to privacy and the concept of doctor-patient confidentiality are essentially eliminated by Schedule 3 of the Bill.

    a) Comcare could compel third parties and the worker to provide documents about the worker, irrespective of the documents' relevance to a claim. Workers can be sanctioned by loss of compensation rights if they fail to comply with a document request. The Bill would enable Comcare to provide these documents to third parties for the purpose of disciplining the worker.

    b) This schedule provides time limits for determining liability. Whilst this is one of the few steps the Bill takes in the right direction, they are by far the most lax time limits in Australia, compared to other schemes, and they favour the decision maker taking an unnecessary length of time to come to a determination. The Bill proposes 30 days for initial determination for injury and 70 days for disease or a 'designated injury'.

28. Schedule 4: Schedule 4 allows for provisional medical expenses payments up to $5,000. However, since these provisions are unenforceable, an injured worker would still have no right to provisional medical expenses.

29. Schedule 5: The decisions of injured workers concerning their own medical treatment will no longer be a matter between themselves and their chosen doctor(s). Instead, treatment

will be determined by standards developed by Comcare-approved doctors who have no treating relationship with the employee patient

30. Schedule 6: Household and attendant care services are also singled out in Schedule 6 for new restrictions and time limits on provision. Injured workers can be sanctioned for not undergoing assessments of their need for these services and unless 'catastrophically injured' will be cut off from receiving these services after three years, irrespective of need.

31. Schedule 7: Absences from Australia of more than six weeks are punished in Schedule 7 by way of suspension of benefits, irrespective of the reason for the absence.

32. Schedule 8: Schedule 8 denies injured workers the right to accrue leave whilst receiving compensation, even if they are working and under a Rehabilitation Plan.

33. Schedule 9: Incapacity payments will be reduced for all workers by the cuts in Schedule 9. The harshest financial impacts would be felt by those with injuries that take longer to resolve, especially those who are permanently and significantly disabled.

34. Schedule 10: This Schedule provides for a minor increase in redemption payments. The proposed increase is so meagre it makes this provision pointless.

35. Schedule 11: Injured workers' legal costs will either not be paid, or will be paid at significantly less than rates allowable for similar challenges.

36. This will create a David v Goliath situation and appears designed to intimidate workers into giving up their claims. Schedule 11 provisions would limit the capacity of injured workers to challenge decisions to refuse them compensation. There is no restriction on the number of lawyers that Comcare or a 'liable employer' or licensee can hire to support a denial of compensation, yet the worker, no matter how unfairly they have been treated, will not be able to recover more than a fraction of their legal costs, if at all.

37. Schedule 12: Permanent impairment payments would be dramatically reduced for an anticipated 90% of permanently injured workers if Schedule 12 is enacted.

38. Schedule 13: Schedule 13 is designed to facilitate the expansion of the Comcare scheme, including provisions to include 'group employer licenses' in Comcare. These changes have been foreshadowed in a Bill that has been before Parliament since March 2014 but yet to be passed.

39. Schedule 14: confirms that 'gradual onset injuries' will be mired in complicated new rules designed to cut down claims costs for employers for both physical and psychiatric injuries.

40. Schedule 15: sets out a new 'sanctions regime' and 'obligations of mutuality'. The sanctions proposed are not only more punitive when compared to other workers' compensation systems, they are more punitive than the 'mutual obligations' and 'compliance framework' that job-seekers on Newstart must meet in return for the dole.

41. The proposed sanctions regime will result in vulnerable injured workers being denied all present and future rights to compensation for their injuries, even those who are seriously injured by the gross misconduct of others.

42. Schedule 16: excludes Defence-related claims from the provisions of the Bill. The ACTU supports this, noting that the ADF and Department of Veterans Affairs have over the years been appalling in their handling of the claims of injured ADF personnel and Veterans. However, we re-state that the proposals in this Bill are not appropriate for any worker and have no place in a humane society.

43. Schedule 17: draws the downstream medical effects of an initial injury into the same restrictive provisions that appear throughout the Bill. 'Associated injuries', for example a severe leg fracture which leads to a hip dislocation because the injured worker is no longer able to walk properly, will be subject to the same eligibility hurdles, and if eligible, the same reduced incapacity payments, reduced impairment benefits, the new sanctions regime and 'obligations of mutuality' as the initial injury.

44. Regulations proposed by the Bill: The Bill provides for future changes to eligibility and other changes to be made via a series of new regulations. These regulations have not yet been made publicly available, and appear designed to avoid the proper scrutiny of Parliament. Whilst some proposed regulatory powers in the Bill appear minor, we have identified 10 significant new regulatory powers proposed by the Bill. These are discussed in more detail at Appendix A.

STATEMENT OF OPPOSITION TO THE BILL

45. The ACTU is opposed to this unfair Bill on the basis that it would severely disadvantage injured workers covered by Comcare now and in the future.

46. This Bill is unfair and unbalanced and we ask that the Committee reject it in its entirety.

47. It is impossible to understand the full impact of this Bill on workers because many of the changes foreshadowed in the Bill are subject to regulations which are yet to be fully revealed.

48. The Bill proposes to restrict eligibility to compensation for a range of workers based on particular classes of injuries and illnesses, meaning that fewer injured workers can access Comcare.

49. In its attempt to restrict access to compensation, this Bill re-introduces 'fault' as grounds to exclude injured workers from the scheme. This fundamentally alters the historical intention of Comcare, which was to provide reasonable support and compensation for injury on a no-fault basis.

50. For those workers who do gain access to the scheme, reduced benefits will fall well short of compensation for losses suffered, and will deny many the right to live with dignity after an unforeseen catastrophe at work.

51. The Bill provides for a range of new punitive measures, including onerous job search, rehabilitation and return to work requirements that disempower workers while placing unprecedented power in the hands of employers to dictate workers' rehabilitation plans.

52. Workers who fail to meet these punitive requirements are then subject to sanctions, which may include the suspension or cancellation of their compensation.

53. Any costs saved by employers will merely be shifted onto workers and their families and will place an increased cost burden onto welfare agencies, public health services, the National Disability Insurance Scheme, Centrelink, and private income protection and Total and Permanent Disability (TPD) insurers. These service providers will experience an increase in demand for their services due to the exclusion of disabled workers from workers' compensation.

SAVINGS

54. At pages 49-50 of the Regulation Impact Statement the Government states:

> "Taylor Fry Actuaries conducted costings on the proposed package of changes in July 2014… the Government's package of changes will save both premium payers and licensees between 12 per cent and 21 per cent annually. This equates to between $62million for premium payers and $19 and $32million for [31] licensees."

55. For a scheme as small as Comcare, these are extraordinarily large annual savings, and this is likely to be a conservative estimate. Safe Work Australia estimates that only 5% of the cost of workplace injury is borne by the employer, with 74% borne by the workers themselves, and the remaining 21% borne by the community. Any cost shifting from employers further onto workers will only serve to exacerbate this disparity.

OTHER COMCARE BILLS BEFORE PARLIAMENT

56. This Bill cannot be viewed in isolation because there are two other Comcare Bills currently before the Federal Parliament.

57. The ACTU submits that the three Comcare Bills now before the Parliament are inter-related. Therefore we ask this inquiry to consider the Bills and their cumulative impact on injured workers together. We also ask the Committee to consider the previous submission of the ACTU to this Committee on the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 2014 Bill (attached) and our submission on the Safety, Rehabilitation and Compensation Legislation Amendment (Exit Arrangements) 2015 (attached).

2014 BILL TO EXPAND COMCARE

58. The Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (the 2014 Bill) was designed to expand Comcare and introduced into Parliament in March 2014. The 2014 Bill proposes sweeping changes that would open up the Comcare scheme to employers nationally. This would place further significant strain on Comcare to provide

proper regulation, oversight and monitoring, which it is struggling to do even with its current small size.

59. We note that Comcare's health and safety monitoring is already under-resourced, with only 44 active health and safety inspectors to cover the breadth of Australia. In some workplaces under Comcare jurisdiction, health and safety monitoring barely exists or is non-existent. By contrast, most state schemes have more powerful inspectorates and more active health and safety monitoring.

60. If the 2014 Bill allowing the expansion of Comcare were to be enacted, a significant number of injured workers currently covered by state schemes will also lose rights and benefits including common law rights to sue an employer for negligence.

2015 COMCARE EXIT ARRANGEMENTS BILL

61. The Federal Government introduced the Safety, Rehabilitation and Compensation Legislation Amendment (Exit Arrangements) 2015 (the 2015 Exit Arrangements Bill) in March this year to enable the Commonwealth to set and collect exit contributions for employers who wish to exit Comcare (like the ACT Government).

62. Read together, the 2014 and 2015 Bills make it clear that the Commonwealth now envisages giving employers the right to 'scheme swap' at will. This is a significant risk from a number of angles.

63. From the perspective of smaller to medium size employers who may not have the resources or the desire to 'scheme swap', it will inevitably lead to an increase in premiums.

64. For state governments, it will increase scheme volatility and force them to increase employer premiums or, in the long run, risk scheme viability.

65. Taken as a package, it is clear that the Government's vision for workers' compensation is one in which all workers are forced onto a scaled-down version of Comcare, with fewer rights and benefits, with little to no proper monitoring or resourcing for the scheme.

HISTORICAL BACKGROUND

66. Historically, workers' compensation schemes evolved in industrializing economies from the late nineteenth century. In Australia, the various states and the Commonwealth established schemes in the early twentieth century.

67. The first Commonwealth legislation on compensation matters commenced in 1911 for seafarers and in 1912 for government employees (other than 'officers'). The Commonwealth Employees Compensation Act 1930 (the 1930 Act) was the first comprehensive Commonwealth scheme. This was replaced by the Compensation (Commonwealth Government Employment) Act 1971 (the 1971 Act) and then, in turn by the Commonwealth Employees Rehabilitation and Compensation Act 1988, subsequently renamed the Safety Rehabilitation and Compensation Act 1988 (the SRC Act).

68. The essential legislative framework was to provide compensation coverage for workers whose injury or illness resulted in incapacity for work, so as to ameliorate against the hardships imposed on both the workers and their dependants.

69. Initially, Australian schemes provided compensation coverage for 'personal injury by accident' arising out of and in the course of employment.

70. Starting in the 1940s, various schemes were amended to provide for diseases suffered by workers to which employment contributed, by way of causation or aggravation, that resulted in incapacitation for work. The notion of 'accident' for the purposes of workers' compensation evolved to incorporate work-related conditions, diseases and illnesses.

NO-FAULT BENEFITS AND 'THE COMPENSATION BARGAIN'

71. Since the 1980s, a fundamental feature of Comcare became the payment of benefits regardless of fault, whether such fault was on the part of the employer or the worker.

72. This concept of 'no fault' compensation acknowledges that injury results in significant hardship for workers and their families through the deprivation of income and the additional medical and rehabilitation costs incurred.

73. It is important to note that employers benefited considerably from the introduction of no fault compensation. Statutory no-fault benefits were provided in exchange for the

mandatory relinquishment of the worker's right to recover compensation for the real extent of their loss from his or her employer under the tort of negligence.

74. The trade-off between assured, limited, no-fault coverage and the end to recourse for workers outside the workers' compensation system is known as 'the compensation bargain'.

75. This Bill represents a major departure from the 'compensation bargain' in the 1980s that saw workers under Comcare give up common law rights in return for statutory no-fault benefits. The Bill uses a number of devices to limit or exclude workers from receiving no-fault benefits, whilst the right to sue for injuries as a result of employer negligence has not been returned. This will have enormous financial and emotional consequences for workers and their families.

COMCARE – A SCHEME FOR THE COMMONWEALTH PUBLIC SECTOR

76. The Commonwealth scheme was established for Commonwealth government departments, statutory authorities, and corporations established for public purposes. In recent times, former Commonwealth agencies and business enterprises in competition with a Commonwealth agency or privatised agency have been able to license under Comcare.

77. Since the introduction of the newer licensee provisions, a wide range of private corporations (31) have applied for and been granted licenses to act as self-insurers, exercising Comcare's statutory powers in respect of claims from such employment.

78. The Government signalled soon after its election that it would welcome more private employers into the scheme, regardless of its original purpose and design being for the Commonwealth public service.

THE HANKS-HAWKE REVIEW

79. As part of the *Review of the Safety, Rehabilitation and Compensation Act (SRC) 1988,* undertaken by Mr. Allan Hawke and Mr. Peter Hanks QC in 2012 ('the Hanks- Hawke Review'), 147 key recommendations were made in relation to the Comcare scheme. The review concluded that inadequate regulation of Comcare was leading to inferior outcomes in relation to claims management, and suggested establishing a "more robust regulatory

framework to improve performance" , as well as other suggestions relating to performance improvement.

80. This included establishing time frames for the lodgement, determination and appeal of claims. The Australian public sector is the only jurisdiction that administers its compensation scheme without mandated time frames for decision-making about liability and benefit payment.

81. Although the Explanatory Memorandum for this Bill implies that the proposed amendments are a response to Hanks-Hawke, a thorough review of the original 147 recommendations reveals that this is not, in fact, the case.

82. The ACTU was not supportive of a number of the recommendations in the Hanks-Hawke review on the basis that many of the proposals were detrimental to workers. In our opinion the review recommendations went too far in favour of employers.

83. Given this general opposition, it is even more concerning that the Bill before Parliament goes above and beyond the Hanks-Hawke recommendations and introduces a number of measures that were specifically recommended against by Hawke and Hanks.

84. It is our view that the Bill cherry picks its recommendations to suit a particular ideological agenda designed to weaken the workers' compensation scheme, to penalize workers, and to limit the liability of big businesses while making it harder for workers to access appropriate and fair compensation and rehabilitation.

85. Although we will elaborate on our concerns in later sections of this submission, by way of example, the Bill proposes the insertion of a 'significant contribution' test, which states that compensation is not payable for conditions that would have arisen in any event given the worker's age.

86. Mr. Hanks never recommended this, and, if enacted, it would allow employers to discriminate against workers on the basis of their age by withholding compensation payments from them and denying such workers any opportunity for rehabilitation and return to work.

87. The Bill proposes that injuries be excluded if they are a result of 'reasonable management action', which can include restructures and organizational change. This is the exact opposite of the recommendation in the Hanks Review. See, for example, para 5.123 of the review, which states that "employers who pursue profitability or enhanced efficiency

through restructuring their workforce should continue to be responsible for the personal health consequences that affect their employees."

88. The introduction of a punitive range of sanctions which allows compensation payments to be suspended or cancelled for various 'infringements', such as overseas travel, were not recommended by Mr. Hanks in his report, and have no grounding or basis in rehabilitation best practice.

89. In addition, two key Hanks Review recommendations have been ignored or watered down to the extent that they have no usefulness, being:

    a) The reinstatement of journey claims, to ensure that workers who are travelling to and from work are protected in the event of injury. This was recommended by the Hanks Review at Recommendation 5.7.

    b) The introduction of statutory timeframes with a mechanism for review where those timeframes are not met, as per Recommendation 9.2 and 9.3 of the Review.

90. Taken as a whole, a survey of the key recommendations in the original Hanks-Hawke reviews reveals the government's true motivation in introducing this Bill.

91. This Bill is not designed as a true response to the recommendations put forward by Mr. Hanks, unless it is clear that the response is to reject most of the findings of the review. Rather, it is a cherry picking exercise with the sole purpose of reducing employer liability for injuries at the expense of those who have been injured at work.

SCHEDULE 1: ELIGIBILITY FOR COMPENSATION AND REHABILITATION

92. The eligibility amendments set out in Schedule 1 of the 2015 Bill, together with other provisions, substantially restrict access to, and eligibility for, workers' compensation.

CURRENT PROVISIONS

93. Currently, under Section 14 of the SRC Act, Comcare or a licensee is obliged to pay compensation where injury to a worker results in incapacity for work, impairment or death. The relevant nexus between injury and employment is set out in the definition of 'injury' in section 5A of the SRC Act and related provisions.

94. Injury is defined to include:

a) Injury (other than a disease) including any physical or mental injury which arises out of or in the course of employment. These include injuries caused by external trauma, trauma such as tissue ruptures and the like without external trauma, or sudden physiological change.

b) Disease, where a physical or mental ailment to which employment contributed to a 'significant' degree. The introduction of the standard of 'significant contribution' was introduced from 13 April 2007 whereas the prior test was to require a 'material' contribution.

c) The aggravation of either existing injury or disease, in accordance with the nature of that condition and its relevant employment (that is, where the aggravation of injury arises out of or in the course of employment or the aggravation of the disease is contributed to in a significant degree by the employment.

95. There are already limitations on liability through various exclusionary provisions that have a long historical association with the scheme, such as:

a) Intentional self-infliction of injury [Section 14(2) of the SRC Act].

b) Serious and wilful misconduct, save for those cases of serious and permanent impairment [Section 14(3) of the SRC Act].

c) Voluntary submission to an abnormal risk of injury where such injury is sustained in circumstances where the course of employment is given extended meaning [Section 6(3) SRC Act].

d) There are some exclusionary provisions that have more recent origin, such as the exclusion of aggravations by the work of a pre-existing disease where the worker

willfully and falsely represented to the employer that they did not previously suffer from the disease that has been aggravated [Section 7(7) SRC Act].

96. In more recent times, those injuries, including diseases, which result from 'reasonable administrative action taken in a reasonable manner with respect of the worker's employment', are the subject of exclusion [Section 5A proviso]. The present form of the proviso commenced from 13 April 2007 and excludes injuries on a broader basis than the proviso that existed from December 1988.

PROPOSED CHANGES

97. The 2015 Bill proposes to significantly restrict eligibility requirements and thereby reduce the number of injured workers covered by the Commonwealth scheme. The proposed changes introduce an element of worker fault for a wide variety of employment related medical conditions, thereby moving away from historical principles of no-fault compensation which has been a principle of Comcare since the 1980s.

98. The changes are:

a) Widely expanding the exclusionary proviso relating to 'reasonable administrative action taken in a reasonable manner in respect of the employee's employment' to the section 5A definition of injury to a new 'reasonable management action' concept. This new concept is not restricted to employment matters, as is currently the case, and will include operational actions and directions [See: proposed amendment of section 5A (1) definition of injury and new section 5A (2)].

b) Introducing the concept of 'designated injury' that covers any or all injuries, disease or the aggravation thereof. The full scope of the government's intentions will be clarified in yet to be released regulation [See: proposed amendment of section 5A (1) definition of injury, and new sections 5A (2), 5C]. There will be a higher test to meet and higher standards of proof for a range of injuries and illnesses that will be called a 'designated injury', only some of which are identified in the Bill with others that will be identified the future regulation.

c) Vulnerability to injury, including age and disability, is now to count against acceptance of liability. [Proposed section 5A (3); 5B (2) (c)].

d) Introduction of 'Compensation Standards', as a further means to change boundaries for eligibility though as yet unseen regulations. 'Compensation Standards' will have the force of legislation yet will not be reviewable by the Parliament. The Compensation Standards will limit eligibility for compensation in relation to an ailment specified in the regulations (and its causation or aggravation) [See: proposed section 5B (3), 7A].

e) Imposition of a Catch-22 proviso for psychiatric injury by reference to 'reasonable belief' or 'interpretation' of 'an incident or state of affairs' [See: proposed section 5A(3); 5B(2)(d)].

OUR CONCERNS

99. The amendments in Schedule 1 strike at the long standing rights of all injured workers to be covered by a workers' compensation scheme and will leave most workers under Comcare without any certainty of over. Broad and onerous new tests for eligibility to Comcare in the Bill, combined with regulations yet to released, could exclude almost any injury or illness from eligibility. Exclusion will be based on the nature of the injury or illness itself, or the wide variety of new circumstances that will be captured by re-crafted exclusions such as the 'reasonable management action' test.

100. Comcare has for around 30 years been a scheme that provides no fault cover to workers. It would become a fault-based scheme for workers if this Bill is enacted. Most workers would need to consider private insurance because they will be excluded from eligibility for such a wide range of workplace injuries and circumstances.

101. We have particular concerns in relation to:

a) The new definition of 'reasonable management action' because it strikes at the rights of all injured workers and means that any injury or illness could be excluded from Comcare, unless the injured worker can prove that management directions or operational systems were unreasonable.

b) The expansion of the definition of 'designated injury' strikes at the rights of injured workers as Comcare will be able to regulate to exclude or impose higher tests on certain injuries and illnesses. In addition to conditions named in the Bill, Comcare will be able to add 'designated injuries' by regulation.

c) The discriminatory aspects of the next test of 'susceptibility or vulnerability' to injury or illness strikes at the rights of older workers, workers with disability and indeed any worker with any susceptibility to any injury or illness.

d) The psychiatric liability test strikes at the rights of any worker who suffers a psychiatric illness to fair treatment, not only excluding them from Comcare, but reversing decades of progress in our community towards removing stigma and better understanding of mental illness.

e) The new Compensation Standards provide a wide new regulatory power to Comcare to change the rules of eligibility in future. For the purposes of workers' compensation, an illness will no longer be an illness and an injury no longer an injury if Comcare regulates it so.

REASONABLE MANAGEMENT ACTION

102. This proposal would operate to exclude any condition or injury or the aggravation of a pre-existing ailment, arising out of or in the course of employment, should a 'reasonable management action' contribute to the injury or illness, unless the workers can prove the employer's 'unreasonableness'.

103. This definition has been drafted broadly enough to cover any physical injuries which are the result of any direction for an operational purpose and anything done in connection with such a direction.

104. The onus will be on the worker to somehow uncover the evidence required to prove the unreasonableness of an employer's direction. These new provisions would render all injuries non-compensable if they result from an operational direction unless the operational direction can be proven as being 'not reasonable'.

105. Even a modest contribution to the injury or illness from reasonable management action is sufficient to exclude the worker from compensation entirely. There is no test, for example, to propose that the management action should be 'wholly' or even 'predominantly' the cause of the injury.

106. In this regard these provisions are far more extreme and will exclude more workers compared to a Victorian WorkCover exclusion upon which this amendment is said to be based upon.

107. The proposed schedule:

a) Removes the current words defining 'reasonable administrative action taken in a reasonable manner with respect to the employees employment' and replacing them with 'reasonable management action taken in a reasonable manner or the 'anticipation or expectation' of such action being taken;

b) Removes the words 'with respect to the employee's employment' in the new 'management action'; and

c) Adds to the definition of 'management action' in proposed section 5A(2): 'an organizational or corporate restructure', 'a direction given for an operational purpose or purposes' and 'anything done in connection with' such operational and organizational actions.

108. Any injury resulting from the burden of biomechanical forces over time due to the system of work, itself the product of a direction given for an operational purpose, will be excluded from eligibility for compensation.

109. The onus will be on the worker to somehow uncover the evidence required to prove the unreasonableness of an employer's direction.

110. This amendment will serve to undermine the principle of our no-fault workers' compensation scheme. Few employees will have the resources to challenge the decision to the degree of proof now required of them by the operation of so comprehensive an exclusionary provison.

NEW CONCEPT OF 'DESIGNATED INJURY'

111. Schedule 1 proposes to broaden the definition of 'designated injury', which are injuries or illnesses that will subject to higher tests of proof for eligibility for compensation.

112. The new concept of designated injury is not defined in the proposed section 5C beyond the following injuries to:

a) the heart;

b) blood vessel associated with the heart;

c) the brain;

d) blood vessel associated with the brain;

e) intervertebral disc; or

f) 'Injury associated with an intervertebral disc' (which conceivably covers any spinal injury).

113. Regulations referred to in the Bill, as yet unseen, may designate any bodily condition at all as a 'designated injury'.

114. The proposed amendment to the definition of injury in section 5A(1) and paragraphs (d) through to (g) of the Bill are designed to exclude injuries and illnesses which at present are connected to employment because they arise out of the employment or in the course of employment. These injuries and illnesses will in future be excluded from compensation under Comcare, unless a worker can prove a significant contribution from the employment and the tasks the worker is required to do in the job.

VULNERABILITY TO INJURY

115. New tests would require consideration of whether the worker would have hypothetically suffered a similar 'designated injury' at the 'same time in the worker's life' or at the 'same stage'.

116. It has been a long standing principle of injury and compensation law that the injured victim is taken as found, including their age, vulnerabilities and susceptibilities.

117. The new 'significant degree' test relates to:

a) A designated injury [proposed section 5A(3)]; and

b) Employment related ailments or diseases [proposed section 5B (2) changes].

118. Since any musculoskeletal condition may be regarded as an ailment, or any spinal condition as a 'designated injury', the effect of such a provision has the potential to strike out any such musculoskeletal injury.

119. It is an accepted proposition of general medicine that from the end of the stage of human physical development, no later than an age in the early twenties, all humans are on a process of slow but inexorable degenerative change.

120. Degenerative changes can happen without any symptomatic expression and are generally asymptomatic until such time as a work injury occurs.

121. The older the worker, the more vulnerable to such musculoskeletal injury they become. With age, human tissues become weaker, the bones more brittle, and the intervertebral discs more prone to rupture.

122. To remove injured workers from a workers' compensation scheme because of their vulnerability is unfair and inhumane. In a society where the working age now extends beyond 65 years, and the Government has declared it expects workers to work longer, our work force is ageing, and therefore becoming more susceptible, on the whole, to workplace injury. This provision effectively serves to discriminate against workers on the basis of their age, which is completely unjustifiable.

PSYCHIATRIC LIABILITY TEST

123. As currently defined, a psychological injury does not exist unless it is demonstrated that the victim suffers a condition "outside the boundaries of normal mental functioning and behavior". It is likely to be impossible for an employee to demonstrate that there existed reasonable grounds for the belief or interpretation of an incident or state of affairs when, by virtue of their condition, they are unable to function rationally.

124. It is a contradiction in terms to require reasonable grounds for belief when a person is not functioning rationally.

125. Currently, there is no burden of demonstrating the rationality of the worker. It is hard to conceive of a worker that is afflicted with a condition outside the boundaries of normal mental functioning and behavior being capable of satisfying the new test.

126. A bank teller who is faced by a person holding their hand inside a paper bag and demanding money may conclude, with no reasonable basis, that the bag conceals a weapon.

127. Such circumstances may give rise to a post-traumatic stress disorder from the imagined consequences of failing to comply with a robber's demands. If it is later discovered that the robber does not have a weapon and never stated he had one, the teller, a victim of a perceived life-threatening situation, may have no reasonable basis for the belief about the incident and may not receive compensation to assist them with the ailment or consequent loss of income.

128. In an age where the medical profession and the community are making advances in understanding psychiatric conditions, the removal of support for worker's suffering psychiatric illnesses (and post-traumatic stress disorders) is a retrograde and discriminatory step.

COMPENSATION STANDARD

129. The Bill proposes that Comcare may invent new 'Compensation Standards' that will operate to restrict the legislative definition of injury for the purposes of disallowing compensation. Without having to laws for designating injuries, Comcare will be given the power to make legislative instruments that have the force of law, and to specify an ailment and 'minimum factors' that must be found to exist 'before it can be said that an employee is suffering from the ailment'.

SCHEDULE 2: REHABILITATION

130. The timely return to work of injured workers is in the interests of all parties. However, the correct checks and balances must be in place to ensure the health of injured workers is not jeopardised throughout this process, and to ensure that the return to work is sustainable.

131. Schedule 2 contains a broad restructuring of the rehabilitation framework and preferences the rights of employers over the needs of injured workers. The Bill overhauls the existing rehabilitation framework in a manner that removes important protections for the injured.

CURRENT PROVISIONS

132. Section 37 of the Act allows a rehabilitation authority to make a reviewable determination. A return to work plan established under this provision must have regard to a number of specific factors including the following:

a) any reduction in the future liability to pay compensation if the program is undertaken;

b) the cost of the program;

c) any improvement in the employee's opportunity to be employed after completing the program;

d) the likely psychological effect on the employee of not providing the program;

e) the employee's attitude to the program;

f) the relative merits of any alternative and appropriate rehabilitation program; and

g) any other relevant matter.

133. These factors allow for a balanced consideration of both the interests of a rehabilitation authority and those of the worker.

134. Existing statutory tools are more than sufficient to ensure that workers participate in return to work programs. At present, under the SRC Act, a worker is under a positive obligation to engage with the return to work process by attending assessments (s36 (8)) and participating in rehabilitation programs.

135. Currently, in the event a worker cannot demonstrate a reasonable excuse for non-compliance with a return to work plan, then there is a real risk that their rights to incapacity payments will be suspended under the SRC Act. The vast majority of injured workers are self-motivated and do not need this inducement to ensure they positively engage with a return to work process, but they can lose payments if they do not.

PROPOSED CHANGES

136. Schedule 2 of the Bill proposes to:

a) Repeal s 36 and s37 of the SRC Act, which will limit an employee's rights to rehabilitation and review of decisions taken by employers on rehabilitation Introduce a Workplace Rehabilitation Plan Framework, which will be directed and developed by the employer. Workers will receive sanctions if they fail to comply with the employer's Framework, even if the worker's own medical practitioner advises against the employer's Framework and provides different advice.

b) Place job search requirements on workers with an injury, at least as onerous as those for jobseekers without injury or disability.

OUR CONCERNS

137. Schedule 2 of the Bill fails to provide sufficient enforcement mechanisms and weakens the responsibility of the liable employer to assist a worker to return to work. Most alarmingly, it provides the employer with extraordinary powers to direct an injured worker on the health provider they must see, and what tasks they must undertake, even if this contradicts the opinion of an injured worker's treating medical doctor.

138. Failure to comply with a variety of employer directions will lead to breaches of the 'obligation of mutuality' which will result in sanctions against the worker.

JOB SEARCH REQUIREMENTS

139. Remarkably, and of deep concern, is that unrealistic Centrelink-style job search requirements are imposed on injured workers, and the definition of suitable employment is broadened to mean a job with any employer or self-employment.

140. This means that a liable employer can absolve themselves of the responsibility to provide suitable employment by passing the injured worker off to the job market at large, whether or not that market realistically has a job available that is suitable for the worker.

141. The abolition of s 37 creates a real risk that private rehabilitation providers engaged by and at the behest of 'liable employers' may force a worker back to a place of employment before they are medically fit to be there, potentially in direct contradiction to the opinion and recommendation of a workers treating medical practitioner.

WORKPLACE REHABILITATION PLANS

142. The introduction of the employer-directed Workplace Rehabilitation Plan Framework removes important protections for injured workers.

143. These plans create responsibilities for a worker in a broad range of areas and will be incredibly directive. The roles and opinions of treating medical practitioners are minimised in the new framework.

144. A Workplace Rehabilitation Plan, as proposed, can see the liable employer direct the worker to engage in multiple assessments, 'advice' about job modification, occupational rehabilitation, counselling, job seeking, participation in interviews and repeated functional assessments, amongst other things.

145. This could lead to a situation where a worker is given a detailed Workplace Rehabilitation Plan that directs them to engage in various employment-related activities that is not reasonable given their injury and circumstances.

146. Such an amendment grants liable employers incredible discretion and power to direct the activities of an injured worker. In the event the worker is unable to comply, they are under onerous obligations, and will be at risk of breaching their new responsibilities and therefore being 'sanctioned'. Sanctions could include the suspension or even cancellation of their compensation.

147. Section 36G would allow an employer to vary or revoke a rehabilitation plan at any stage. However, if a worker needs amendments or changes to the plan, for example regarding job-seeking activities, then they are under an obligation to notify their employer in writing within three business days that obligations set by the employer under the plan cannot be met. Such a requirement places a huge onus on an injured worker without any equivalent duty being placed on the liable employer.

148. There is no penalty on an employer if they fail genuinely to engage in the rehabilitation process.

149. Furthermore, liable employers need only consult with medical practitioners as far as 'reasonably practicable' when constituting a plan they do not need to accept the doctor's medical opinion.

150. Such proposed changes to the rehabilitation framework are in direct opposition to the objects and purposes of the SRC Act. They severely encroach on the rights of individuals to take the guidance of medical practitioners in relation to injuries, rehabilitation and treatment.

151. The proposed 'Rehabilitation Plan Framework is strongly opposed.

SCHEDULE 3: SCHEME INTEGRITY

152. This Schedule provides minimum statutory timeframes for decision making and appeals in relation to claims handling. However, as we will demonstrate below, even with these changes, Comcare still lags behind other state schemes and the timeframes proposed are only the bare minimum that could be applied, with no real right of review. The Schedule also contains some concerning provisions relating to the access of confidential medical records.

CURRENT PROVISIONS

153. Under the Comcare scheme at present, there are no times frames for decision making and the appeals process is lengthy and poor. This is in contrast with most state schemes, which do provide timeframes and which have proper appeals processes in place. As an example, in Queensland, the Workers' Compensation & Rehabilitation Act 2003 provides that an insurer must make a decision on an application within 20 business days after the application was made, and if a decision has not been made in this time frame, the injured worker must be notified within 5 business days. A worker can lodge an application for review within three months of receiving notice of the decision, and the decision must be reviewed within 25 business days. If the worker wishes to appeal the decision, they must do so within 20 days.

PROPOSED CHANGES

154. Schedule 3 of the Bill will among other things:

a) Introduce new provisions allowing an employer to access confidential medical records of an injured worker, even without the patient's approval or knowledge, and provide sanctions upon the worker if they refuse to hand over their medical records (s58, 58A, 29T, 120A and 120B of the amendments).

b) Introduce minimum statutory time frames for claims handling, but with no sanctions against the employer or Comcare if time frames are not met.

c) Provide for compensation if Comcare disadvantages a worker due to 'defective administration', but with no further detail as to how this provision would apply.

OUR CONCERNS

RIGHT TO PRIVACY

155. New sections 58 and 58A represent an alarming invasion of the right to privacy of injured workers. Comcare or the employer can demand documents from an injured worker to be provided within 14 days.

156. New section 29T provides that a failure or refusal to do so without a reasonable excuse is a 'breach of an obligation of mutuality' which is subject to the new sanctions regime and may result in a cancellation of compensation rights (See: item 14 of Schedule 15 to the Bill).

157. New section 58A enables Comcare or the relevant authority to obtain documents about injured workers from a third party.

158. New sections 120A and 120B also increase powers to gather information about the worker. Without the injured worker's permission, a 'relevant authority' can obtain information or documents from an employee or third party even after liability has been accepted. Failure or refusal to provide the information may also lead to sanctions against the worker.

TIME FRAMES

159. This Schedule of the Bill inserts timeframes for claims handling.

160. Statutory time limits on decision-making are proposed by the Bill in one of the only measures in the Bill that is a step in the right direction.

161. However, the timeframes proposed are the least beneficial by far for injured workers of any scheme in Australia (except for other Commonwealth schemes tha,t like Comcare, don't have time frames). The following time limits for determinations are proposed:

    a) Liability for an injury that is not a disease or a designated injury or an aggravation of a designated injury – 30 days; and

    b) Liability for an injury that is a disease or a designated injury or an aggravation of a designated injury – 70 days.

162. If no decision has been made, an injured worker can request re-consideration. Reconsiderations must be made within 60 days (new subsections 62(6) and 62(6A).

163. A seriously ill or injured worker will still have to wait for three to four months to learn whether liability for their claim has been accepted.

164. It should be noted that these time frames are quite long in comparison with other schemes and jurisdictions, and should be viewed as the bare minimum of acceptable time frames.

165. There are no sanctions or penalties placed on Comcare, the employer, or the relevant insurer if self-insured, if these time frames are not met.

166. If these time frames are not met, the worker's claim is automatically deemed to be rejected, even if their claim is in fact valid. Although the worker has access to an appeals process, they may not always be aware of this and as a result, may not receive compensation to which they are entitled, due to lack of knowledge of the proper processes.

DEFECTIVE ADMINISTRATION

167. New section 70C of the Act provides that Comcare can pay compensation for detriment caused by its 'defective administration'. It is unclear to whom and in what circumstances such compensation would be paid, however, it is noted that the power is discretionary.

SCHEDULE 4: PROVISIONAL MEDICAL EXPENSE PAYMENTS

168. The ACTU has advocated for provisional medical expense payments to be included in the Comcare scheme in previous submissions. While we support the inclusion of provisional medical expenses in Schedule 4, due to the way that the legislation has been drafted it appears these payments are symbolic in nature only.

CURRENT PROVISIONS

169. The Comcare scheme as presently legislated has no provision for medical expense payments. In this, it lags behind other state schemes.

PROPOSED CHANGES

170. Schedule 4 proposes the provision of $5000 as a lump sum provisional payment to contribute to medical expenses.

OUR CONCERNS

171. Should an employer choose not to make provisional payments an injured worker has no recourse or right of review.

172. The employer must provide the request to the relevant authority within two days and the request will be determined in seven days, but if payment is refused, the only entitlement of the worker is to receive notice of this in writing.

173. Only one request for up to $5,000 in expenses can be made for injuries and associated injuries, no matter how serious the injuries.

174. The Hanks Report recommended that workers receive income replacement on a provisional basis in addition to a lump sum payment for upfront medical expenses; however, this recommendation was not taken up by this Bill.

175. The Commonwealth now envisages that injured workers will wait for up to four months for a decision on liability, noting they are also likely to be without income if they have run out of sick leave entitlements. If surgery or other significant treatment is required for serious injuries or inpatient treatment is required, the sum will be vastly inadequate.

SCHEDULE 5: MEDICAL EXPENSES

176. This schedule contains onerous requirements in relation to medical treatment. We have attached at Appendix B a detailed discussion of medical treatment issues and our concerns about the impact the Bill would have on medical treatment and therefore opportunities of the worker for genuine and successful rehabilitation.

177. Medical treatment for the purposes of Comcare would have to be carried out by a registered or accredited health practitioner and both doctors and clinic would have to be approved by Comcare for medical costs to be compensated.

178. The amendments restrict what treatment including the prescription of medication will be afforded as Comcare will be given new powers to set medical costs by regulation (without reference to reasonableness)

CURRENT PROVISIONS

179. The current scheme entitles workers to the reasonable costs of medical treatment required because of their work related illness or injury. Medical treatment includes a range of treatment, usually directed by the injured worker's treating doctor in order to assist in the injured worker's treatment and rehabilitation.

PROPOSED CHANGES

180. The Bill introduces the following significant changes to a worker's access to medical treatment, their right to choose a health practitioner and their right to have a say in the treatment they receive. A summary of how this will occur is set out below:

a) 'Clinical Framework Principles' will be set by regulation and can only be prepared by Comcare. These principles are to be used as the basis for Comcare determining what treatment can be provided and at what price (new section 16A);

b) Comcare can create by regulation its own 'medical services table' to limit the payment of treatment costs (new section 16B);

c) Comcare will 'designate' the doctors and clinics it is prepared to pay for treatment. An injured worker will be required to nominate a 'designated medical practitioner' or a 'designated medical clinic' with whom they are to seek treatment (new section 54A);

d) Comcare can create its own 'Medical Treatment Reports Determination' to prescribe the form of medical reports and limit the payments made to a treating doctor who has been requested to provide medical information (new section 57B);

e) Comcare can disclose information relating to an injured worker's medical treatment to a 'professional disciplinary authority' (new section 71A); and

f) Comcare can obtain information from doctors directly and can force the injured worker to obtain and provide their doctor's private clinical notes. A failure to do so will lead to the worker being sanctioned (new section 115A).

OUR CONCERNS

MEDICAL EXPENSES TABLE TO BE SET BY COMCARE WITHOUT REFERENCE TO REASONABLE COSTS

181. New section 16B proposes a table setting out costs that Comcare is prepared to pay without reference to discretion to cover what is reasonable. Consequently, injured workers are likely to be left with a gap or will only be treated by the pool of practitioners who are prepared to accept Comcare's pricing regime.

182. The medical expenses table provisions will interfere with the ability of treating doctors to direct care and treatment of their patients.

183. The current scheme allows an injured worker the right to accept or reject medical advice and it is only in situations where there is clear evidence of a failure to undergo curative treatment without reasonable excuse that compensation payments can be refused. In the event of a dispute, the worker has access to a right of appeal.

PATIENT/DOCTOR CONFIDENTIALITY IS WITHDRAWN BY THE BILL

184. The current scheme protects the privacy of the doctor and patient relationship and it is only within the context of independent review at the Administrative Appeals Tribunal will that privacy be disturbed. Even so, injured workers are still afforded protection against an unrestricted use of material summonsed by Comcare or the employer.

MEDICAL SERVICES TABLE, MEDICAL TREATMENT REPORTS DETERMINATION AND MEDICAL EXAMINATION RATES DETERMINATION

185. By imposing limits on the payment of medical treatment expenses, the worker and their family, will be left to pay the shortfall. This will lead to workers either deferring treatment, which will ultimately lead to their injuries becoming entrenched and impacting on their capacity for work, or being forced into debt to pay the escalating costs.

186. The proposed 'Medical Treatment Reports Determination' limits the costs payable to a treating medical practitioner who responds to a request for report by a relevant compensation authority. However, the cost of reports obtained from medico-legal examiners engaged by the same compensation authorities, are not so limited. The opinions of those medical practitioners who undertake treatment of injured workers is therefore under-valued in favour of non-treating commentators who have no responsibility for treating the injured worker.

DESIGNATED MEDICAL PRACTITIONER OR CLINIC

187. The Bill requires an injured worker nominate a 'designated medical practitioner' or a 'designated medical clinic' when making their claim for compensation.

188. The nomination is relevant to the payment of medical expenses as only those expenses incurred following the prescription by a designated medical practitioner or clinic, count as medical treatment for the purpose of payment by Comcare.

189. The Bill seeks to establish a regime whereby for each different practitioner who may become involved in the case, the injured worker must revoke a prior designation and designate a new practitioner or clinic. The nomination must be made before the prescription of any medicine. This proposal is grossly unfair because in many cases, the prescription of medication is made by a number of treatment providers such as a General Practitioner and a Specialist, both of whom may deal with a separate and discrete part of the injury. However, the Bill suggests that the injured worker would only be able to get compensation for certain medicines prescribed by one designated practitioner.

190. The Bill unfairly limits the injured worker's freedom to seek treatment from medical practitioners of their choice and significantly increases the bureaucratic costs.

SANCTIONS FOR REJECTING MEDICAL ADVICE

191. An injured worker who rejects medical treatment advice from a designated 'legally qualified medical practitioner' which is determined to be 'reasonable' will have breached an 'obligation of mutuality'. Such a breach can give rise to the cessation of compensation payments.

192. Health and well-being of injured workers may be put at further risk by the Bill

193. Comcare, not the medical profession, will guide decision making about medical treatment without reference to the individual condition of the worker. Both the treating doctor and the injured worker are bound to accept Comcare's treatment decisions. Should the treating doctor recommend another form of treatment, the injured worker will need to bear those costs.

194. We have deep concerns this will lead to a failure to treat injuries and potentially mistreating injuries in a misguided attempt to follow a Comcare defined, 'Clinical Framework Principles'.

195. The Clinical Framework Principles cannot be challenged. They will be defined by legislative instrument.

196. The 'legally qualified medical practitioner' referred to in the Bill is not defined as a treating doctor. Rather, a medico-legal commentator, not charged with the responsibility of treating the patient, may be so considered. Such a proposal would allow substitution of opinion from non-treating doctors over those of treating doctors who have the duty for providing medical care for their patient.

197. Already, there is a large population of doctors who refuse to become involved in the compensation process. The Bill will make the situation worse and will eventually see workers being managed by employer and Comcare-funded practitioners. This situation will not only deliver less effective treatment owing to the lack of knowledge of the worker's condition but will create a significant conflict of interest.

SCHEDULE 6: RESTRICTION OF HOUSEHOLD SERVICES AND ATTENDANT CARE

CURRENT PROVISIONS

198. Under the present Act, where a worker's injury results in significant incapacity and disability that prevents them undertaking household support duties or requires attendant care, Comcare or a licensee is obliged to pay for the reasonable costs of such services pursuant to section 29 of the Act.

199. The compensation for the cost of such services is not automatic.

200. In respect of an injured employee living with family members who may take on the burden of household care there is no obligation for the compensation payer to make payments.

201. The costs are not unlimited, but are capped.

202. The provision of such services through the compensation system for injured workers suffering such disability as gives rise to the needs to be met relieves pressure on home care services provided by local government and other organisations.

203. It is possible in appropriate cases that family members may act as paid attendant carers.

PROPOSED CHANGES

204. Schedule 6 of the 2015 Bill proposes to introduce the following:

a) Formal accreditation, approval and registration of attendant care service providers.

b) Ceases the reliance upon an appropriate family member for the provision of attendant care services where such a person is not accredited, approved or registers to provide such a service unless undefined "special circumstances" exist [proposed subsection 29(3A)].

c) Discontinues continuing support by way of attendance care for injury after three years, or after the six month period following discharge from inpatient care [proposed subsection 29(5)].

d) The Bill proposes the introduction of a new section 29A in respect of household services and attendant care services, limited to such services as are required by the injured worker as a result of a 'catastrophic injury', not defined and to be left to regulations.

OUR CONCERNS

CATASTROPHIC INJURY

205. What is or is not a 'catastrophic injury' for the purposes of receiving attendant care benefits, will be left to as yet unseen regulations.

206. The changes proposed will cut down an entitlement to compensation save for those cases regarded by regulations as 'catastrophic'. The concept is not linked to any definition provided in the Act or currently settled in law. It is a matter for future definition without any standard in the Act to control the regulatory definition.

207. The definition of 'catastrophic injury' used by the National Injury Insurance Scheme (NIIS) excludes a range of permanent impairments from that scheme– for example; the loss of a limb is not defined as a 'catastrophic injury' under the NIIS.

208. We also note that the NIIS and the National Disability Insurance Scheme (NDIS) have developed the definition of 'catastrophic injury' for the purpose of scheme eligibility, not to determine the level or period that services will be provided for.

209. Using regulation and legislative instruments to cut down an entitlement for people with very serious injuries is the worst type of behavior by policy makers.

THREE YEAR LIMITATION

210. The limitation on the provision of services to a period of three years following the injury is without any basis by reference to the injured worker's need. In cases where the need is experienced beyond the time scale proposed, the attendant care compensation support will not continue unless it meets the yet to be declared definition of 'catastrophic injury'.

211. Removing this entitlement will lead to unmet needs and transfer the cost onto local and community services and the NDIS, which are not resourced to meet the need of the long-term injured. This is a retrograde step.

FAMILY MEMBERS AS ATTENDANT CARERS

212. The creation of a new accreditation, approval and registration process for attendant carers increases the regulation in the system. It will slow the delivery of desperately needed services and will divert funds into the approval and registration process rather than employing attendant carers and delivering attendant care services.

213. There are some instances where family members, owing to their particular circumstances, are the most appropriate individuals to act as paid attendant carers. When such family members forego employment opportunities the family income suffers at a time when the injured worker will not be able to earn full wages, and therefore it is only right that such carers be fairly recompensed for their labour.

214. Removing family members from the field of compensation will be detrimental to the care of long-term injured workers. The current provisions already restrict family members as attendant carers unless their use is justified by reference to 'special circumstances'. The provision is thereby merely an attempt to remove family members from the field of potential carers whose services may be compensated.

SCHEDULE 7: ABSENCES FROM AUSTRALIA

215. Schedule 7 of the Bill proposes to suspend compensation entitlements where an injured worker is absent from Australia in excess of six weeks.

CURRENT PROVISIONS

216. Under the current scheme, whilst a worker needs to seek approval prior to departure, there are no cuts to entitlements if a worker travels overseas.

PROPOSED CHANGES

217. Schedule 7 would stop compensation payments if a worker leaves the country for six weeks.

OUR CONCERNS

218. A worker may have valid reasons for leaving the country and it should have no impact on payments as to whether the worker is in Australia or not.

219. The only rationale given for this amendment is that leaving the country would "negatively impact on the worker's access to rehabilitation". There is no evidence of this.

220. Many FIFO workers, working in high risk industries such as mining or offshore oil and gas industries, are based in nearby countries and fly in to work in Australia. This means that their family base and support network may be located in a country other than Australia. These workers would be negatively impacted by this proposal, and may be forced to relocate their entire family in order to access compensation.

221. Many 457 and 417 visa workers are forced to return to their country if they no longer have employment in Australia. This leads to a catch-22 situation in instances where a migrant worker is injured at work, in that they will be forced to return to their home country once their employment ceases, and thereby would be ineligible for workers' compensation.

222. In circumstances where a worker is totally unfit for work as a result of a compensable work related injury, it should not matter whether the worker lives in Australia or elsewhere. A worker whose family support network is overseas and is required to assist in the

management of their injury, should not be penalised for an extended stay outside Australia. There is no justification for this amendment.

SCHEDULE 8: ACCRUAL OF LEAVE WHILE RECEIVING COMPENSATION

223. The Bill proposes to prevent those who are unable to work as a result of a work injury from accruing leave entitlements under their workplace agreement.

CURRENT PROVISIONS

224. Under current provisions, the Fair Work Act and other national legislative instruments are silent on the question of whether leave accrues while on compensation.

225. Therefore it devolves to the various state and territory legislation to state whether leave accrues. Each state has different provisions for this.

226. Under the current Comcare scheme, in most instances, accruals are permitted for the first 45 weeks of a worker's incapacity.

PROPOSED CHANGES

227. This section overrides state and territory legislation to provide that an employee is no longer able to accrue leave while on workers' compensation.

OUR CONCERNS

228. Workers' compensation is intended as income replacement and in most instances the worker continues to be an employee of the employer. Therefore they should be entitled to the same benefits as all other employees, including recognition of service for the purpose of long service leave. Compensation should be treated as a form of paid leave, and since

annual and personal/carers leave accrues when a worker is on paid leave, so it should also accrue while on workers' compensation.

229. Moreover, in instances where workers are undertaking a return to work plan, this amendment would effectively prevent workers from accruing leave entitlements even when they are undertaking work for their employer.

230. This cut places injured workers' at a significant disadvantage compared with their uninjured colleagues who are able to accrue sick leave, long service leave and annual leave in the same period. There is no justification for this financial penalty against workers.

SCHEDULE 9: CALCULATION OF COMPENSATION

231. This Schedule is about step down provisions and about reducing payments to injured workers.

232. If these provisions are enacted, permanently incapacitated workers, especially those who were not on high salaries to start with, will not be able to meet ordinary living expenses.

CURRENT PROVISIONS

233. The current scheme provides that a worker is entitled to their Normal Weekly Earnings (NWE) for the first 45 weeks of incapacity and thereafter 75% of their NWE until 65, assuming they remain totally incapacitated for work.

234. The current scheme also applies a cap on incapacity payments based on 150% of the Average Weekly Ordinary Time Earnings of Full time Adults (AWOTEFA) after the step down comes into effect at 45 weeks.

235. Under the current scheme, there is no timeframe applied to whether allowances are included in a workers' entitlement.

PROPOSED CHANGES

236. The Bill proposes to amend step down provisions above and beyond what the Hanks-Hawke review proposed. These amendments will have a particular impact on psychological claims, noting these claims can be harder to resolve.

237. The proposed scheme significantly reduces incapacity payment to workers. The stated intention of the Government is that earlier and less beneficial 'step-down' of incapacity payments, act as an incentive for workers to return to work. There is no evidence of this, but it is reasonable to assume that the step-downs proposed in the Bill will cause significant hardship.

238. The Bill introduces step downs earlier than the current scheme, as follows:

    a) 1 to 13 weeks = 100%;

    b) 1 to 26 weeks = 90%;

    c) 27 to 52 weeks = 80%;

    d) Over 53 weeks = 70%.

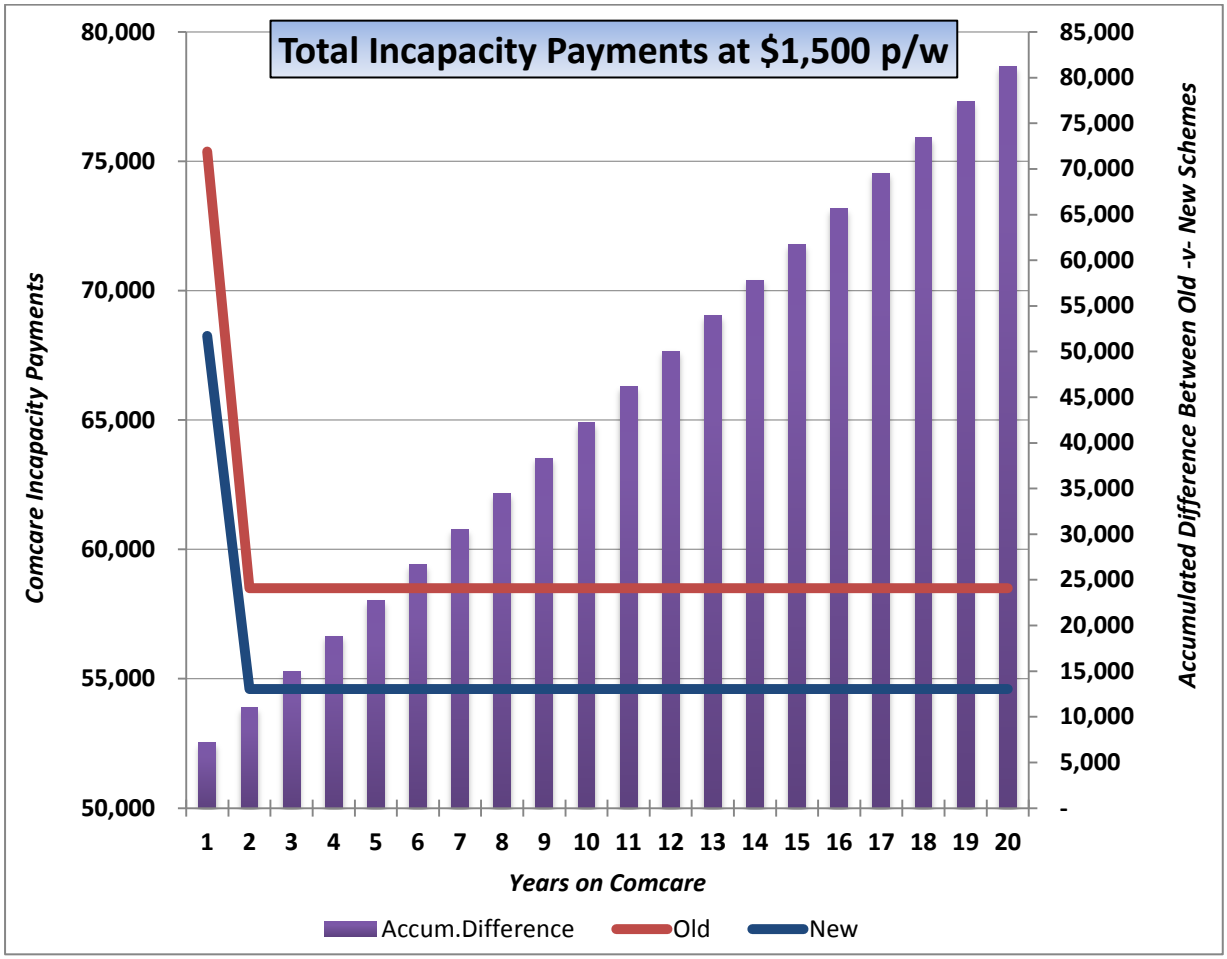
OUR CONCERNS

239. The graph below considers the loss of income of permanently and significantly incapacitated workers and is based on information provided in the Hanks/Hawke review. It shows how much over a period of time that an injured worker would lose as a consequence of these provisions.

240. Despite the claim by the Government that the most seriously injured benefit from this Bill, the graph below demonstrates that a seriously and permanently incapacitated worker, who had been on a low to medium income prior to injury, could lose between $120,000-$325,000 over 20 year period (depending on their income around the time of injury).

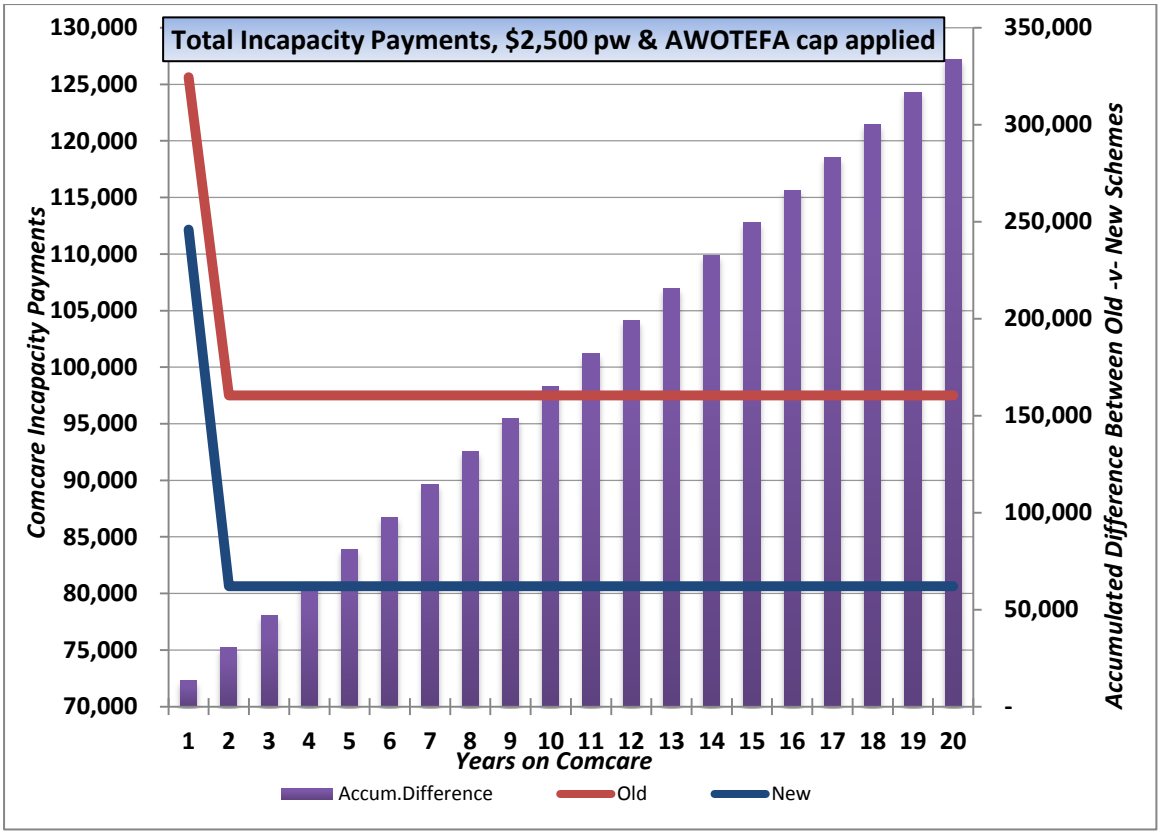
INCAPACITY PAYMENTS

241. In order to understand the effect of the reduction in incapacity payments, this graph compares the financial impact on a worker whose earnings are agreed at $1500 per week.



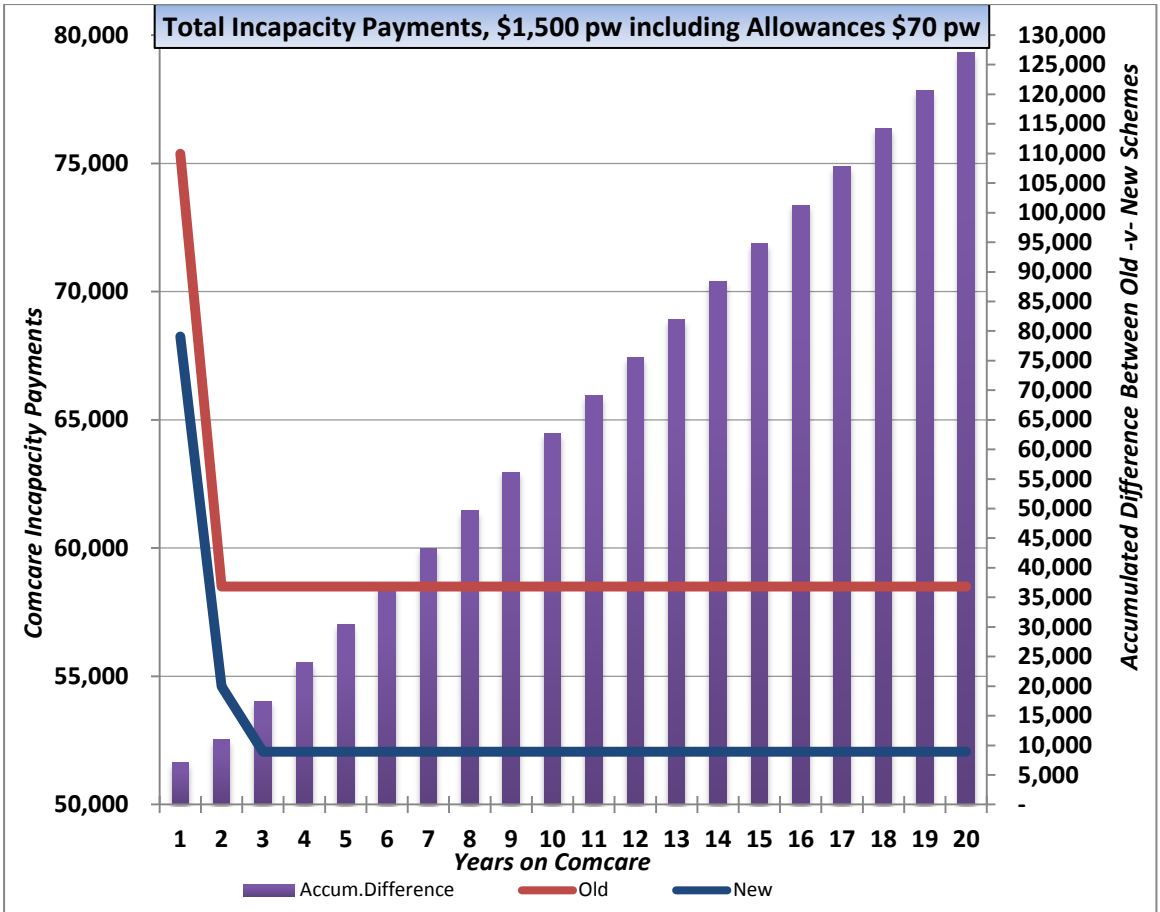
242. The Bill also introduces a cap on incapacity payments at an earlier date. By introducing a step-down at 13 weeks, the Bill applies that cap after only 13 weeks. This will increase the financial impact on those suffering from accepted compensable illnesses.

243. In order to understand the effect of the reduction, this graph compares the financial impact on a worker whose earnings are agreed at $2500 per week.



244. The Bill cuts workers entitlements to eligible allowances. The Bill only permits such entitlements to be included in the calculation of their incapacity payments for the first 104 weeks after an injury. In addition to the limit on the number of weeks, the allowances will only be included if the worker would have worked overtime during those 104 weeks.

245. In order to understand the effect of the reduction, this graph compares the financial impact on a worker whose earnings are agreed at $1500 per week with an overtime component of $70 per week.



The old scheme allows for 100% of all pre-injury income for 45 weeks and 75% thereafter The new scheme provide 100% (1st 13 weeks), 90% (next 13 weeks), 80% (for the next 26 weeks) and 70% after. In addition, after the first 104 weeks, and any allowances which were were part of the income are excluded in assessing the weekly incapacity payments. Based on a worker earning $1,500 per week (including allowances of $70 per week), under the old scheme, the compensation would be $75,375 for the 1st year and $58,500 for each year thereafter. Under the new scheme, the compensation would be $68,250 (1st year), $54,600 (2nd year) and $52,052 for each year thereafter.

246. The period immediately following an injury is crucial to recovery including allowing sufficient rest and ability to seek treatment. For those workers suffering from serious injuries, cutting incapacity payments after only 13 weeks will not allow enough time to recover. Cutting payments after 13 weeks will cause an additional financial stressor in what is already a trying time for an injured worker.

SCHEDULE 10: REDEMPTION OF COMPENSATION

247. The current scheme provides a set of criteria that must be satisfied for a worker to redeem his or her incapacity payments. The very restrictive set of criteria has meant the current redemption mechanism is very rarely used. The Bill increases the redemption amount payable from $110.65 (as at 1 July 2014) to $208.91 per week .

248. However, the Bill fails to allow workers to redeem payments on a voluntary basis, nor does it provide a mechanism for enabling a worker to separate from the system. The Bill, therefore, falls short of what is required to make the redemption provision meaningful.

SCHEDULE 11: LEGAL COSTS

249. This schedule would allow Comcare to cap injured workers costs and reimbursements, irrespective of whether the employer or Comcare have caused the disputes through wrong decision making. It consequently restricts the right of injured workers to seek a review of wrong decisions and restricts access to the justice system.

250. A worker with mounting medical expenses and no income will not be able to afford legal battles with their employer and Comcare that often behaves as if they have endless resources to deny workers Comcare benefits.

CURRENT PROVISIONS

251. Under the present Act, Comcare or a licensee is obliged to pay for the reasonable costs of any employee seeking review of a decision of a compensation paying authority to deny or limit a liability in respect of an injury.

252. The system establishes a three-tier decision making process. The first two tiers of review are internal to the decision-making authority:

a) The primary decision, if adverse to the employee's interests, must be reviewed by a second tier, review officer; and

b) It is only after that review decision is made that, if still adverse to the employee, an application for review may be made to the Administrative Appeals Tribunal.

253. At present, there is no right of an employee to have the costs of any legal representation paid by Comcare or a licensed authority until the completion of the second tier decision making process; these are borne by the employee and their Union and acts as a significant control on legal costs claimed by employees.

254. However, the decision maker (Comcare or the licensed authority) may at any time hire lawyers to act against the injured worker. There is no restriction on Comcare engaging legally qualified officers to be involved at the first two decision-making stages.

255. Only at the third tier stage of review is it possible for employees to have a right and only if they are successful, to recover some of their legal costs, in accordance with an already discounted legal costs schedule. That scale of costs used at the AAT for Comcare matters is based on the Federal Court scale and is automatically discounted by 75 percent for Comcare claimants.

256. It is Comcare and licensee decision makers who generally have control over delay in most proceedings and are the ones to promulgate costly processes that serve to increase legal costs.

PROPOSED CHANGES

257. The significant proposals to alter the present scheme entitlements are:

a) The introduction of a 'Schedule of Legal Costs' by regulations as yet unseen [proposed section 67A];

b) Conferring power to reimburse any employees costs at the earlier second tier stage of review but only on surrender of rights of review at the AAT [proposed section 62(1) and (3); and

c) Empowering the AAT to require the costs of Comcare or the licensee to be paid by the claimant in any unsuccessful review application [proposed subsection 67(10B)].

258. The proposals are inherently unfair and are not among the recommendations of the Hank's review or the recommendations of any public review.

OUR CONCERNS

LEGAL COSTS SCHEDULE

259. Limiting the costs of legal spending of the decision maker – Comcare or licensee – to a particular amount may simply mean inadequate investigation in a complex case resulting in error by reason of such inadequate attention that will make prolonging disputation inevitable.

260. To then limit an employee's rights to obtain legal assistance on review will only lead to the compounding of problems and the lengthening of legal disputes. It will lead to:

    a) Increased numbers of employees being unable to afford proper review of their rights for lack of access to legal assistance; and

    b) Consequential lengthening of review processes because an unrepresented litigant's case is most expensive and drawn out because workers have no access to independent legal advice and assistance.

261. The tenor of the proposals wrongly blames injured workers for the increasing costs of litigation without any analysis of the true operation of the system where the decision makers – Comcare and licensees - have primary control over the creation and timing of disputes and whose behavior in litigation in utilising extensive summonsing powers provided to the AAT adds significantly to the cost and delay of review.

262. The conferring of discretionary power on the decision maker to allow the recovery of costs at the earlier stage is an illusory advantage to an employee considering:

    a) The costs are limited to those in the costs schedule in control of Comcare, whose decisions are under challenge so there is no independent body able to oversee the award of those costs;

    b) The costs are designed to not reflect the true value of the legal support and resources needed to obtain such review;

    c) The award of costs is wholly discretionary;

d) The discretion is exercised by the very body whose erroneous decision is to be replaced;

e) The new decision that replaces the first decision may itself be wrong and need review; and

f) The limited and discretionary costs are payable only if the injured worker gives up the right of AAT review [proposed section 62A(1)];

g) The Courts have long regarded the AAT as part of the three-tier decision making process, not judicial review.

263. In the course of an AAT review, the decision maker (Comcare) is not bound to stand by its initial reasons for decisions if it realises it is wrong. There is no rationale for requiring the injured worker should bear such great costs as a result of securing a lawful and corrected decision through a three-tier review system.

SCHEDULE 12: PERMANENT IMPAIRMENT

264. This schedule combines lump sum and ongoing payments for permanent impairment and non-economic loss.

265. It requires the medical assessor to discount 'pre-existing' impairment so that these are excluded from compensation.

266. This will of course have the effect of reducing payments for workers with permanent impairment.

CURRENT PROVISIONS

267. The current scheme provides for a permanent impairment payment commensurate with a worker's individual experience of pain and suffering. Having reached the 10% threshold, a worker completes a Non-Economic Loss Questionnaire and is asked a series of questions about how the injury has impacted on such aspects as pain, suffering, mobility, social relationships, recreational activities and life expectancy. The worker and their treating

doctor make an assessment of the impact. The worker is thereafter awarded a payment consistent with the evidence.

268. A large number of workers are already excluded from compensation owing to the tough criteria needed to reach a 10% Whole Person Impairment (WPI). Comcare introduced the Second Edition of the Guide to the Assessment of the Degree of Permanent Impairment ("the Guide") in 2006 as a cost saving mechanism. The result was a reduction of 68% in claims.

PROPOSED CHANGES

269. This schedule proposes to:

a) Significantly reduce permanent impairment entitlements and dramatically cut payments to those suffering impairment less than 35%.

b) Eliminate any lump sum payments for permanent impairment and non-economic loss for those suffering from a secondary psychological condition.

OUR CONCERNS

PERMANENT IMPAIRMENT

270. When the Comcare scheme was introduced in 1988, the Parliament significantly increased a workers entitlement to a lump sum impairment payment to offset the workers' relinquishment of their common law rights. This must not be forgotten when reviewing the benefits available to injured workers under the scheme today. The government has sought to justify this Bill by making a simple comparison between benefits across all workers' compensation jurisdictions without consideration of the fact that state schemes include the right to pursue common law rights. The Bill significantly reduces permanent impairment entitlements and dramatically cuts payments to those suffering impairment less than 35%.

271. We attach a graph comparing payments under the current scheme and those proposed under the Bill. The graph is based on information in the Hanks review report.

272. The Bill eliminates any lump sum payments for permanent impairment and non-economic loss for those suffering from a secondary psychological condition. It is not uncommon for the secondary psychological effects of a condition to be significantly distressing. Overlooking the psychological affects when assessing compensation for permanent impairment devalues psychological illness and takes us back to a time where psychological conditions were considered less important or less real than physical conditions.

273. This is at odds with the many awareness campaigns supported by the government over recent years, which clearly highlight the dramatic impact psychological conditions can have on an individual, their family and our community at large.

274. The removal of a secondary psychological lump sum payment has a significant impact on those workers whose physical injuries do not meet the tough criteria or whose injuries are not properly covered by the Comcare Guide . For those workers who cannot obtain a lump sum payment for their physical injuries, their only means of being awarded a lump sum payment is by way of a secondary psychological claim. We provide the following case studies to illustrate the point:

a) The Bill removes a worker's entitlement to payment by rolling up this compensation into the permanent impairment assessment. In doing so, there is no consideration of the individual response to an injury, which can differ quite significantly from person to person.

b) With the elimination of permanent impairment payments for secondary psychological conditions, those experiencing permanent psychological distress will no longer be entitled to any compensation for psychological aspects of their injury.

SCHEDULE 13: LICENSES

275. Schedule 13 relates to the passage through Parliament of the 2014 Bill referred to in paragraph 58 of our submission. If enacted, this Schedule will ensure that 'liable employer' powers and claims management arrangements will apply to employers that license as self-insurers under tests that were flagged in the 2014 Bill but have yet to pass Parliament.

276. We have outlined our concerns about these proposals in the ACTU's submission on the 2014 Bill, attached.

SCHEDULE 14: GRADUAL ONSET INJURIES

277. This schedule clarifies that responsibilities for managing a claim for gradual onset injuries will rest with the most recent employer. Liability for payment of compensation will be allocated among employers and new Division 5A to be inserted into Part VIII of the Act provides mechanisms for this.

278. Eligibility will still depend upon whether the injured worker can prove the gradual onset injury was contributed to by a 'significant degree' by the worker's employment with the relevant authority responsible for the last employment that made a significant contribution to the gradual onset injury.

279. It is obvious that this will be an extremely difficult hurdle for workers with 'gradual onset injuries'. This is particularly the case given the different eligibility criteria in other state and territory schemes. We envisage that those workers who cross state and federal workers' compensation schemes may fall through the cracks and be denied compensation for what should be a work-related injury.

SCHEDULE 15: SANCTIONS

280. The philosophy in Schedule 15 of the Bill appears to be derived from the recent amendments to the Social Security Administration Act 1999 relating to Newstart recipients, but go further in relation to punishments for injured workers compared to job-seekers.

281. 'Mutual obligation requirements' refers to participation requirements designed to ensure Newstart recipients actively look for work. This Bill proposes a similar concept of 'obligations of mutuality', but goes far beyond the scheme that applies to jobseekers on Newstart allowance.

CURRENT PROVISIONS

282. Under recent amendments to the jobseeker compliance framework introduced from 1 January 2015, a jobseeker may have payments suspended for failing to attend appointments with their employment services provider without reasonable disputes;

however, payments are restored when the job seeker attends the next appointment. If reasons for not attending were reasonable, payments will be back paid.

283. Such punitive measures reasonably do not apply to injured workers, since the current scheme is geared towards rehabilitating and returning workers to a position with their current employer, rather than throwing the worker on the mercy of the open job market.

PROPOSED CHANGES

284. 'Obligation of mutuality' is defined in Part 2, Division 1 subsection 6 4(1). The sanctions regime has two levels for reduction then cancellation of compensation rights.

285. Section 29H sets out extra obligations for injured workers with psychological or psychiatric injuries. A person suffering such an injury is required, in a form approved by Comcare, to have a mental health practitioner approved by Comcare confirm the diagnosis of the workers treating doctor. The diagnosis of a general-practitioner will no longer be satisfactory.

286. The Obligation of mutuality if breached means the injured worker will lose weekly incapacity payments and the right to pursue compensation with respect their injury (or injuries) if they are determined by the relevant authority/their employer, to be without 'reasonable excuse'.

287. Section 29ZA (1) (a) and (b) of the Bill makes clear that except for compensation under section 17 or 18 (medical treatment), an employee who is subject to the cancellation regime loses rights:

(a) To compensation under the Act; and

(b) To institute or continue proceedings in relation to compensation if they without reasonable excuse;-

- Failed to accept an offer of employment;
- Accept an offer of employment but failed to engage or to continue to engage in that employment; or
- Failed to seek suitable employment with any employer and including self-employment.

288. A breach of an obligation related to suitable employment cannot be remedied by the employee. This is expressly stated in the Bill.

289. If an employee is subject to the level 1 sanctions regime, incapacity payments will be reduced by the amount the employee would have earned had they engaged in the 'suitable employment'. If the employee is subject to a further breach, even if they are very severely incapacitated, or an associated secondary injury develops, the cancellation of rights to compensation still applies.

290. This Bill proposes a three level sanctions regime for injured workers, all of which are decided by the 'the employer or Comcare. A third level results in a 'cancellation regime' applying. This means an employee's rights to compensation and to institute proceedings in relation to compensation …in respect of current and future associated injuries are permanently cancelled'. p 98 ex memo. The vulnerability of the employee is not taken into account as it is the Social Security regime, making the proposal for Comcare extraordinarily punitive.

291. A range of behaviour can be sanctioned under the Bill. Failure to attend a medical examinations; being absent from work without a medical certificate; not following medical or dental practitioner advice; not having an assessment of need for household and attendant care services; not following the employer prescribed 'workplace rehabilitation plan'; not undergoing a work readiness assessment; not providing information requested; not supplying information requested about a common law claim; not supplying a statutory declaration and not job seeking as required by the 'relevant authority are included in the range of 'behaviour' that could be sanctioned.

292. Determinations of a breach must be made by the employer, even if the 'breach' has been rectified. If a breach continues for 30 days, the continuing breach will be treated as another breach.

293. Section 29Y of the Bill states clearly that if the employee is subject to the level 1 or level 2 sanctions regime in relation to an injury, the employees' rights:

> *"29Y (1)*
>
> *(d) to compensation under this Act; and*
>
> *(e) to institute or continue any proceeding under this Act in relation to compensation;*

are suspended so far as those rights relate to the injury…."

294. Should the sanctions escalate such that the injured worker is subject to the 'cancellation regime'. *All* rights with respect to the injury are cancelled.

295. A more detailed but not exhaustive list of matters for which an injured worker can be sanctioned are set out below:

(a) Failure to comply with a requirement under Section 50 where Comcare makes or takes over a third party claim
(b) Where a diagnosis is not made by a psychiatrist within 12 weeks for a claim for a psychiatric illness
(c) An alleged failure to accept suitable employment
(d) An alleged failure to seek suitable employment
(e) Refusal or failure to undergo a medical examination
(f) Absence from work without a medical certificate
(g) An alleged failure to follow medical treatment advice (unless the failure is while obtaining a second opinion)
(h) An alleged failure or refusal to attend an assessment regarding the need for household and/or attendance care services
(i) An alleged failure to fulfil the responsibilities of a Workplace Rehabilitation plan
(j) An alleged failure to undergo or fully cooperate with a readiness assessment
(k) Alleged failure to comply with a notice requesting information.

OUR CONCERNS

296. The proposals in this Bill go above and beyond the job search requirements relating to Newstart recipients. For example:

(a) Employment service providers assist job-seekers to prepare a 'Jobs Plan' rather than a rehabilitation plan. Social Security Laws require this to include work capacity, personal needs, caring responsibilities and capacity to comply with requirements. No such compassionate tailoring is required for injured workers by the Bill.
(b) Providers must actively support job-seekers to meet their mutual obligations. Employers are not required to assist injured workers to meet the obligations of mutuality.

(c) In considering the action to take if a jobseeker has not complied with a Jobs Plan, before recording a breach the provider must take into account:

- Personal circumstances;
- System recorded vulnerability indicators;
- Compliance history; and
- Other relevant info.

297. Therefore the Social Security Administration Act sanctions regime requires that, prior to suspending job seeker payments; the decision maker must take into account the individual job seekers circumstances and vulnerabilities and restores social security payments to a job-seeker when they resume participation.
298. By contrast the Bill proposes a strict liability approach to injured worker breaches and if they have found a breach to have occurred without an excuse the employer considers reasonable, they notify Comcare without reference to the personal circumstances or vulnerability of the injured worker. The employer's obligation is simply to inform the relevant authority of breaches by the employee (29ZB).
299. These amendments are not appropriate for an injured worker whose main focus should be on returning to work with their current employer, either in their previous position or in an alternative suitable position with the employer. There is no justification for imposing such harsh job search requirements and sanctioning workers who are deemed by their employer to have failed to meet these onerous requirements.

SCHEDULE 16: DEFENCE-RELATED CLAIMS

300. The purpose of this schedule is essentially to exclude ADF personnel and veterans from being impacted by the Bill. As indicated in the summary of the Bill above, we don't oppose the provisions to protect ADF personnel and veterans from this Bill, but believe the Bill is entirely inappropriate with respect to all injured workers.

SCHEDULE 17: INTERPRETATION

301. This schedule clarifies that responsibilities for managing a claim for gradual onset injuries will rest with the most recent employer. Liability for payment of compensation will depend upon whether the injured worker can prove the injury was contributed to by a 'significant degree' by the employee's work with the employer. To the extent this schedule supports the limitation of the rights of injured workers with gradual onset injuries we oppose it.

APPENDIX A: REMOVAL OF RIGHTS BY REGULATION

We draw to the attention of the Committee the extensive number of new rules that the Bill proposes will be established or altered by regulation, thereby avoiding proper examination by the Parliament.

The Bill proposes at least ten new sets of regulations covering various topics, but which in the main provide for the removal or alteration of rights and exclusions from compensation.

As far as the ACTU is aware none of these pieces of regulation have been written, or if any have been written, they are not publicly available. The consequence of this is that the Parliament will not be informed before it votes on the Bill of the full impacts of the Bill upon injured workers including the consequences of granting extra regulatory powers to Comcare and the Minister.

Set out below in the order they appear in the Bill, are ten new powers of regulation that the Bill would give to the Minister and/or to Comcare, if passed.

Regulation 1

'Compensation Standards'

Schedule 1 provisions enable Comcare to determine a 'Compensation Standard' in relation to a specified ailment that sets out the factors that must be met as a minimum, and exist before it can be said that an employee is suffering from a specifies 'ailment' for the purposes of compensation. These factors would have to be taken into account in determining whether the specified ailment or an aggravation of the specified ailment was contributed to, to a significant degree, by the employee's employment.

S34 provides for a 'Compensation Standard' which will be a legislative instrument for the purposes of the Legislative Instruments Act 2003.' [P7 ex memorandum.]

Item 4- Subsection 4(10A) – In what is arguably an attempt to exclude independent review, these amendments ensure that only Comcare can determine a Compensation Standard under new section 7 A.

Regulation 2

‘Designated injuries’

Comcare wish to introduce new ‘designated injuries’ by regulation in addition to those injuries and illnesses already identified in the Bill. Comcare would have the far reaching power to add any injury or illness.

Regulation 3

Work readiness assessments

Comcare can make rules in relation to the form and content of work readiness assessments in legislative instruments.

If the Bill is passed Comcare will be able to make rules requiring a report of a ‘work readiness assessment’ to be given to the relevant authority. The rules to be set out in a legislative instrument will relate to ‘form and content ‘of the reports.

Relevant authorities’ will be given discretion to perform work readiness assessments.

Regulation 4

Work rehabilitation plans’

S 36A provides that a ‘work rehabilitation plan’ may require an employee to carry out specifies activities, and an obligation follows that becomes part of the employee’s ‘responsibilities’ under the plan.

S 38E empowers Comcare to make rules for ‘work rehabilitation plans’ that will be a legislative instrument

Regulation 5

Incentive scheme for employers

New S 70D – Comcare incentive scheme for employers - financial incentives for employers to provide suitable employment will be set by legislative instrument.

Regulation 6

Item 110 – Transitional rules

Gives power to the Minister to make rules in relation to transitional matters and will be a legislative instrument.

Regulation 7

Item 12

S 70C – Compensation for detriment caused by defective administration in connection with claims will be subject to Ministerial Principles which will be a legislative instrument/regulation.

Regulations 8 and 9

Schedule 5 – Medical Expenses - Item 6 ss 4(10) and (10A).

Paragraph 245 ex memo describes that Comcare to be given power by regulation to make 'Clinical Framework Principles' under new S 16A and a medical services table under new S 16B. These amendments ensure that only Comcare (not the AAT or other independent body) can formulate Clinical Framework Principles and prescribe a medical services table. This means Comcare will be able to cap compensation at will, without regard to the compensation needed for medical costs.

S 16 (3C) limits comp payable by Comcare in respect of medical treatment to the amounts specified in the medical services table.

Item 7

Comcare must have regard to the CFP's and other matters Çomcare considers relevant in determining whether it was reasonable for a worker to obtain treatment.

Clinical Framework Principles

S 16 A empowers the making of Clinical Framework Principles. These are principles to be taken into account in determining whether treatment was reasonably obtained. They will be a legislative instrument and are based on principles issues in 2005 by WorkSafe and the TAC.

Medical Services Table

New S 16B empowers Comcare to prescribe by regulation a table that sets out treatment items and compensation payable with respect to each. Inserts 57B which empowers Comcare to make a 'Medical Examination Rates Determination'. This will be a legislative instrument.

Regulation 10

Designated medical practitioner and clinics

S54A enables Comcare to designate doctors and clinics by regulation. Only if the practitioner is 'designated' by Comcare will treatments be compensated and medical bills paid. S 53A (3) and (4) enable designations to be revoked and new ones made.

Item 10 inserts a new ss 57(5A) that limits compensation in respect of a Medical Examination to an amount to be specified in the 'medical examination rates determination made under new subsection 57B.'

Item 11 inserts 57B which empowers Comcare to make a 'Medical Examination Rates Determination'. This will be a legislative instrument.

Regulation 11

Disclosure of medical information about the injured worker

New S 71A (6) enables Comcare to disclose information about medical treatment in relation to an injury suffered by a worker 'to a professional disciplinary authority. Comcare can impose conditions in respect of classes' of disclosures by legislative instrument. S 71 B also empowers Comcare by legislative instrument to identify healthcare practitioners by reference to a class of persons.

Regulation 12

Medical treatment reports

A 'relevant authority' can request a written medical report from a provider of medical treatment. The RA is required to pay a cost as specified in a 'Medical Treatment Reports Determination' made by Comcare (also a legislative instrument).

Regulations 13 and 14

Household Services and Attendant Care Services

Item 1-3, 8.1 SS 4 (1) Attendant care providers will have to be accredited, registered and approved. Only Comcare can accredit. S29 enables regulations to be made about the accreditation of persons and corporate bodies. News 29E enables regulations to be made about the registration of individuals and corporations as registered providers of attendant care services. S29 enables regulations to be made about approvals.

Item 5

8.2 The term catastrophic injury which will 'govern the amount and duration of comp payable for household services and attendant care will be defined in regulations. Based on the definition in the NIIS.

Regulation 15

Schedule 11 – Legal costs

This schedule empowers Comcare develop a new Schedule of Legal Costs as a disallowable instrument and thereby override Court awards. Paragraph 406 explanatory memorandum makes clear the intent is to reduce the overall amount of costs that may be awarded or reimbursed to a claimant who has disputed Comcare and won. This gives Comcare the power to override the powers of the Courts.

APPENDIX B: RESTRICTION OF MEDICAL TREATMENT SUPPORT

Current Provisions

Under the present Act, Comcare or a licensee is obliged to pay for the reasonable costs of medical treatment received by the employee for an employment injury. Medical treatment is defined reasonably broadly to meet the needs of injured employees with the widest variety of medical needs. The provisions of the current Act allow for concurrent treating doctors in more complex clinical settings. There is no limit on the variety of healthcare practitioners that may be called upon by the principal treating doctor to assist in the injured employee's treatment.

The privacy of the doctor and patient relationship is provided for and only when in the course of a legitimate dispute concerning a case at a recognised independent review at the Tribunal will that privacy be disturbed with the protections afforded all litigants and limitations upon unrestricted use of summonsed materials.

An injured employee retains the right to accept or reject medical advice like any other patient. It is only where there is clear evidence that a failure to undergo curative treatment without reasonable excuse that compensation payments can be refused.

In the event of any dispute about treatment, the employee has a right to independent review. On review the Tribunal may enquire into whether the treatment proposed is one that meets the definition of medical treatment, whether it is directed at the injury and whether the cost is reasonable in the circumstances.

It is not the place of any decision maker in the system, whether Comcare, a licensee, or the Tribunal on review, to determine what treatment is to be provided to the injured employee. The decision makers cannot act as medical providers. If there is a division of opinion about the value of treatment, being a matter about which minds may differ, say, concerning the efficacy of a surgical procedure, the accepted approach is to ask whether the proposed treatment is one of a variety of treatments that a responsible body of practitioners could provide. If so, the decision maker is to allow the treatment and does not interfere in the relationship between the injured employee and their chosen medical practitioner.

Proposed Changes

The significant proposals to alter the present scheme entitlements are:

- The imposition of 'Clinical Framework Principles', yet to be defined, having the force of statute [proposed new section 16A] and to be used as the basis for determining what treatment is reasonable for an injured employee to obtain [proposed subsections 16(3A)], together with redefining suitability of treatment by reference to 'the necessity for the medical treatment in the circumstances' [proposed subsection 16(3B) and in particular 16(3B) (b)].
- The power for Comcare to create its own 'medical services table' to define limits on treatment costs [proposed section 16B] and to use such a table to limit payment of costs [proposed subsection 16(3C)] as well as a 'Medical Treatment Reports Determination' to limit the costs of provision of medical information by a treating doctor or specialist [proposed section 115A].
- Requirements for injured workers to choose a 'designated medical practitioner' and 'designated medical clinic approved by Comcare' [proposed section 54A].
- Sanctions for rejecting medical treatment advice [proposed section 29P].
- Significant power or Comcare to obtain information about the worker from third parties (anticipated to be doctors) and powers to force the claimant or injured employee to obtain their doctor's private clinical notes [proposed sections 58, 58A, 120A and 120B].

'Clinical Framework'

The Bill proposes to end treatment at the discretion of the treating medical practitioner in consultation with the patient and substitute "Clinical Framework Principles", decided at the discretion of Comcare which has no direct responsibility for the treatment of patients, only responsibility for meeting the cost of the treatment.

If Comcare decides that for any given medical condition, only certain treatments should be followed, regardless of the circumstances of any individual case, the treating doctor of the injured employee is bound to accept that limitation, regardless of the clinical view as to the appropriate course of treatment or require that the injured employee meet the costs over and above.

This is an unwarranted interference in the doctor patient relationship. There can be no single 'Clinical Framework' for all cases without taking into consideration the specific factors of each patient and their needs. It is impossible to define all such needs in advance of the circumstances actually arising. It will lead simultaneously to:

failing to treat injuries following a protracted and difficult clinical course; and potentially mistreating injuries in a misguided attempt to follow a predetermined, Comcare-defined, 'Clinical Framework' which may not be appropriate in a particular case but which needs treatment.

The Clinical Framework cannot be challenged because it would be, by proposed section 16A, a legislative instrument, having the force of law, one which all review bodies must observe no matter how inappropriate such a 'Clinical Framework' may be generally or in any particular case.

Ultimately, for a case falling outside the 'Clinical Framework' the injured employee will be faced with the decision to either:

1. bear the burden of costs not within the 'clinical Framework'; or

2. undergo treatment that the treating medical practitioner exercising clinical skill and experience, does not recommend in the particular case which may be of no therapeutic benefit.

Medical Services table, Medical Treatment Reports Determination and Medical Examination Rates Determination

Further, in a step away from the general rule of payment of medical treatment in circumstances where the treatment is reasonable on the basis of cost, the Bill now proposes:

- Comcare is to establish a 'medical services table' specifying limits on the costs of treatment [proposed section 16B subsection 16(3C)];
- Comcare is to define the fee for Medical Examination Rates [proposed section 57B];

The limitation on the payment of medical services will only have the effect of forcing further cost burden onto injured workers. Such an inequitable provision will have the effect of:

- Deferring treatments, perhaps indefinitely, on the grounds of cost at a time when an injured employee's capacity to earn may be seriously compromised;
- Leading to the deferral of therapeutic or even curative surgery, on the grounds that the costs of surgery and possibly prosthetics will not be fully met; and

- Resulting in more cases of injury leading to permanent impairment where timely intervention would lead to better therapeutic outcomes.

Such inequitable outcomes will only push the problems into the public system, lengthening public hospital waiting lists for surgical treatment (and thereby delaying treatment to patients on such lists who are not entitled to compensation); it will delay the injured employee's recovery leading to lengthening periods of incapacitation for work.

The proposed 'Medical Treatment Reports Determination' limits the costs payable to a treating medical practitioner who responds to a request for report by a relevant compensation authority.

However, the cost of reports obtained from medico-legal examiners engaged by the same compensation authorities, are not so limited. The opinions of those medical practitioners who undertake treatment of injured employees is thereby undervalued in favour of non-treating commentators who have no responsibility for treating the injured employee. Such a provision will only entrench an anti-treating doctor attitude within compensation authorities and lead to poor outcomes, devaluing the opinions of those charged with the care of injured employees.

The proposed 'Medical Examination Rates Determination' power in proposed section 57B, placed in Part V of the Act dealing with Claims management matters is limited to examinations required by a relevant authority for the purposes of determining liability to pay compensation.

Designated medical practitioner or clinic

The Bill proposed section 54A is to be inserted within the Part V of the Act dealing with Claims for Compensation and provides that the injured employee when making a claim for compensation may nominate to Comcare or a licensee a 'designated medical practitioner' or a 'designated medical clinic'.

The nomination is relevant to the payment of medication expenses. Only such expenses as are incurred following the prescription of a designated medical practitioner or clinic count as medical treatment.

The proposed section 54A would establish a regime whereby for each different practitioner who may become involved in the case, the injured employee must revoke a prior designation [subsections 54A (3) and (4)] and designate a new practitioner or clinic. The nomination process in the proposed section is designed for a single practitioner only.

Such a singular nomination must be made prior to the prescription of any medicine, since only the provision of a section 8 medicine by such a designated practitioner or clinic is recognise as medical treatment.

This limitation:

- unfairly limits the injured employee's freedom to seek alternative practitioners;
- renders concurrent treatment non-compensable; and
- increases the bureaucratic, or 'red tape' costs in the Comcare system.

The prescription of scheduled medicines in often coordinated by concurrent treating doctors, in situations where a general practitioner refers a patient for specialist physician review or surgical advice or intensive specialist adjunct treatment. Concurrent treating doctors dealing with the particular specialist needs of an injured worker patient routinely provided medicines affected.

In a simple case of medicines might be prescribed by a general practitioner designated for the purposes of the Act. That practitioner may refer the injured worker to a surgeon who proposes surgical treatment and further medications associated with the surgery and post-operative recovery periods without wishing to interfere with the general practitioner's treatment regime.

In another case, an injured worker may develop a particular complication derived from an injury requiring specialist physician intervention. The specialist may prescribe medicines to the injured worker designed only to deal with the particular complication affecting a body part or system not otherwise treated by the general practitioner but without cutting across the general practitioner. Even in such simple common cases, without delving into more complex cases involving multiple concurrent practitioners, the system of limiting treating to a 'designated medical practitioner' or 'designated medical clinic' would have adverse health outcomes.

The injured worker would only be able to get compensation for certain medicines prescribed by one designated practitioner, in spite of the fact that all such medicines are directed to the treatment of the patient and are in many cases designed to be taken together with medicines prescribed by concurrent practitioners. Were an injured employee to alter the designated practitioner so as to get compensation for the different medicines prescribed by the specialist, then those medicines, which until that point were compensable, cease to be compensable. This leads to an absurdity in the treatment of injured employee patients.

Sanctions for rejecting medical advice

Proposed section 29P makes the rejection of medical treatment advice from any 'legally qualified medical practitioner' who is said to be 'reasonable' to be a breach of an 'obligation of mutuality' which is a concept that is defined as any 'act or omission that is declared by this Act to be a breach of an obligation of mutuality'.

The alleged definition of 'breach of an obligation of mutuality' fails to identify the parties said to have any mutual obligations or the obligations on the non-employee party that might be owed. It is essentially meaningless and provides no rationale for the sanctions regime that is in fact the intended purpose.

What is important to note is that the 'legally qualified medical practitioner' referred to in the proposed section is not defined to be a treating doctor. A medico-legal commentator, not charged with the responsibility of treating the patient may make treatment recommendations, presumably within the proposed 'Clinical Standards Framework,' yet to be defined by Comcare, without reference to the treating doctor.

Such a proposal would allow substitution of opinion from non-treating doctors over those of the doctors who have undertaken the responsibility of providing medical care within their professional area for their patient. It is a significant intrusion upon the widely accepted community standard that respects the doctor-patient relationship.

While it is not currently proposed to cover refusal of surgery or to take or use a medicine, it is intended to cover 'medical treatment advice' covering 'one or more items of medical treatment' or engaged in 'conduct that is incidental to obtaining such treatment' meaning conduct 'preparatory to an item of medical treatment', ancillary to such an item or 'directed towards ensuring that the person derives the full benefits of an item of medical treatment'.

Such definitions reflect an attitude that the patient who suffers employment injury is to blame for not recovering. It establishes a potential for compensation payers to define a treatment regime that the injured employee's doctor may not agree with. In such a case, the treating doctor is not in control of the patient's treatment.

The long term effect will be to cause treating doctors to increasingly avoid treating patients with employment injuries because of the intrusion of contrary opinion from practitioners not charged with the responsibility for treating the patient.

Private medical records obtainable by Comcare and the employer

The Bill proposes allowing the relevant authority to obtain any records from a third party in new sections 58A (in respect of a 'claimant' who might include the legal personal representative of an employee or the dependent of a deceased employee) and new section 120B (in respect of the injured employee).

An intrusion into the privacy of relationship by the forced surrender of private patient medical records occurs in the context of the Bills new proposed section 71A empowering Comcare to disclose 'information relating to medical treatment obtained in relation to an injury suffered by an worker to a professional disciplinary authority, to be prescribed by regulations.

Further, the Bill proposes, with sanctions for failing to comply, to allow relevant authorities to require claimants (section 58) or injured employees (section 120A) to obtain 'information or a document that is relevant to a claim' within a specified period of time. The sanction is refusal to deal with the claim for non-compliance.

The 'information or documents' can include the treating medical practitioner's clinical medical notes.

The Bill's new proposals in respect of demands for information and documents uses the Commonwealth's legislative power to obtain access to private clinical notes for routine administration of claims. This marks a serious departure from privacy principles and intrusion on privacy of medical treatment records.

The records taken by Comcare may be used for any administrative purpose in the existing claim, and past and even future claims that have or might be made.

Comcare is not bound to restrict the use to a disputed matter before a duly appointed independent Tribunal with statutory powers to summons document (and thereby limiting the use of such records to the dispute at hand only).

Injured workers may be penalised for not complying with such demands as would intrude into their private treatment records.

Intrusion by Commonwealth authorities and private licensed corporations' private medical records will have one or two probable effects:

1. The destruction of the privacy between patient and treat will encourage medical practitioners to avoid treating injured workers altogether, or ceasing to treating doctor their patient on becoming a claimant or recipient of compensation, in order to guarantee privacy of medical treatment relationships.

2. The knowledge that private clinical notes will become the reading matter of compensation paying authorities will cause doctors to amend the way they prepare notes so as not to disclose matters properly kept private, with the attendant risk that the notes are less effective in allowing a doctor to properly records and track the clinical progress of their patient.

The uninformed inspection of clinical notes, not properly understood in the context of the patient and doctor relationship, will only engender false reporting to such disciplinary authorities and create regulatory mischief with no benefit that can be calculated to assist an injured worker.

ADDRESS

ACTU

365 Queen Street

Melbourne VIC 3000

PHONE

1300 486 466

WEB

actu.org.au

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