



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: InjuryComp:RElw889660

19 August 2014

The Hon. Dominic Perrottet, MP  
Minister for Finance and Services  
Level 36 Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Minister,

**Safety, Rehabilitation and Compensation Amendment Bill 2014**

I am writing to you on behalf of the Law Society's Injury Compensation Committee ("the Committee") with respect to the Safety, Rehabilitation and Compensation Bill 2014 (Cth) ("the Bill"). The Bill was tabled in Federal Parliament on 19 May 2014 and has been the subject of a Senate Inquiry. It is expected the Bill will be debated when Parliament resumes in late August.

As you know, the Committee has taken an active part in contributing to the various reviews of aspects of the NSW workers compensation scheme this year. The Committee remains committed to playing a constructive role in ensuring a viable, fair and improved scheme, and to this end draws your attention to concerns regarding the impact of the proposed legislation.

A copy of the submission of the Law Council of Australia to the Inquiry is attached. The Committee shares its views with respect to the expansion of the Comcare scheme and the potentially adverse ramifications for the NSW scheme.

The Bill seeks to amend the *Safety Rehabilitation and Compensation Act 1988* and the *Work Health and Safety Act 2011* to expand the eligibility of corporations to self-insure through the Commonwealth's Comcare scheme. The amendments enable those corporations which are currently required to meet workers compensation obligations under two or more workers compensation laws of a state or territory to apply to the Safety, Rehabilitation and Compensation Commission ("the Commission") to join in the Comcare scheme. The Bill also enables the Commission to grant group licences to related corporations. This "national employer test" will replace the previous "competition test".

Together the amendments will have the effect of expanding significantly the number of employers who will be operating under the Comcare scheme and this shift raises concerns for the NSW scheme. The potential for large numbers of employers to opt out of contributing to the premium pool at state level may have negative consequences for the financial viability of the NSW scheme. At the very least it is suggested that an exodus from the NSW scheme would introduce instability and volatility into the valuation of the scheme.

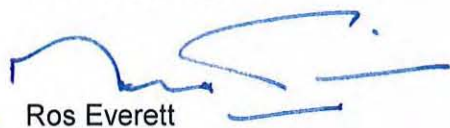
It is also submitted that the Bill will introduce increased complexity for work health and safety regulation where workers at the same site have different employers with some falling under Comcare and others subject to state legislation. Overlapping safety regimes can create complexity, duplication, additional red tape and costs.

Finally, as pointed out by the Law Council, workers injured in NSW will lose access to their common law rights if the employer chooses to move from the NSW workers compensation scheme to self-insurance under the Comcare scheme. Such workers will also have different benefits and restricted rights of access to compensation as a result of the extension of exclusions also proposed in the Bill.

It is the Committee's understanding that these concerns have been put to the Federal Government by other jurisdictions.

The Law Society's Chief Executive Officer, Michael Tidball, or I would be happy to discuss the issues raised further should you so wish.

Yours sincerely,



*pw*  
Ros Everett  
**President**



Law Council  
OF AUSTRALIA

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# **Inquiry into the Safety, Rehabilitation and Compensation Amendment Bill 2014**

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**Senate Education and Employment  
Committee**

**2 June 2014**

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## Introduction

1. The Law Council of Australia welcomes the opportunity to comment on the proposed Safety, Rehabilitation and Compensation Legislative Amendment Bill 2014.
2. As outlined in **Attachment A**, the Law Council is the national peak body for the Australian legal profession, effectively representing around 60,000 Australian lawyers through the law societies and bar associations of the states and territories, and the Large Law Firm Group Ltd (collectively referred to as the "Constituent Bodies" of the Law Council).
3. This submission concentrates on three aspects of the Bill:
  - The expansion of the SRC scheme, through the issuing of self-insurance licences to "national employers";
  - Amendment of serious and wilful misconduct provision (Section 14(3) of existing Act); and
  - Abolition of recess claims (Section 6(1)(b) of the existing Act).

## Expansion of the scheme

4. The proposed amendments will replace the existing "competition test" with a "national employer test" for determining whether a corporation can join the Comcare/SRC Act scheme. The stated aim is to "broaden the range of corporations that can seek to enter the Comcare scheme and allowing multi-state employers to reduce their compliance costs in maintaining workers compensation coverage."<sup>1</sup>
5. The Law Council agrees that the "competition test" is interpreted in a way that allows a broad range of corporations to apply for licences under the scheme. A "national employer test" is considered to be a more readily applied.
6. Further, the Law Council has advocated greater national uniformity in workers' compensation provisions, although the preferred approach is to adopt best practices from each jurisdiction in developing harmonising legislation, rather than simply enabling national employers to opt-out of state/territory schemes.<sup>2</sup>
7. The Law Council does not regard the SRC Act as being the flagship for a best-practice workers compensation scheme.
8. A major concern is that the expansion of the SRC scheme will have ramifications for the financial viability of existing State and Territory workers' compensation schemes, particularly as it is unclear as to whether any actuarial analysis has been undertaken in respect of the effects on these schemes.

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<sup>1</sup> Explanatory memorandum, page 1

<sup>2</sup> See Law Council Position Paper on *Workers Compensation: Toward National Harmonisation*, 11 November 2009.

9. Although it is contemplated that the SRC Act scheme will attract existing businesses that self-insure this is not guaranteed in the legislation and the exodus of premium paying national employers from State and/or Territory schemes would undoubtedly adversely affect existing pooling arrangements and premiums for medium to small businesses in those jurisdictions.
10. Until such actuarial analysis has been undertaken, the Law Council would urge that entry to the scheme be limited to national employers currently self-insuring within existing State and/or Territory schemes.
11. The Law Council is also concerned that employees working side-by-side at a work site may enjoy very different rights and entitlements if they are injured, simply based on an insurance decision of their employer. If implemented, employees of self-insurers under Comcare would lose their common law rights, which disadvantage workers in all states, except South Australia and the Northern Territory.
12. The Law Council recommends that sections 44 and 45 of the existing Act be amended to provide that common law rights will continue, subject to the law in the jurisdiction of the accident.

## **Amendment to serious and wilful misconduct provision**

13. Currently Section 14(3) of the SRC Act provides that "Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment."<sup>3</sup>
14. The Bill will remove the words "unless the injury results in death, or serious and permanent impairment." The Law Council is opposed to this amendment, on the basis that:
  - a. the existing formulation is contained in all State and Territory workers compensation legislation.<sup>4</sup>
  - b. in 2012-13 a review into the *Safety, Rehabilitation and Compensation Act* by Mr Peter Hanks QC and Dr Allan Hawke AC<sup>5</sup> found that:

"...these provisions are working satisfactorily and do not recommend any changes to them."<sup>6</sup>

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<sup>3</sup> Section 14(2) provides that compensation is not payable for injury that is intentionally self-inflicted.

<sup>4</sup> s82(3) *Workers Compensation Act 1951* (ACT); s14 *Workers Compensation Act 1987* (NSW); s84(4) *Accident Compensation Amendment Act 2010* (VIC); s22 *Workers' Compensation and Injury Management Act 1981* (WA); s130 *Workers Compensation and Rehabilitation Act 2003* (QLD); s25(2) *Workers Rehabilitation and Compensation Act 1988* (TAS); s30B(2) *South Australia Workers Rehabilitation and Compensation Act 1986*; s57 *Workers Rehabilitation and Compensation Act* (NT).

<sup>5</sup> [http://docs.employment.gov.au/system/files/doc/other/src\\_act\\_review\\_report.pdf](http://docs.employment.gov.au/system/files/doc/other/src_act_review_report.pdf)

<sup>6</sup> Para 5.102, page 48.

- c. the Law Council believes there is value in uniformity and no case has been made for the need to change it.
  - d. if a worker is killed or the injury results in serious and permanent impairment there may be real difficulties in being able to answer whether these injuries arose from "serious and wilful misconduct" and this evidentiary burden is unfair to the worker, beneficiaries and the family of that injured employee.
  - e. it is contrary to the no-fault underpinning of workers compensation schemes, by introducing fault as an absolute bar to compensation.
15. The Law Council submits that workers' compensation schemes are predicated on a presumption that those who are unable to work or suffer loss due to injury sustained in the workplace should receive compensation, treatment, care and support to assist in their recovery. The provision of this care, is regardless of whether the worker was at fault, or whether their injury arose from serious and wilful misconduct. Further, if the consequences are sufficiently serious, compassion should be a primary consideration, given the worker and his/her family will have already suffered.

## **Recess claims**

16. The Law Council notes that recess claims were abolished in 2007 only to be reintroduced in 2011. It is now proposed that they be abolished again.
17. The rationale for reinstatement of off-site recess/break claims was that "This will realign the Comcare scheme with most jurisdictions and remove the inequity in coverage for employees whose employers do not provide on-site facilities for meal breaks."<sup>7</sup>
18. On balance the Law Council is of the view that recess claims this should be retained.
19. The majority of jurisdictional workers' compensation schemes provide compensation in respect of recess claims and there is value in greater national consistency. There is also value in ensuring workers are covered for meal breaks, irrespective of whether they choose to remain on-site or venture off-site.
20. The Law Council is happy to answer any questions or discuss any issues with the Committee.

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<sup>7</sup> Second reading speech in respect of SRC Amendment Bill 2011  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-03-23%2F0033%22>

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.