THE LAW SOCIETY
OF NEW SOUTH WALES

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Safety, Rehabilitation and Compensation Act Review
Department of Education, Employment and Workplace Relations
GPO Box 9880
CANBERRA ACT 2601

7 May 2013

By email: WorkersCompenastionPolicy@deewr.gov.au

Dear Sir/Madam

***Safety, Rehabilitation and Compensation Act* Review**

Please find attached a submission from the Law Society of NSW's Injury Compensation Committee in response to the recommendations of the *Safety, Rehabilitation and Compensation Act* review.

Should you have any queries about the submission, please direct them in the first instance to Patrick McCarthy, Policy Lawyer for the Injury Compensation Committee, on (02) 9926 0323 or at patrick.mccarthy@lawsociety.com.au.

Yours faithfully

per **John Dobson**
President

Injury Compensation Committee submission

1. On 24 July 2012, the Honourable Bill Shorten MP, Minister for Workplace Relations, announced a review of the *Safety, Rehabilitation and Compensation Act 1988* to be undertaken by Mr Peter Hanks QC and Dr Allan Hawke AC. The terms of reference outlined the review would report on:

   a. Updating the legislation and operation of the scheme, including any legislative anomalies and updates that need to be addressed;

   b. The performance of the Comcare scheme and ways to improve its operation; and

   c. The financial and governance framework of the Comcare scheme.

2. These terms of reference were subsequently further defined by Mr Hanks QC in an Issues Paper on 13 September 2012.

3. The Law Society's Injury Compensation Committee (the Committee) welcomes many of the recommendations made by Mr Hanks in his report dated February 2013.

4. However, there are a number of recommendations about which the Committee has concerns because of the potential for negative impacts upon NSW based workers currently covered by the scheme and those who may become covered by the scheme if eligibility is expanded. The Committee is also concerned that small business holders in the State may be unable to compete with larger employers if the scheme's coverage is expanded.

5. In particular the Committee contends that the current eligibility requirements and the moratorium on self–insured licensees should continue. This is because of:

   - the underperformance of Comcare in critical areas, particularly in "return to work" outcomes, a focus of the NSW compensation scheme;

   - the unknown impacts upon the financial viability of the State and Territory schemes and smaller employers as a result of large employers exiting those schemes and thereby reducing the premium base to deal with long-tail liabilities;

   - the creation of the benefit regime under Comcare to meet the needs of the public service where there is a comparatively low risk of significant physical injury. The Committee considers Comcare is unsuitable for most other industries, particularly high injury risk industries, and does not adequately recognise or compensate significant physical injuries.

6. The Committee provides the following comments in response to specific recommendations:

   a. *Extension of the Comcare scheme to "national employers"*

      Self-insurance under Comcare should not be viewed as a right for companies to save money.

The Comcare scheme was designed for public servants and not for those involved in high risk industries. The Comcare scheme does not hold employers to account in the same way the State and Territory schemes do for breaching their work, health and safety obligations.

A no-fault scheme for those industries which carry a high risk of injury could result in the relaxation of safety regulations and thereby increase the risk of injury to workers.

State schemes may be left holding the long tail liabilities of companies which transition to Comcare under the broadened definition, with a reduced premium base to meet the liabilities. It follows that the costs will be borne by those employers remaining in State and Territory schemes, and that there would be a disproportionate impact or cost for small to medium sized premium payers.

b. *Granting of group licenses*

The Committee does not support the recommendation to allow the granting of group licenses to companies of licensed self-insurers with more than one entity.

Subsidiary companies will likely not be subject to the same rigour to which the parent company was subject when applying for the initial license. Consequently, such companies may be granted licenses despite being poor performers in injury prevention, claims management and work, health and safety standards. The Committee recommends each company be required to make an application for a license so that superior work, health and safety standards can be assured.

c. *Common law entitlements*

The recommendation to maintain the cap on common law damages disregards the important role of the common law in exposing workplace health and safety risks and holding negligent employers to account for the harm they have caused.

d. *Redemptions*

The recommendations in respect of voluntary redemptions are inadequate. The Committee submits that the cap proposed for redemption be omitted.

e. *Expansion of the Fair Work jurisdiction*

The Committee rejects the recommendation that jurisdiction be given to Fair Work to review reviewable decisions under the SRC Act that involve workplace issues. Cases before the Administrative Appeals Tribunal commonly involve a number of issues. Consequently, whilst it is envisaged an employee could opt for Fair Work to determine the matter in certain situations rather than the AAT, in reality an employee will be required to run two cases on the same issues in two separate jurisdictions, a process which will be costly for both employee and employer.

f. Divesting claims decision-making power to premium payers

Finally, the Committee notes another significant recommendation of the review is for decision-making, including in relation to liability, to be divested from Comcare to premium paying Commonwealth agencies. Whilst employers from such agencies have expressed concerns about decisions made by Comcare on their behalf, if this proposal is accepted, it will result in the quality of decisions being left in the hands of various agencies, employing many decision-makers who have no or limited experience in exercising this responsibility. As a consequence of divestment of decision-making powers the Committee is concerned the quality of decisions will be inconsistent and variable, and therefore result in an inestimable increase in disputation to be dealt with by either the AAT or Fair Work.

7. In summary the Committee contends:

- Employer eligibility for the Comcare scheme should not be expanded, nor the moratorium lifted.
- Common law benefits should be restored, and at least indexed from the date quantum was frozen, so that they bear a relationship to the severity of injuries and the culpability of a negligent employer.
- Redemption arrangements also assist a scheme to manage long-tail liabilities and play a very valuable role in allowing injured workers to get on with their lives.
- The recommendations to alter the jurisdiction of the Administrative Appeals Tribunal and confer some jurisdiction upon the Fair Work Commission are misguided and require re-consideration to avoid duplication, confusion and unnecessary costs.