Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014

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Law and Bills Digest Section

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House: House of Representatives
Portfolio: Employment
Commencement: Various dates as set out in the table in section 2 of the Bill.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
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Purpose of the Bill
The purpose of the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (the Bill) is to implement some of the recommendations of the Review of the Safety, Rehabilitation and Compensation Act 1988 by Peter Hanks QC and Dr Allan Hawke AC which had been commissioned by the former Australian Labor Party (Labor) Government in 2012 (SRC Act review reports).¹

Structure of the Bill
The Bill is comprised of five schedules:

• Schedule 1 extends the criteria applying to a corporation which is seeking a self-insurer licence. 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 the Comcare scheme

• Schedule 2 enables the Commission to grant group licences to related corporations and makes consequential changes to extend the coverage provisions of the Work Health and Safety Act 2011 (WHS Act)² to those corporations that obtain a licence to self-insure under the SRC Act

• Schedule 3 excludes access to workers’ compensation where a person engages in serious and wilful misconduct, even if the injury results in death or serious and permanent impairment

• Schedule 4 excludes access to workers’ compensation where injuries occur during recess breaks away from an employer’s premises and

• Schedule 5 contains minor technical corrections to the WHS Act.

Background
Comcare scheme
The Safety, Rehabilitation and Compensation Act 1988 (SRC Act)³ underpins the Comcare scheme, which provides for the rehabilitation and compensation of injured employees employed by:

• Commonwealth Government agencies and statutory authorities that pay premiums to Comcare under the SRC Act

• Australian Capital Territory Government agencies and authorities that pay premiums to Comcare under the SRC Act and

• Commonwealth authorities and eligible corporations that have been granted self-insurance licences by the Commission under the SRC Act.⁴

The groups covered by the first two bullet points above are referred to as premium payers, whilst the group covered but the last of the bullet points are referred to as licensees.

The Commission and Comcare are co-regulators of the SRC Act.⁵ The SRC Act is administered by Comcare under the auspices of the Commission. Broadly, Comcare provides safety, rehabilitation and compensation services to the Commonwealth. The Commission oversees the activities of Comcare and other service providers under the SRC Act. It is also develops policy and determines the level of contributions and premiums for employers. The rehabilitation and compensation framework under the SRC Act and the work health and safety requirements under the WHS Act are together referred to as the Comcare scheme.

⁴. P Hanks QC, Safety, Rehabilitation and Compensation Act review report, op. cit., p. 5. The SRC Act also applies to members of the Australian Defence Force who were injured before 1 July 2004 during non-operational service. The Department of Veterans’ Affairs administers those claims on behalf of the Military Rehabilitation and Compensation Commission.
⁵. SRC Act, sections 89B and 89C (Commission); sections 69 and 70 (Comcare).
Reviews of the Comcare scheme

Since 2004, the Comcare scheme has been the subject of a number of reviews including:

- by the Commonwealth Department of Education, Employment and Workplace Relations in 2009: *Report of the review of self-insurance arrangements under the Comcare scheme* (Review of self-insurance arrangements)\(^7\) which was prepared after receiving a report from consulting actuaries, Taylor Fry (Taylor Fry report)\(^8\)
- by Dr Allan Hawke AC in 2012 in relation to the Comcare scheme’s performance, especially its governance and financial frameworks (Hawke report)\(^9\) and
- by Peter Hanks QC in 2013: (Hanks report). Together the Hawke and Hanks reports are the *SRC Act Review reports*.\(^10\)

Comments in relation to the recommendations from the above reports are canvassed under the relevant Schedule heading within this Bills Digest.

Committee consideration

**Senate Education and Employment Legislation Committee**

On 15 May 2014 the Senate Selection of Bills Committee recommended that the provisions of the Bill be referred to the Senate Education and Employment Legislation Committee (the Senate Committee) for inquiry and report by 8 July 2014.\(^11\) The comments made by submitters to the Senate Committee are canvassed under the heading 'Key issues and provisions' below.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills has no comment on the Bill.\(^12\)

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) noted that, according to the statement of compatibility, if passed, the Bill will expand the eligibility criteria for licensing under the SRC Act and so bring more employers, and therefore employees, under the Comcare scheme. In that case, employees moving to the Commonwealth scheme may receive a 'different amount of compensation' than they would have under their previous state or territory scheme.

Of concern to the Human Rights Committee was that variations in compensation amounts might reduce the amount of compensation being received by an injured worker, and so represent a limitation on the right to social security and the right to enjoy just and favourable conditions of work.

The Human Rights Committee has, therefore, sought information from the Minister for Employment to seek clarification about whether the proposed changes to the licensing system may limit the right to social security and the right to enjoy just and favourable conditions of work and, if so:

- whether the limitation is aimed at achieving a legitimate objective
- whether there is a rational connection between the limitation and that objective and

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11. The details of the terms of reference, the submissions to the Senate Education and Employment Legislation Committee and the final report (when published) are available on the *inquiry website*, accessed 16 June 2014.
• whether the limitation is proportionate to that objective.  

At the time of writing this Bills Digest the Minister had not responded to the Human Rights Committee.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

**Financial implications**

According to the Explanatory Memorandum there will be no financial impact to the Commonwealth from the Bill.

**Schedule 1—key provisions**

The provisions in Schedule 1 of the Bill commence on the earlier of a single day to be fixed by Proclamation or six months after Royal Assent.

**Background**

In Australia, constitutional responsibility for workers’ compensation primarily resides with state and territory governments. As a result, there has been a proliferation of inter-jurisdictional inconsistencies relating to:

• eligibility for workers’ compensation
• the range and level of payments
• access to common law damages
• premium setting principles
• injury management arrangements and
• dispute resolution mechanisms.

The issue of these inconsistencies has, from time to time, attracted the attention of policymakers and scheme administrators. In March 2004 the Productivity Commission report put the matter back on the agenda.

The Productivity Commission report proposed a national workers’ compensation scheme for corporate employers, particularly those with operations in more than one jurisdiction, which would operate in conjunction with existing state and territory schemes. The Government of the day did not support the key elements of the Commission’s proposed national framework model. However it did leave open the prospect of granting self-insurer licences under the existing provisions of the *SRC Act*.

The self-insurance arrangements in the Comcare scheme provide competitive neutrality for those corporations competing in the market place with Commonwealth-owned, or formerly Commonwealth-owned businesses to ensure that the Commonwealth did not have an unfair advantage. Initially, all the self-insurers were either owned, or formerly owned Commonwealth authorities.

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14. The Statement of Compatibility with Human Rights can be found within the Explanatory Memorandum to the Bill.
17. In the early 1970’s the Woodhouse Committee called for the dissolution of state and territory workers’ compensation schemes and the establishment of a comprehensive national accident compensation scheme, based on the New Zealand model. A further attempt was proposed in an *Industry Commission report* published in 1994.
19. Ibid., p. xxxiv.
However, a self-insurance licence was subsequently issued to Optus on the grounds that it was able to satisfy the ‘competition test’ in section 100 of the SRC Act in that it was carrying on a business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority, being Telstra. This was followed by applications for national self-insurer status from other major Australian corporations such as Toll Transport Pty Ltd, the National Australia Bank and Linfax.22

In response to these applications, the Government enacted amending legislation in 2006 that gave national self-insurers the opportunity of securing coverage under Federal workplace health and safety laws.23

Self-insurer licencees

‘Licensees carry the financial risk for their own claims and manage them either directly or through contracted third party claims administrators’ in a manner which is consistent with the provisions of the SRC Act.24 From the point of view of those national companies which have been granted a self-insurer licence the advantages are both financial and administrative. Holders of a self-insurer licence no longer have to manage their workers’ compensation liability across different schemes in each state and territory. For companies operating in banking, transport, telephony and broadcasting, for instance, these advantages are considerable and this is reflected in the self-insurer licences which have been granted.25

Moratorium

Whilst national companies gained significant advantages by holding a self-insurer licence, there was some question about whether workers may have been disadvantaged. To this end, the Rudd Government placed a moratorium, with effect from 11 December 2007, on new applications from private sector corporations wanting to move to the Comcare scheme ‘to enable the Government to examine whether the Comcare scheme provides workers with access to appropriate workplace safety and compensation arrangements’.26

The Review of self-insurance arrangements in 2009 considered a range of issues including, amongst other things:

• whether the current arrangements for self-insurers pose any risk to the Commonwealth or to state and territory schemes and

• whether there should be changes to the eligibility rules for obtaining a licence to self-insure.27

Commenting on the ongoing moratorium, the report of the Review of self-insurance arrangements stated:

The Department was unable to find convincing evidence that self-insurance licensing should no longer be offered by the scheme. For this reason and also in light of evidence of the scheme’s comparatively effective performance, the Department has recommended the retention of the current statutory ‘in competition’ criterion as the precondition [to] a corporation’s gaining ‘eligible corporation’ status essential for licensing.28

The moratorium was lifted by the current Government on 2 December 2013 on the grounds that it would ‘help remove unnecessary barriers for the benefit of workers and businesses while achieving a more flexible and productive workplace relations system’.29

Amendments to SRC Act

Removal of the competition test was considered by the Review of self-insurance arrangements but rejected on the grounds that such a move had ‘the potential to open up the scheme to high risk industries that the scheme is not designed to regulate’.30

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28. Ibid., pp. 2–3.
However, the Hawke report noted that licensees have consistently been able to achieve better outcomes on performance measures (for example, return to work outcomes) when compared to the premium payers.\(^{31}\)

On that basis the Hawke report recommended that ‘the competition test should be lifted altogether for all national employers’.\(^{32}\) The amendments in Schedule 1 are consistent with this recommendation. The replacement of that test with a national employer test was also recommended by the Hawke report\(^{33}\) and endorsed by the SRC Act Review.\(^{34}\)

At present section 100 of the SRC Act empowers the Minister to declare that a corporation is an *eligible corporation* if the corporation satisfies either of the following:

- it is, or was, a Commonwealth authority or
- it is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority (known as the ‘competition test’).

An eligible corporation may then apply to the Commission to be granted a self-insurer licence. Existing section 103 of the SRC Act empowers the Commission to grant a licence subject to certain conditions.

Under the Bill there will no longer be a requirement for a declaration by the Minister. Item 9 of Schedule 1 of the Bill repeals section 100 of the SRC Act and inserts proposed sections 100 and 100A. Proposed section 100 of the SRC Act defines the term national employer as a corporation that has employer obligations in two or more Australian jurisdictions.\(^{35}\) The employer obligations are obligations to pay premiums, contributions or similar payments under a workers’ compensation law of a state or territory.\(^{36}\) Consistent with this amendment, the definition of an eligible corporation in Part VIII of the SRC Act is repealed.\(^{37}\)

### Amendments to WHS Act

For those self-insurer licences granted under the competition test after 2004, occupational health and safety coverage was provided under the SRC Act. However, when the WHS Act was enacted in 2011, section 12 operated so as to exclude the application of state and territory work health and safety (WHS) laws to non-Commonwealth licensees only during the specified transition period.

The Hawke report suggests that some of the delay in lifting the moratorium came about because the former Government had ‘agreed to transfer [WHS] coverage of all non-Commonwealth licensees to the states and territories on 1 January 2013 on the assumption that the model laws would be implemented in all jurisdictions’.\(^{38}\) As the model laws have not been enacted by all of the states as anticipated, the effect is that whilst non-Commonwealth licensees have the benefit of a single workers’ compensation statute, they are not subject to a single uniform WHS law.

Items 17–22 of Schedule 1 of the Bill amend section 12 of the WHS Act so that non-Commonwealth licensees will be subject to the provisions of the WHS Act.

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32. Ibid.
33. Ibid., recommendation 8.
35. Section 4 of the SRC Act defines a corporation for the purposes of Part VIII as a foreign corporation within the meaning of paragraph 51(xx) of the Constitution; or a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a financial corporation formed within the limits of the Commonwealth; or a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a trading corporation formed within the limits of the Commonwealth; or a body corporate that is incorporated in a territory; but does not include a Commonwealth authority.
36. Proposed subsection 100(2) of the SRC Act.
37. Items 1 and 7 of Schedule 1 of the Bill.
Schedule 2—key provisions
The provisions in Schedule 2 of the Bill commence immediately after the commencement of Schedule 1.

**Background**
According to the Review of self-insurance arrangements the ability for the Commission ‘to grant a single licence to related eligible corporations that are owned by the same holding company would be in line with current commercial realities and self-insurance provision in the state workers’ compensation systems’. Although the granting of group licences was recommended by that review, it was not acted on.

Existing licensees who were consulted during the Hawke review expressed concern that there continued to be no access to group licences under the Comcare scheme. This was identified as a problem for businesses which were required to apply for individual licences for different parts of their business—giving rise to higher administrative costs.

**Amendments to SRC Act**
Currently Part VIII of the SRC Act provides for licencing of Commonwealth authorities and certain corporations. It does not provide for the granting of group licences. The amendments in Schedule 2 of the Bill address this issue.

**Item 50** of Schedule 2 defines the term **corporate group** for the purposes of Part VIII of the SRC Act as a group of two or more bodies corporate, where each body corporate in the group is a **related body corporate** of each other body corporate in the group. **Item 52** of Schedule 2 inserts **proposed subsections 100(1A) and (1B)** into the SRC Act to define the term **national employer group**. A **corporate group** is a **national employer group** if either:

- at least one corporation in the group is a national employer or
- at least one corporation in the group has employer obligations in a particular Australian jurisdiction and at least one other corporation in the group has employer obligations in another Australian jurisdiction.

The amendments in Schedule 2 operate to create separate regimes for single employer licences (under **proposed Subdivision A of Division 2 of Part VIII** of the SRC Act) and group employer licences (under **proposed Subdivision B of Division 2 of Part VIII** of the SRC Act). To that end, amendments are made to existing sections 102–107 of the SRC Act so that they refer to the application for and the grant, variation or revocation of a single employer licence.

**Item 98** of Schedule 2 inserts **proposed Subdivision B—Group employer licences**.

**Power to issue a group employer licence**
**Proposed Subdivision B** empowers the Commission to issue group employer licences as follows:

- a corporation may apply in the approved manner and form for a group employer licence provided that the application relates to two or more specified corporations, one of which is the applicant: **proposed subsections 107B(1)–(4)**
- in addition, the application must nominate one of the corporations to be the **administration manager** for the licence, **to be a relevant authority** for the licence and the body corporation which will be the **key body corporate**: **proposed subsections 107B(5)–(10)**

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40. Ibid., recommendation 18, p. 29.
42. **Item 50** of Schedule 2 of the Bill inserts the definition of the term ‘related body corporate’ into section 99 of the SRC Act. The definition provides that the term has the same meaning as in the *Corporations Act 2001*, accessed 25 March 2014. Under section 50 of the Corporations Act where a body corporate is a holding company of another body corporate; or a subsidiary of another body corporate; or a subsidiary of a holding company of another body corporate, then the first-mentioned body and the other body are related to each other.
44. **Item 1** of Schedule 2 of the Bill inserts the definition of **administration manager** into subsection 4(1) of the SRC Act. For a group employer licence the terms refers to the corporation that is designated by the licence as the administration manager for the licence.
• relevant application fees are to be paid to Comcare in respect of the application: proposed subsection 107B(11)

• the Commission is empowered to issue a group licence if it is satisfied that it is appropriate to do so: proposed subsections 107D(2) and (3). In reaching that decision the Commission must be satisfied of the matters set out in proposed paragraphs 107D(4)(a)–(e) including, but not limited to, the capacity of the nominated relevant authority to ensure that claims will be managed in accordance with standards set by the Commission for the management of claims and that the issue of the licence will not be contrary to the interests of the employees of a covered corporation whose affairs fall within the scope of the licence.

Power to refuse to issue a group employer licence

Proposed subsection 107D(5) of the SCR Act provides that the Commission must not issue a group employer licence in circumstances where the Commission is satisfied on the basis of the past conduct of a covered corporation or nominated relevant authority that the corporation is unlikely to meet the standards for the rehabilitation of the corporation’s employees; or that it is unlikely that the nominated relevant authority will manage claims in accordance with the standards set by the Commission.

In addition, according to proposed subsection 107D(6) of the SCR Act the Commission must not issue a group employer licence unless all of the following conditions are satisfied:

• each corporation covered by the licence is a member of a particular corporate group
• each body corporate in the group is a related body corporate of the key body corporate for the licence
• the group is a national employer group and
• each corporation covered by the licence is incorporated in Australia.

Proposed subsections 107G and 107H of the SRC Act also provide circumstances in which the Commission may refuse to issue a group employer licence where it considers that the nominated administration manager or the nominated relevant authority respectively are not appropriate to fulfil those roles.

Variation of group employer licence

Proposed sections 107P–107W of the SRC Act set out the range of circumstances in which the Commission may vary a group employer licence—as well as the operation of legislative rules (made by the Minister by legislative instrument in accordance with proposed section 122A)47 in respect of those variations.

Suspension or revocation of a group employer licence

Under proposed section 107X of the SRC Act, the Commission is empowered to suspend or revoke a group employer licence where it considers it is appropriate to do so, provided that the Commission has followed such preliminary procedures as are specified in the Minister’s directions (provided for by proposed subsection 101(1A) of the SRC Act inserted by item 62 of Schedule 2).

Authority to accept liability

Items 99–118 of Schedule 2 make minor consequential changes to existing sections 108 and 108A so that those sections will, in future, refer to the authority of single employer licensees to accept liability for claims. Item 119 inserts proposed sections 108AA and 108AB which are modelled on sections 108 and 108A to provide that where a relevant authority under a group employer licence accepts liability to pay compensation in respect of an injury, loss, damage or death of an employee then liability is accepted on behalf of all the corporations covered by the group employer licence.

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45. Item 12 of Schedule 2 of the Bill inserts proposed paragraph (aa) into the definition of relevant authority at subsection 4(1) of the SRC Act so that, in relation to an employee who is employed by a corporation that is covered by a group employer licence the relevant authority is a corporation that is designated by the licence as a relevant authority for the licence.

46. Item 50 of Schedule 2 of the Bill inserts the definition of key body corporate into section 99 of the SRC Act. For a group employer licence the term refers to the body corporate that is designated by the licence as the key body corporate for the licence.

47. Inserted by item 182 of Schedule 2 of the Bill.
Under **proposed subsection 108AB** of the **SRC Act** those corporations are jointly and severally liable to pay the relevant compensation. **Proposed paragraph 108AB(1)(d)** specifically excludes Comcare from any liability to pay the compensation. In addition, **proposed paragraph 108AB(1)(e)** provides that no state or territory workers’ compensation law applies to the corporation.

**Managing claims**

In a similar way, **items 120–153** of Schedule 2 make minor consequential changes to sections 108B and 108C of the **SRC Act** so that those sections will, in future, refer to the authority of single employer licensees to manage claims. **Item 154** of Schedule 2 of the Bill inserts **proposed sections 108CA and 108CB** into the **SRC Act** which are modelled on sections 108B and 108C. **Proposed section 108CA** provides that a group employer licence may authorise either the relevant authority for the licence or a specified person acting on behalf of the relevant authority to manage claims. Such matters will be determined by the Commission. Claims are required to be managed in accordance with the scope of the relevant licence.

**Licence conditions**

**Item 166** inserts **proposed section 108DA**, modelled on existing section 108D (which is duly amended to refer to single licensees only). **Proposed section 108DA** broadly empowers the Commission to issue a group employer licence subject to conditions. **Proposed subsection 108DA(2)** provides a non-exhaustive list of conditions which may limit the scope of a group employer licence. Under **proposed subsection 108DA(4)** the Commission may, by written notice to the administration manager, vary the conditions of the licence.

**Functions of licensee**

**Item 173** inserts **proposed section 108FA** into the **SRC Act** to set out a range of additional functions of a corporation which is covered by a group employer licence including, amongst other things, to make payment and determine claims accurately and quickly.

**Schedules 1 and 2—key issues**

Together, the amendments contained in Schedules 1 and 2 of the Bill have the effect of significantly ‘expanding the number of employers who will be operating under the Comcare scheme’. This shift has given rise to a number of concerns—particularly from organisations representing workers’ rights.

The arguments against such an expansion include:

- there is no requirement that an employer have a minimum number of employees in a particular Australian jurisdiction in order to qualify for a self-insurer licence. In particular, group licences could be granted to small employers which are not equipped to administer a self-insurance scheme
- Comcare is not adequately equipped to monitor performance or hold self-insurers to account on a national scale if a self-insurer does not meet injury management and return to work obligations
- there are privacy concerns relating to the administration of workers compensation by self-insurers
- the Comcare scheme:
  - was established to cover workers who undertake low risk work in the Australian Public Service and was not designed to cover other types of work such as construction, manufacturing or mining
  - performs at a lower level than many state and territory workers’ compensation schemes because there are no statutory processing times — in particular there are no time frames on employer obligations to make medical and other compensation payments when a worker is injured

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– offers lesser benefits than many state and territory workers’ compensation schemes, has limited access to common law compensation and the amount payable in that case is capped at $110,00055
– has inadequate dispute resolution processes. Decisions which are the subject of appeal to the Administrative Appeals Tribunal (AAT) are subject to long delays and ‘workers are discouraged from pressing their claim as the AAT is a costs jurisdiction’.56
• the choice of workers’ compensation is made by the employer based on financial savings, and employees are not consulted about what this means to them if they are injured.57

WHS

Many submitters were uneasy that employers entering the Comcare scheme would no longer be required to comply with requirements of state-based health and safety regulators. According to the Shop, Distributive and Allied Employees’ Association:

ComCare has only 44 inspectors nationally. An inspectorate this size does not have the capacity to enforce health and safety standards nationally across a wide range of industries which it has no experience in regulating.

ComCare appears unable to manage their current level of responsibility; as demonstrated by their significantly lower rate of proactive health and safety interventions compared to other schemes (State regulators). Unlike the State regulators, ComCare has historically low rates of prosecutions. A low prosecution rate and an inadequate inspectorate arm demonstrate a poor enforcement capability. In light of ComCare’s current performance it seems incongruous that this Bill would seek to encourage an influx of employers and new industries into what is clearly an under-resourced and poor performing regulatory body. Such a move will have a huge and detrimental impact on the health and safety of workers nationally.58

Effect on state and territory schemes

The Hawke report noted that there was some opposition to the self-insurance scheme—in particular the ACTU had signalled its in-principle opposition to self-insurance arrangements because of the potential for significantly large numbers of employers to opt out of contributing to the premium pool of workers’ compensation schemes either at an individual, state or national level.59

However, the Review of self-insurance arrangements had considered this issue, noting that Taylor Fry’s report:

... stated that there would be minimal impacts on state workers’ compensation schemes if private corporations were to join the Comcare Scheme as self-insurers. This is consistent with the findings of the 2004 Productivity Commission report ... [and] ... the Victorian Government advised that a review it conducted, following the introduction of legislative safeguards in Victoria in 2005, had concluded that the financial risks to the Victorian workers’ compensation scheme of exiting corporations were not material.60

Despite this apparent assurance, the Queensland Council of Unions is concerned that the move from state and territory based workers’ compensation schemes to the Comcare scheme may result in ‘massive increases in

56. Finance Sector Union of Australia, Submission to the Senate Education and Employment Committee, op. cit., p. 4.
premiums for state-based employers and/or the eventual removal of entitlements to injured workers to attempt to maintain the scheme’s viability’.  

Similarly, the Law Council of Australia is of the view that the expansion of the Comcare 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’.  

**Risk to premium payers or the Commonwealth**  
The Taylor Fry report considered what would happen in the event of the financial failure of a self-insurer. The Productivity Commission report provides two examples of self-insurer failure. Blue Ribbon Meats (self-insured under the Tasmanian scheme) collapsed in 2001 and T O’Connor and Sons Pty Ltd (self-insured under the South Australian scheme) collapsed in 1991. In both cases the bank guarantee was insufficient to meet the relevant outstanding claims liability. The Productivity Commission report notes, though, that ‘the schemes strengthened their prudential requirements’ in response to the collapses.  

The Taylor Fry report noted that ‘Comcare has two distinct groups: premium payers and self-insurers’ and that ‘a shortfall in the funding of the premium paying scheme would not have a direct impact on self-insurers, and vice-versa’.  

The provisions of proposed paragraph 108AB(1)(d) ensure that the premium pool for the Comcare scheme is quarantined against any claim in the event of the financial failure of a self-insurer.  

According to the Taylor Fry report, the first call would be made on the self-insurer’s bank guarantee held by the scheme administrator—which is independently assessed on an annual basis. ‘The regular assessment of financial viability and independent actuarial review of necessary bank guarantees means that the risk of insufficiency is small’.  

The report does concede, though, that if:  

... a bank guarantee was inadequate, there would be some moral pressure for injured workers’ compensation to be guaranteed by other means, such as a guarantee fund ... Finally, the Commonwealth may be considered as the last source of such a guarantee.

**Schedule 3— Injury caused by misconduct**  
The provisions in Schedule 3 of the Bill commence on the day after Royal Assent.  

**Background**  
Subsection 14(1) of the SRC Act provides that compensation is payable in respect of an injury suffered by an employee if the injury results in death, incapacity for work or impairment. However, subsection 14(3) of the SRC Act contains an exception to this general rule; 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. Currently, this exception does not apply if the injury results in death, or serious and permanent impairment.  

According to subsection 4(13) of the SRC Act an employee who is under the influence of alcohol or a drug (other than a drug prescribed for the employee by a legally qualified medical practitioner or dentist and used by the employee in accordance with that prescription) shall be taken to be guilty of serious and wilful misconduct.  

**Identifying serious and wilful misconduct**  
Apart from the clarification provided by subsection 4(13) of the SRC Act, it has been for the courts to determine what type of conduct amounts to serious and/or wilful misconduct.

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65. Ibid.  
66. Ibid.
In *Kemp and K & S Freighters*,\(^{67}\) the Administrative Appeals Tribunal (AAT) reviewed the existing authorities as follows:

- in *Whittaker and Department of Defence*, the Administrative Appeals Tribunal (AAT) interpreted ‘wilful misconduct’ as involving ‘the doing of acts in fact amounting to misconduct intentionally, with knowledge that those acts will amount to misconduct’.\(^{68}\) In that case, proceeding through an intersection against a red traffic light was found not to amount to wilful misconduct because there was no evidence to assist the AAT to determine whether it was done through inadvertence rather than deliberately

- as to whether misconduct is ‘serious’, the Federal Court made the following observation in *Comcare v Calipari*:

  ... For present purposes I would note that the word ‘serious’ in the formula describes the misconduct in question and not the actual consequences of it. Nonetheless, because the s 14(3) disentitlement arises where the injury is caused by the misconduct it is well accepted that the seriousness of the misconduct is to be evaluated having regard to whether that conduct would be attended by the risk of non-trivial injury.\(^{69}\)

- in *Inco Ships Pty Ltd v Hardman* the Federal Court stated that misconduct ‘is serious if it significantly increases the likelihood of serious injury’.\(^{70}\)

**Key provisions**

**Item 1** of Schedule 3 amends subsection 14(3) of the *SRC Act* so that compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee. Essentially then, it removes the exception that currently exists in cases where an injury results in death, or serious and permanent impairment. **Item 2** of Schedule 3 of the Bill inserts **proposed item 1A** into the table in subsection 147(2) of the *SRC Act* so that the amendment to subsection 14(3) will not apply to defence related claims. This is because the *SRC Act* relates to defence related injuries which occurred prior to 1 July 2004.

**Key issue—evidence of wilful misconduct**

Of the four reports which have considered the workings of the *SRC Act* (listed under the heading Review of the Comcare scheme in this Bills Digest), only the *SRC Act Review* considered the terms of section 14 of the *SRC Act*. Mr Hanks subsequently stated: ‘I also believe that these provisions are working satisfactorily and do not recommend any changes to them’.\(^{71}\)

According to the Explanatory Memorandum, the rationale for the change is that it ‘will ensure that the high importance placed on adhering to work health and safety requirements is not demeaned by people acting in such a manner’.\(^{72}\)

What it may also do is make it difficult for the dependants of an employee who has died, or is so seriously injured so as to be unable to speak for him or herself, to claim compensation in circumstances where serious and/ or wilful misconduct is alleged. It will be left then, to the employer (and witnesses) to attest to the nature of the misconduct that led to the injury. This is contrary to the no-fault character of the workers’ compensation scheme.

Organisations representing workers rights’ have condemned the proposed amendment.\(^{73}\) Slater and Gordon Lawyers noted the comment in the Regulation Impact Statement that ‘in circumstances where a claimants’ injury is the result of their own serious and wilful misconduct, community expectations are that the injury would not be compensable’.\(^{74}\) They refute this view stating that, ‘it is our experience that this statement misreads the

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\(^{72}\) Explanatory Memorandum, p. 44.


way in which many in the community view the misfortune of fatal and catastrophic injuries and their impacts upon individual workers and their families’. 75

The Australian Council of Trade Unions also refutes the view expressed in the Regulation Impact Statement stating that ‘there is a strong expectation within the Australian community that workers have a fundamental right to be safe at work and to be fairly compensated in the event of a workplace injury’. 76

**Schedule 4—recess in employment**

The provisions in Schedule 4 of the Bill commence on the day after Royal Assent.

**Background**

Under the SRC Act, workers’ compensation is payable in respect of an injury which arises out of, or in the course of, a person’s employment. Coverage for off-site recess break claims has been the subject of a number of legislative amendments. The coverage was removed from the SRC Act in April 2007 through the **Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007** 77 and subsequently reinstated by the **Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2011** 78.

This Bill once again removes the coverage for off-site recess break claims. This is consistent with the position of the Productivity Commission Inquiry of 2004, which found that the employer’s ability to exert control over workplace recess breaks was a relevant consideration. It recommended that coverage for recess breaks (and work-related events) be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events. 79

The Review of self-insurance arrangements also concluded that claims arising from injuries sustained during off-site recess breaks should be excluded. 80

The rationale for the reinstatement of coverage for off-site recess break claims appears to have been that:

The removal of coverage resulted in a number of practical difficulties. One concern was the difficulty in determining what would, and what would not, constitute an off-site recess break where, for example, employees worked off-site or where no facilities were provided for lunch breaks. Another concern was the inconsistency between the fact that an employee would be covered when attending employer-sanctioned courses at educational institutions either within or outside normal working hours but not necessarily during lunch breaks. 81

**Key provisions**

**Item 1** of Schedule 4 of the Bill repeals and replaces paragraph 6(1)(b) of the SRC Act so that injuries which occur while an employee is temporarily absent from their place of employment during an ordinary recess will not be considered to have arisen out of, or in the course of, the employee’s employment. This means that an employee will not be entitled to be paid workers’ compensation in respect of an injury which was sustained in those circumstances.

**Item 2** of Schedule 4 of the Bill is a consequential amendment to ensure that subsection 6(3) of the SRC Act is consistent with subsection 6(1), as amended.

**Key issues**

The question arises as to what and where is ‘a place of employment’. One submitter to the Senate Committee whose workers are regularly ‘off-site’ objected to the amendments in Schedule 4 of the Bill on the grounds that

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75. Slater and Gordon Lawyers, Submission to the Senate Education and Employment Committee, op. cit., p. 6.
76. Australian Council of Trade Unions, Submission to the Senate Education and Employment Committee, op. cit., p. 3.
it would create ‘greater uncertainty for employees’—especially those who are ‘increasingly working from home or are routinely expected to travel between worksites during their recess periods’. 82

Examples of these uncertainties were pointed out by the Shop, Distributive and Allied Employees’ Association:

There is some debate over whether, for example, a construction camp built near a mine site would be considered a ‘place of work’. If so, given that an employee doing fly-in-flyout (FIFO) work is required to be located in a particular town or camp, would the entire town or camp constitute the employee’s place of work, or only a section of it? If an employee works in a building with several other employers’ offices and the incident occurs in the building’s common area, such as the foyer or elevator, does this constitute the employee’s place of work? Would the outside of the building be classified as a place of work, given the employee is required to enter the building from that particular street or entrance? 83

These appear to be the same sorts of ‘practical difficulties’ which led to the reinstatement of coverage for off-site recess break claims in 2011. Primarily though, the concern is that ‘the proposed amendment would only serve to shift the burdens and risks associated with employment further on to an employee’. 84

82. Financial Sector Union of Australia, Submission to the Senate Education and Employment Committee, op. cit., p. 6.
83. Shop, Distributive and Allied Employees’ Association, Submission to the Senate Education and Employment Committee, op. cit., p. 6.
84. Australian Council of Trade Unions, Submission to the Senate Education and Employment Committee, op. cit., p. 12.