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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SAFETY, REHABILITATION AND COMPENSATION AND OTHER LEGISLATION
AMENDMENT BILL 2011**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Tertiary Education, Skills, Jobs and
Workplace Relations, the Honourable Chris Evans MP)

SAFETY, REHABILITATION AND COMPENSATION AND OTHER LEGISLATION AMENDMENT BILL 2011

OUTLINE

The Bill amends the *Safety, Rehabilitation and Compensation Act 1988* to:

- enable Comcare to access the Consolidated Revenue Fund (CRF) to pay compensation claims in respect of diseases with a long latency period (such as asbestos related diseases) where the employment period was pre-1 December 1988 but where the condition did not manifest itself until after that date;
- allow for continuous workers' compensation coverage for employees while overseas and who are in a declared place, or who belong to a declared class of employee. An example of the latter might be members of the Australian Civilian Corps;
- re-instate claims arising from off-site recess injuries;
- allow compensation for medical expenses to be paid, where payment of other compensation is suspended; and
- allow for time limits for claim determination;

The Bill also makes a number of minor technical amendments to the *Occupational Health and Safety (Maritime Industry) Act 1993* and the *Seafarers Rehabilitation and Compensation Act 1992* which are consequential on the commencement of the *Legislative Instruments Act 2003*. The amendments do not in any way affect the operation of the amended Acts.

FINANCIAL IMPACT STATEMENT

It is estimated that the amendments to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) reinstating coverage for off-site recess breaks will cost Comcare \$1.7m for 2010/11 and the same for the forward years (adjusted for indexation of 4.5% p.a.). It is estimated that some 23% of medical costs (which are 25% of total claim costs) would otherwise be claimable through either Medicare or the Pharmaceutical Benefits Scheme (PBS).

Therefore the proposal would result in a net savings to the PBS of \$136,000 for 2010/11 and the same amount indexed for medical cost inflation over the forward years.

It is estimated that the amendments to the SRC Act that will allow the payment of medical costs while an employee's other benefits are suspended, will cost Comcare's premiums pool \$24,000 for 2010/11 and the same for the forward years (adjusted for indexation of 4.5% p.a.).

It is estimated that the cost of introducing continuous coverage for employees who are injured while overseas and are in a declared place or who belong to a declared class of employee, would be in the order of \$2 million p.a.

The remaining amendments are expected to have a nil financial impact.

NOTES ON CLAUSES

Part 1—Preliminary

Clause 1—Short title

This is a formal provision specifying the short title of the Act.

Clause 2—Commencement

This clause specifies when the Act commences.

Clause 3—Schedule(s)

This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule. The Schedule contains amendments to the *Occupational Health and Safety (Maritime Industry) Act 1993*; *Safety, Rehabilitation and Compensation Act 1988*; and *Seafarers Rehabilitation and Compensation Act 1992*.

Any other item in a Schedule operates according to its terms.

Schedule 1—Amendment of the Occupational Health and Safety (Maritime Industry) Act 1993

Schedule 1 of the Bill makes a number of technical amendments to the *Occupational Health and Safety (Maritime Industry) Act 1993* (OHSMI Act) as a consequence of the commencement of the *Legislative Instruments Act 2003*. These amendments do not in any way affect the operation of the provisions of the OHSMI Act.

Item 1—Subsections 109(5) and (6)

Proposed item 1 will repeal subsections 109(5) and (6) and substitute a new subsection 109(5).

The proposed new subsection will clarify that a new code of practice or the variation or revocation of a code, approved by the Minister, is a legislative instrument and accordingly, the provisions of the *Legislative Instruments Act 2003* will apply.

It also clarifies that the code of practice is made, varied or revoked by the Minister, and not some other body, on his or her approval.

Notwithstanding that the legislative instrument is made on the day of Ministerial approval, the legislative instrument takes effect in accordance with section 12 of the *Legislative Instruments Act 2003*.

Schedule 2—Amendment of the Safety, Rehabilitation and Compensation Act 1988

Schedule 2 of the Bill contains amendments to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). The principal amendments will:

- re-instate claims arising from off-site recess injuries (item 1);
- allow for continuous coverage for employees who are overseas and are working in a declared place, or who belong to a declared class of employee (item 2);
- allow for compensation for medical expenses to be paid, where payment of other compensation is suspended (items 3-5);
- allow for time limits for claim determination (items 6 and 7);
- enable Comcare to access the Consolidated Revenue Fund (CRF) to pay compensation claims in respect of diseases with a long latency period (such as asbestos related diseases) +where the employment period was pre-1 December 1988 but where the condition did not manifest itself until after that date (items 8-12).

Part 1—Amendments

Item 1—Paragraph 6(1)(b)

Proposed item 1 will amend paragraph 6(1)(b) to allow claims to be made under the SRC Act which arise from injuries that occurred off-site during recess breaks. This type of coverage was provided prior to 13 April 2007 and is now being reinstated.

Reinstatement of claims arising from off-site recess injuries was recommended by the ‘2008 Review of Self-insurance Arrangements under the Comcare Scheme’.

Item 2 – At the end of subsection 6(1)

Subsection 6(1) provides for the circumstances in which an injury to an employee may be treated as having arisen out of, or in the course of, his or her employment for the purposes of payment of compensation under the Act.

Proposed item 2 will amend subsection 6(1) to include two new situations where there will be a rebuttable presumption that an injury occurred in compensable circumstances.

New paragraph (h) will provide that injuries which occurred while an employee was at a declared overseas place, at the direction or request of the Commonwealth or a licensee, will automatically be presumed to be compensable. This means that so long as an employee is doing something that is reasonable (including outside normal working hours), in the circumstances of the overseas posting, he or she will be covered for compensation purposes. This presumption would still be subject to the existing exceptions around submission to an abnormal risk of injury, an injury that is intentionally self-inflicted and injuries arising out of serious and wilful misconduct.

It is anticipated that the Minister’s declaration of places to which this new paragraph would apply would be limited to areas which are significantly dangerous and have a higher risk of injury, for example, Iraq and Afghanistan.

New paragraph (i) will operate in a similar way to paragraph (h), but here the Minister may declare a class of employees, such as the proposed Australian Civilian Corps (ACC), to be

covered for the whole time they are overseas. Members of the ACC will be working in high risk environments and so it is appropriate that, so long as an ACC member is overseas, he or she is covered by the SRC Act.

As with proposed paragraph (h), this means that so long as an employee is doing something that is reasonable (including outside normal working hours), in the circumstances of the overseas posting, he or she will be covered for compensation purposes. This presumption would still be subject to the existing exceptions around submission to an abnormal risk of injury, an injury that is intentionally self-inflicted and injuries arising out of serious and wilful misconduct.

These amendments will provide a mechanism which can give those employees who are working overseas in dangerous situations some comfort from the fact that they have what is colloquially known as “24/7 coverage”.

Item 3—After subsection 36(4)

Item 4—After subsection 37(7)

Item 5—After subsection 50(5)

Proposed items 2, 3, and 4, will amend subsections 36(4), 37(7), and 50(5), to exclude from the suspension provisions a claimant’s right to compensation for medical treatment under section 16.

Currently, the right to compensation under the SRC Act is suspended if a claimant refuses or fails without a reasonable excuse to undertake a rehabilitation program. Compensation under the SRC Act includes medical and related benefits. The suspension of medical benefits under the Act can have counterproductive effects to early rehabilitation and return to work. The purpose of this amendment is to remove such counterproductive effects.

Excluding compensation for medical treatment was recommended by the ‘2008 Review of Self-insurance Arrangements under the Comcare Scheme’.

Item 6—Before subsection 61(1)

Item 7—At the end of section 62

These items would allow for the setting of time limits for the determination of a claim and for the making of a reconsideration of a determination.

Item 6 would provide that a determining authority must consider and determine a claim under section 14 of the SRC Act, within the period prescribed by the regulations. A claim under section 14 is a claim that relates to initial liability.

Item 7 would provide that decisions in relation to a claimant’s request for a reconsideration of a determination must be made within the prescribed time limits.

The actual time limits will be set by regulation.

Inclusion of time limits for the determinations under the SRC Act was recommended by the ‘2008 Review of Self-insurance Arrangements under the Comcare Scheme’.

Item 8—After paragraph 90B(a)

This item will amend section 90B of the SRC Act by inserting new paragraph (ab).

Section 90B was intended to give Comcare access to the Consolidated Revenue Fund (CRF) to pay for all of its undischarged liabilities, and associated expenses, for claims attributable to employment before 1 December 1988. These liabilities are described in paragraph 90B(a) as ‘any liability that is taken, by section 128, to have been incurred by Comcare’.

As an indirect result of references to section 128 by the Full Federal Court in *Comcare v Etheridge* [2006] FCAFC 27 (15 March 2006), Comcare’s access to the CRF under section 90B to discharge its liabilities for long-latency injury claims was closed off. The amendments in new paragraph 90B(ab) would restore Comcare’s access to the CRF to pay for these claims.

The sorts of long-latency injuries envisaged by paragraph 90B(ab), are those which would be attributable to an event or process occurring during an employee’s employment before 1 December 1988 but would not have manifested themselves or caused impairment or death until after that date. The example in paragraph 90B(ab) refers to mesothelioma arising from the inhalation of asbestos fibres. While asbestos-related diseases would typically fall within the proposed paragraph 90B(ab), the amendment is intended to cover a broad spectrum of injuries. (Note that ‘injury’ in the SRC Act also covers diseases.)

Item 9—Paragraph 90B(b)

This proposed amendment is consequential on item 8 and would provide for the payment, from the CRF, of Comcare’s administrative expenses associated with its liabilities referred to in paragraphs 90B(a) and (ab).

Item 10—Subparagraph 90C(1)(a)(i)

This proposed amendment is consequential on item 8 and provides that subparagraph 90C(1)(a)(i) refers to paragraph 90B(ab) in addition to paragraph 90B(a).

Item 11—Subsection 92(3)

This proposed amendment will remove a redundant reference to subsection number ‘(3)’.

Part 2—Saving provision

Item 12—Saving—Payments under section 90B

The Court decision in *Comcare v Etheridge* had the indirect result of finding that section 90B could not be interpreted as giving Comcare access to the CRF to pay for its liabilities arising from disease claims attributable to employment before 1 December 1988 but not manifesting until after that date.

This meant that Comcare’s drawings on the CRF to pay for liabilities were retrospectively invalidated.

The proposed amendments in this item set up a mechanism for the recovery and off setting of the CRF drawings.

Paragraphs (1)(a) and (b) provide that the section applies in relation to amounts paid out of the CRF to Comcare under section 90B which were invalidly paid at the time (the relevant amounts) but which, if the proposed amendments in Item 8 above had been in force, would have been validly paid.

Subsection (2) proposes that the relevant amounts already paid to Comcare may be recovered by the Commonwealth as a debt.

Subsection (3) proposes that Comcare is entitled to be paid an amount, equal to the relevant amounts referred to in paragraphs (1)(a) and (b) above, out of the CRF.

Subsection (4) proposes that the Commonwealth may off-set the debt in subsection (2) against Comcare's entitlement under subsection (3).

Subsection (5) would appropriate funds from the CRF for the purposes of the proposed item.

Schedule 3—Amendment of the Seafarers Rehabilitation and Compensation Act 1992

Schedule 3 of the Bill makes a number of technical amendments to the *Seafarers Rehabilitation and Compensation Act 1992* (‘the Seafarers Act’) as a consequence of the commencement of the *Legislative Instruments Act 2003*. These amendments do not in any way affect the operation of the provisions of the Seafarers Act.

Item 1—Paragraph 10(1)(b)

Proposed item 1 will amend the paragraph by omitting the reference to ‘written notice’ and substituting a reference to ‘legislative instrument’.

This is a technical amendment as a consequence of the commencement of the *Legislative Instruments Act 2003*. This amendment does not in any way affect the operation of the provisions of the Seafarers Act.

Item 2—Paragraph 10(1)(b)

Proposed item 2 is similar to item 1 and will amend the paragraph by omitting the reference to ‘the notice’ and substituting a reference to ‘the instrument’.

Item 3—Paragraph 28(6A)(b) (definition of *Specified rate per kilometre*)

Proposed item 3 is similar to item 1 and will amend the paragraph by omitting the reference to ‘by written notice’ and substituting a reference to ‘by legislative instrument’.

Item 4—After subsection 42(3)

Item 5—Subsections 42(7), (9) and (10)

Proposed items 4 and 5 deal with the application of the *Legislative Instruments Act 2003* to the Seacare Authority’s ‘Guide to the Assessment of the Degree of Permanent Impairment’ (the Guide).

New subsection 42(3A) makes it clear that the Guide, or variation or revocation of the Guide, on approval by the Minister, is a legislative instrument.

Notwithstanding that the legislative instrument is made on the day of Ministerial approval, the legislative instrument takes effect in accordance with section 12 of the *Legislative Instruments Act 2003*.

Proposed item 5 is a consequential amendment to proposed item 4. It repeals subsections 42(7), (9) and (10) because, as the approved Guide is held to be a legislative instrument, these subsections are redundant.

Item 6—Subsection 44(3)

Proposed item 6 is similar to item 1 and will amend the subsection by omitting the reference to ‘notice in writing’ and substituting ‘legislative instrument’.

Item 7—Paragraph 49(6B)(b) (definition of *specified rate per kilometre*)

Item 8—Paragraph 50(2B)(b) (definition of *specified rate per kilometre*)

Item 9—Paragraph 66(4B) (definition of *specified rate per kilometre*)

Proposed items 7, 8 and 9 are similar to item 1 and will amend paragraphs 49(6B)(b), 50(2B)(b) and 66(4B) by omitting references to ‘by written notice’ and substituting references to ‘by legislative instrument’.

Item 10—Subsection 66(6)

Proposed item 10 is similar to item 1 and will amend the subsection by omitting the reference to ‘written notice’ and substituting a reference to ‘legislative instrument’.

Item 11—Subsection 83A(5) (definition of *specified rate per kilometre*)

Proposed item 11 is similar to item 1 and amends the subsection by omitting reference to ‘by written notice’ and substituting ‘, by legislative instrument,’.

Item 12—Subsection 83A(9)

Proposed item 12 is similar to item 1 and amends the subsection by omitting reference to ‘written notice’ and substituting ‘legislative instrument’.

Item 13—Subsection 130(3)

Proposed item 13 is similar to item 1 and will amend the subsection by omitting the reference to ‘notice in writing’ and substituting a reference to ‘legislative instrument’.

Item 14—Subsection 135(2)

This item corrects a misspelling, so that it now reads “set off”.

Item 15—Subsection 139(7) (definition of *specified law*)

Proposed item 14 is similar to item 1 and will amend the subsection by omitting the reference to ‘written notice’ and substituting a reference to ‘legislative instrument’.

Item 16—Section 142

Proposed item 15 will repeal the section as the *Legislative Instruments Act 2003* has made the section redundant.