

POSSIBILITIES AND PITFALLS INVOLVED IN EXPANDING AUSTRALIA'S NATIONAL WORKERS' COMPENSATION SCHEME

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The purpose of workers' compensation schemes is to intervene early in the life cycle of workplace injury and to maximise the opportunity for a worker to return to employment. At present there is no unified national workers' compensation scheme. Over time, Australia has developed a myriad of workers' compensation schemes: in each of the states and territories, and also at the national level. Problems arise from the lack of uniformity between workers' compensation schemes in Australia. This inequity has created several problems, including varied premiums faced by employers with identical risk profiles in the same jurisdiction, rising 'competitive premiums' as states and territories seek to entice employers to operate in their state, and 'cost-shifting' between states and territories. This article considers four independent reports which have each advocated for the expansion of the national workers' compensation scheme. In light of these reports, this article examines a number of challenges, legislative reforms, and regulatory gaps arising from the most recent legislative effort to expand the national workers' compensation system: the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth).

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I INTRODUCTION

In the late evening of 25 April 2006, 17 employees were going about their work when a small earthquake triggered a mine collapse in Beaconsfield.¹ Although the issue of workplace safety seldom makes headlines, this incident was to become permanently seared on the national psyche, as two of these workers were entombed below ground for 14 days. With one worker already dead, and a number of other workers escaping shortly after the mine's collapse, the two remaining miners survived on a lone muesli bar and by drinking groundwater seeping through the rock overhead using their helmets as drinking vessels.² Finally rescued in the wee hours of the morning on 9 May 2006, the first action of the men as they emerged above ground was to switch their safety tags to 'safe' on the mine out board before reuniting with their families.³ A week after the rescue, a meeting was held by the Australian Workers' Union where it emerged that none of the Beaconsfield miners had been given workplace safety training and that prior to the incident, miners

¹ 'Timeline of Beaconsfield Mine Disaster', *The Sydney Morning Herald* (online), 30 April 2006 <<http://www.smh.com.au/news/national/timeline-of-beaconsfield-mine-disaster/2006/04/30/1146335609775.html>>.

² Andrew Darby, Gary Tippet and Ben Doherty, 'A Whim and a Prayer; Living on Crumbs and a Feast of Jokes', *The Sydney Morning Herald* (Sydney), 3 May 2006, 1.

³ Gary Tippet and Andrew Darby, 'Men of Mettle Emerge as Rescuers Reveal the Full Truth of Their Ordeal', *The Age* (Melbourne), 10 May 2006, 2.

had been concerned about a number of aspects of safety issues pertaining to their work.⁴ In their view, insufficient amounts of cement had been used to close in exploited parts of the mine, supports had been removed from lower parts of the mine and the mesh which was intended to prevent rock collapse was widely considered to be ineffective.⁵ A later coronial investigation into the death of one of the miners found that the mine operator's risk management strategy was inadequate as it ignored information including seismic data which should have alerted it to the real likelihood that the mine would experience a seismic event of significant magnitude.⁶ The Coroner's report also noted deficiencies in the regulatory framework and advocated the adoption of a body of regulations specifically addressing the safety needs of the mining industry.⁷

Retelling this well-known story serves a purpose other than highlighting the critical importance of workplace safety. The Beaconsfield mine collapse captures the challenge arising from Australia's geography pertinent to any proposed expansion of the national workers' compensation scheme. On the day that the Beaconsfield mine collapsed, state mine inspectors who were based in Hobart reached the mine within four hours and were able to assess the site, control rescue efforts and begin their investigation.⁸ Quite a different timeline would have resulted had the Beaconsfield mine been under the jurisdiction of the national workers' compensation scheme regulator, Comcare. If this had been the case, Comcare investigators based in Melbourne would have had to take the first commercial flight into Hobart and a 40 minute drive to Launceston. This would have been at least 10 to 11 hours after the original rockfall causing the mine's collapse.⁹

As the Beaconsfield example reveals, an expansion of Australia's national workers' compensation scheme brings with it many regulatory challenges and

⁴ Andrew Darby, 'A Disaster Waiting to Happen', *The Sydney Morning Herald* (online), 16 May 2006 <<http://www.smh.com.au/news/national/a-disaster-waiting-to-happen/2006/05/15/1147545265579.html>>.

⁵ *Ibid.*

⁶ Tasmania, Coronial Division, Magistrates Court, *Record of Investigation into Death: Larry Knight* (2008) 54 [11.5.1].

⁷ *Ibid* 80 [17.2.1].

⁸ Taylor Fry Consulting Actuaries, 'Review of Self-Insurance Arrangements under the Comcare Scheme' (Report, Department of Education, Employment and Workplace Relations, 15 May 2008) 31.

⁹ *Ibid.*

focuses us on the central question — can a national workers' compensation scheme operate effectively in Australia? The purpose of workers' compensation schemes is to intervene early in the life cycle of workplace injury and to maximise the opportunity for a worker to return to employment. Beyond the individual worker, these schemes seek to make the workplace safe for all workers through monitoring workplaces and minimising work health and safety risks. Over time, Australia has developed myriad workers' compensation schemes, in each of the states and territories, and also at the national level.¹⁰ In Australia, originating in 1973 at the initiative of the Whitlam Labor government which established a Committee of Inquiry into a National Rehabilitation and Compensation Scheme for Personal Injury in Australia,¹¹ there have been various attempts to develop greater consistency between state, territory and Commonwealth workers' compensation systems.¹² From a business perspective, a significant administrative burden arises from having to comply with different workers' compensation schemes by reason of employing workers in more than one state.¹³ Other problems also arise from the lack of uniformity between workers' compensation schemes in Australia. The present approach produces an inequitable and inconsistent approach to workers' compensation. It means that workers in the same state are eligible for substantially different levels of compensation, even though they incurred precisely the same injury, simply by virtue of whether or not their employer is in the national scheme or a state or territory scheme. This inequity creates an uneven playing field for businesses as marked variations can be expected in premiums faced by employers with identical risk profiles, operating in the same jurisdiction, depending on which scheme is covering an employer. This

¹⁰ Although there are currently 11 principal workers' compensation schemes in operation in Australia, this article focuses on schemes operating at the state and territory level and the Comcare scheme. Due to their specialised nature and limited scope, this article does not concern the Seafarers' scheme (for certain seafarers) and the Military and Rehabilitation scheme.

¹¹ This inquiry produced a report: National Committee of Inquiry, 'Compensation and Rehabilitation in Australia' (Report, July 1974).

¹² See also Rob Guthrie, Kevin Purse and Frances Meredith, 'Workers' Compensation and Self-Insurance in Australia — National Priority or Trojan Horse?' (2006) 17 *Insurance Law Journal* 256, 257–8.

¹³ See, eg, Australian Chamber of Commerce and Industry, Submission No 10 to Senate Education, Employment and the Workplace Relations Committee, *Inquiry into the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth)*, 30 May 2014.

has also led to the rise of ‘competitive premiums’ as the states and territories seek to entice employers to operate in their state through the promise of lower premiums which inevitably come at the expense of workers’ entitlements.¹⁴ The presence of so many workers’ compensation schemes has also led to ‘cost-shifting’,¹⁵ with Purse and Guthrie arguing that, ‘the State and Territory schemes have been at liberty to use the federal social security system as a dumping ground for injured workers they no longer have any interest in’.¹⁶

To address these issues, an expansion of the national workers’ compensation scheme has been advanced by a number of reports commissioned by successive governments.¹⁷ The first report to be examined in this article was initiated by the Howard Coalition government and authored by the Productivity Commission in 2004 entitled ‘National Workers’ Compensation and Occupational Health and Safety Frameworks’ (‘Productivity Commission Report’).¹⁸ Another review was commissioned by the Rudd Labor government, authored by consulting actuaries Taylor Fry, who provided a report to the Commonwealth Department of Education, Employment and Workplace Relations in 2009, entitled ‘Report of the Review of Self-Insurance Arrangements under the Comcare Scheme’ (‘Taylor Fry Report’).¹⁹ The third review was commissioned by the Gillard Labor government, conducted by Dr Allan Hawke in 2012 who provided a report entitled ‘Safety, Rehabilitation and Compensation Act Review: Report of the Comcare’s Scheme Performance,

¹⁴ Industry Commission, ‘Workers’ Compensation in Australia’ (Report No 36, 4 February 1994) xxxi. See also Kevin Purse, ‘Winding Back Workers’ Compensation Entitlements in Australia’ (2011) 24 *Australian Journal of Labour Law* 238, 256–8.

¹⁵ See, eg, House of Representatives Standing Committee on Employment and Workplace Relations, ‘Back on the Job: Report into Aspects of Australian Workers’ Compensation Schemes’ (Report, June 2013) 214.

¹⁶ Kevin Purse and Robert Guthrie, ‘Workers Compensation Policy in Australia: New Challenges for a New Government’ [2008] *Journal of Applied Law and Policy* 99, 109.

¹⁷ A number of other reports have considered the viability of a national workers’ compensation scheme. See, eg, House of Representatives Standing Committee on Employment and Workplace Relations, above n 15; Industry Commission, ‘Workers’ Compensation in Australia’ (Report No 36, 4 February 1994).

¹⁸ Productivity Commission, ‘National Workers’ Compensation and Occupational Health and Safety Frameworks’, (Inquiry Report 27, 16 March 2004).

¹⁹ See above n 8.

Governance and Financial Framework' ('Hawke Report').²⁰ The Gillard Labor government also commissioned the fourth review, conducted by Peter Hanks QC in 2013 who provided a report entitled 'Safety, Rehabilitation and Compensation Act Review Report' ('Hanks Report').²¹

Following these four reports and alleging to implement their recommendations is the most recent legislative effort to expand the national workers' compensation system, namely the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth) ('SRC Bill').²² The primary aim of the SRC Bill is to widen access to self-insurance by enticing previous state insured employers into the existing national system.²³ Whilst, in principle, the objective of working towards a nationally consistent regulatory framework for workers' compensation is desirable, there are inherent challenges in seeking to move towards a national scheme which need to be thoughtfully considered. Irrespective of whether the SRC Bill is passed by the current Parliament, this article considers some of these regulatory challenges, which arise from seeking to expand the national workers' compensation scheme.

The structure of this article is as follows. Part II of this article considers the four independent reports which have each advocated the expansion of the national workers' compensation scheme. With the exception of the Productivity Commission Report, each of these reports qualified its recommendation of expansion with a need for a substantial increase in the national scheme's operational and regulatory capacity. In contrast, the SRC Bill seeks to expand access to the national scheme by adopting the 'deregulatory' proposals but not the 're-regulatory' proposals of these three reviews.²⁴ Part III of this article

²⁰ Allan Hawke, 'Safety, Rehabilitation and Compensation Act Review: Report of the Comcare Scheme's Performance, Governance and Financial Framework' (Report, Department of Education, Employment and Workplace Relations, 7 December 2012).

²¹ Peter Hanks, 'Safety, Rehabilitation and Compensation Act Review' (Report, Department of Education, Employment and Workplace Relations, 22 February 2013).

²² The SRC Bill is the first of three Bills designed to reform the Commonwealth's workers' compensation scheme. The Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (Cth) was introduced into Parliament on 25 March 2015. The Safety, Rehabilitation and Compensation Legislation Amendment (Exit Arrangements) Bill 2015 (Cth) was introduced into Parliament on 26 February 2015. A critique of these other two bills is beyond the scope of this article.

²³ Explanatory Memorandum, Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth) i.

²⁴ I acknowledge these words 'deregulatory' and 're-regulatory' are loaded terms with a wealth of scholarship examining their meaning but it is beyond the scope of this article to delve into

examines a number of challenges arising from an expansion of the national workers' compensation scheme, each of which the SRC Bill has failed to address. The article concludes with consideration of legislative reforms beyond the ideas canvassed in the SRC Bill.

II THE FOUR REPORTS

In introducing the SRC Bill into parliament, it was commonly asserted by the government that the Bill's provisions merely implemented the recommendations of the four previous reports into the national workers' compensation scheme.²⁵ Whilst it is certainly true that each of these four reports advocated the expansion of the national scheme, three of these reports did not do so on an unqualified basis. As I will explain, the Taylor Fry Report, the Hawke Report and the Hanks Report each identify a need to significantly increase regulation of self-insurers and to improve the performance of the scheme regulator, Comcare, and the oversight role of the Safety, Rehabilitation and Compensation Commission ('SRCC'). In contrast, the SRC Bill's central thrust is deregulatory, opening the way for a major expansion of the scheme by lowering the threshold for private sector employer eligibility to obtain a self-insurance licence and simplifying application processes.²⁶ It is, therefore, timely to reconsider the reports, and the blueprint provided by each for the expansion of the national workers' compensation scheme.

The first report to advocate the wholesale establishment of a national workers' compensation scheme was by the Productivity Commission. This

this. Here, as a starting point, this paper draws upon Forsyth's definition of 're-regulation' as the partial or complete reversal of deregulatory processes, with 'deregulation' meaning attempts to reduce the presence and impact of worker-protective regulation: Anthony Forsyth, 'Re-regulatory Tendencies in Australian and New Zealand Labour Law' (Working Paper No 21, Centre for Employment and Labour Relations Law, The University of Melbourne, March 2001) 1 <<https://www.law.unimelb.edu.au/files/dmfile/celrl-wp213.pdf>>.

²⁵ For example, in response to questioning about the Bill in the House of Representatives, Mr Hunt MP stated at Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 2014, 13 255:

We have laid out before the House the sources of advice — the Productivity Commission, the reviews commissioned by the Gillard government and the department. We will simply have to disagree as to whether the Productivity Commission, the reviewers including Allan Hawke, and the department are credible and authoritative sources of advice. We stand by all three of those sources. It is up to the opposition to reject them.

²⁶ *Ibid* 13 235 (Keith Pitt).

recommendation was hardly surprising given one of its terms of reference was to 'assess possible models for establishing national frameworks for workers' compensation and [occupational health and safety ('OHS')] arrangements'.²⁷ The Productivity Commission proposed the establishment of a national workers' compensation scheme in three stages, with each stage widening the net of eligible businesses that could move across to the national scheme from the states and territories. In the first instance, businesses that were in competition with a Commonwealth or former Commonwealth authority could transfer to the national workers' compensation scheme and become self-insurers. This would be followed by a second stage in which multi-state firms would be eligible to become self-insurers under the national scheme. The SRC Bill appears to give effect to this second stage. In the third stage, the Productivity Commission proposed that a new national scheme would be made available to all employers and would provide options for premium-based insurance and self-insurance.²⁸ The Productivity Commission's central rationale for the development of a national workers' compensation scheme was to reduce compliance costs for multi-state firms, although a number of scholars have criticised the Commission's evidential basis for this, arguing that 'it confined itself to anecdotal reports from a few large firms'.²⁹

In the three reports which followed the Productivity Commission's examination of a national workers' compensation scheme, the expansion of the national scheme was advanced, albeit on a more qualified basis. The Taylor Fry Report investigated self-insurance arrangements under the national scheme and was conducted by Martin H Fry,³⁰ Professor Michael Quinlan³¹ and Professor Richard Johnstone.³² This report advocated the expansion of the national scheme but developed a series of concrete recommendations as to

²⁷ Productivity Commission Report, above n 18, viii.

²⁸ *Ibid* xxxvii.

²⁹ Kevin Purse, Robert Guthrie and Frances Meredith, 'Faulty Frameworks: The Productivity Commission and Workers' Compensation' (2004) 17 *Australian Journal of Labour Law* 306, 308–9. See also Kevin Purse, Frances Meredith and Robert Guthrie, 'Neoliberalism, Workers Compensation and the Productivity Commission' (2004) 54 *Journal of Australian Political Economy* 45, 47, 52–3.

³⁰ Fellow of the Institute of Actuaries of Australia and founder of Taylor Fry Consulting Actuaries, an independent consulting firm that offers analytics, actuarial, statistical and policy advice to business and government.

³¹ University of New South Wales, Fellow of the Safety Institute of Australia.

³² Director of Research, Queensland University of Technology.

how this should occur. Providing numerous examples of where Comcare lagged behind state inspectorates in terms of a best practice approach to workers' compensation, the Taylor Fry Report warned of a dangerous 'regulatory vacuum' unless Comcare was more effectively resourced and a more proactive enforcement regime was developed.³³ The Taylor Fry Report cautioned that any expansion of the national self-insurance framework should be accompanied by 'stringent rules' to ensure that 'potential self-insurers have best practice OHS arrangements, a sound financial base and the ability to manage the self-insurance process'.³⁴

With a focus squarely on the national scheme's performance, governance and financial framework, the Hawke Report also advocated that national employers be allowed to exit the state and territory schemes and apply for self-insurance.³⁵ This was accompanied by a series of recommendations as to how the national scheme regulator, Comcare, could improve its performance and as to how the SRCC could establish 'a more robust regulatory framework' to monitor Comcare's claims management function.³⁶ This is important as both the SRCC and Comcare share the scheme's regulatory role and the SRCC relies on Comcare to carry out its regulatory functions. Amongst many other recommendations, the Hawke Report also suggested that there needed to be clear criteria associated with determining whether a business is a national employer,³⁷ that Comcare should improve rehabilitation and 'return to work' outcomes for premium payers,³⁸ and that the SRCC should develop a framework so that the financial contribution of premium payers to the scheme is directly linked to their rehabilitation performance.³⁹

The most recent report is the Hanks Report and it too identified defects in the current performance of the national workers' compensation scheme and

³³ Taylor Fry Report, above n 8, 5.

³⁴ Ibid 84.

³⁵ Hawke Report, above n 20, 3 (recommendation 7). Dr Allan Hawke AC is a former senior public servant and diplomat: *Dr Allan Hawke AC*, Committee for Economic Development of Australia <<http://www.ceda.com.au/about/governance/board-of-governors/allan-hawke>>.

³⁶ Ibid (recommendation 3).

³⁷ Ibid 4 (recommendation 8).

³⁸ Ibid (recommendation 13).

³⁹ Ibid (recommendation 14).

its regulatory framework under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('*SRC Act*').⁴⁰ The report stated:

the regulatory provisions in the *SRC Act* are not sufficiently effective. For example, there is little incentive for premium payers to provide rehabilitation for ex-employees, and no capacity for Comcare to intervene, either by providing the rehabilitation itself or by using enforcement powers.⁴¹

The Hanks Report also identified a number of positive recommendations aimed to make the national workers' compensation scheme fairer and to improve the clarity of the *SRC Act*. These included: placing a time frame upon insurers or employers to make decisions in relation to liability for an injured worker's claim;⁴² introducing a mechanism for review when time frames for decision-making are not met;⁴³ reassessing normal weekly earnings to take into account the broader range of employees now covered by the scheme and the changing basis upon which employees are remunerated;⁴⁴ increasing the age restrictions on weekly payments to reflect eligibility for the Age Pension;⁴⁵ and introducing provisional liability to facilitate early medical intervention and return to work, thereby reducing the length of claims.⁴⁶ Notably, none of these recommendations have been incorporated into the reforms proposed by the SRC Bill.

Thus, it is misleading to portray the SRC Bill as implementing the recommendations of the four previous reports investigating the national workers' compensation scheme. As demonstrated above, the 're-regulatory' proposals contained in the Taylor Fry Report, the Hawke Report and the Hanks Report have been ignored by the SRC Bill, as its central thrust is to implement stage two of the Productivity Commission Report. Arguably this produces a national workers' compensation scheme that renders self-insurance too easily accessible to employers without building in the necessary safeguards or

⁴⁰ Mr Peter Hanks QC is a Barrister at the Victorian Bar.

⁴¹ Hanks Report, above n 21, 78 [6.188].

⁴² *Ibid* 15 (recommendation 9.3).

⁴³ *Ibid*.

⁴⁴ *Ibid* 84–5.

⁴⁵ *Ibid* 13 (recommendation 7.16).

⁴⁶ *Ibid* 9 (recommendation 6.2).

increasing the regulatory capacity of Comcare and the SRCC. It is to addressing these tasks I now turn.

III REGULATORY CHALLENGES IN EXPANDING THE NATIONAL SCHEME

Three key issues arise from any attempt to expand the national workers' compensation scheme. The first concerns the viability of using self-insurance licences on a large scale. The second issue is whether the scheme regulator, Comcare, can cope with this expansion of the national workers' compensation scheme. The third issue is the impact of an expansion of the national scheme upon the state and territory workers' compensation schemes and on workers and businesses.

A The National Workers' Compensation Scheme's Self-Insurance Model

The Commonwealth government's workers' compensation scheme was established under the *SRC Act* to provide workers' compensation and rehabilitation coverage for Commonwealth and Australian Capital Territory government employees. In 1992, the *SRC Act* was amended to enable certain categories of non-Commonwealth corporations to self-insure under the Comcare scheme, with the consequence that their workers' compensation arrangements were no longer subject to state or territory law. The first non-Commonwealth corporation to seek a self-insurance licence was Optus⁴⁷ and there are currently 29 corporations with insurance licences within the Comcare scheme.⁴⁸ To be declared eligible for self-insurance, a corporation must either be a 'former Commonwealth authority' or pass a competition test which requires that they be conducting business in competition with a Commonwealth authority, or with a corporation that was previously a Commonwealth authority. The rationale for the introduction of self-insurance arrangements for non-Commonwealth corporations was to provide competitive neutrality for those corporations competing in the marketplace with Commonwealth-owned, or formerly owned, businesses to ensure that the

⁴⁷ Guthrie, Purse and Meredith, above n 12, 257.

⁴⁸ Paula Pyburne, *Bills Digest*, No 95 of 2013–14, 10 June 2014, 6. See generally Comcare, Submission No 11 to Senate Education and Employment Legislation Committee, *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014*, 1.

Commonwealth did not have an unfair advantage. The chief attraction of self-insurance for employers is that they can self-manage the claims management and rehabilitation of their injured workers and take responsibility for meeting all of their claim liabilities.⁴⁹ In essence, self-insurance is regarded as an efficient means for achieving workers' compensation protection that drives down the costs of insurance for employers.⁵⁰

Subsequent to its introduction, the national scheme's self-insurance model has experienced periods of expansion and contraction at the hands of successive federal governments. Legislative changes in 2006 enabled private corporations which were licensed to self-insure under the *SRC Act* also to be covered by the *Occupational Health and Safety Act 1991* (Cth), rather than state and territory occupational health and safety legislation.⁵¹ This arrangement, initiated by the Howard Coalition government 'allowed the most financially viable employers to migrate out of the state schemes, without reference to the state schemes, or to the interests of their employees'.⁵² The Rudd Labor government imposed a moratorium in December 2007 preventing further non-Commonwealth corporations from self-insuring under Comcare. The purpose of the moratorium was 'to enable the Government to examine whether the Comcare scheme provides workers with access to appropriate workplace safety and compensation arrangements'.⁵³ The Abbott Coalition government lifted the moratorium 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

⁴⁹ Classical economic theory suggests employers are optimally placed to identify and manage risks arising from workers' compensation. See, eg, Harold D Skipper and W Jean Kwon, *Risk Management and Insurance: Perspectives in a Global Economy* (Blackwell Publishing, 2007) 323–8.

⁵⁰ See also James S Trieschmann and E J Leverett Jr, 'Self-Insurance of Workers' Compensation Losses' (1978) 45 *Journal of Risk and Insurance* 635, 648; Gail A Jensen, Kevin D Cotter and Michael A Morrissey, 'State Insurance Regulation and Employers' Decisions to Self-Insure' (1995) 62 *Journal of Risk and Insurance* 185, 187.

⁵¹ *OHS and SRC Legislation Amendment Act 2006* (Cth) sch 1.

⁵² Robert Guthrie, Frances Meredith and Kevin Purse, "Dust and Sweat" in Australian Workers' Compensation Systems: Policy Challenges for the Gillard Labor Government' (2010) 5 *Public Policy* 40, 43.

⁵³ Julia Gillard, 'Government Announces Moratorium on New Companies Joining Comcare' (Media Release, 11 December 2007).

workplace relations system'.⁵⁴ In March 2014, the Abbott Coalition government introduced into federal Parliament the SRC Bill. One of its key features is to replace the 'competition test' with the 'national employer test' which allows businesses with employers in more than one state to apply for a self-insurance licence.⁵⁵ The replacement of the competition test has been recommended by all four reviews and is a sensible reform given that there are other large corporations which would benefit from being in the national scheme but do not meet the current criteria.⁵⁶ Whether its replacement with the national employer test as envisaged by the SRC Bill is advisable is altogether a different matter. Concerns have been raised that this provides too many businesses with access to the national scheme and employers should be able to demonstrate a minimum number of employees in each state and superior financial and work health and safety records.⁵⁷

A key normative consideration is whether self-insurance is an appropriate component of workers' compensation schemes. One aspect of this is the extent to which an employer seeking a self-insurance licence should be able to demonstrate a best practice approach to work health and safety. Another key aspect is with regards to an employer's ability to demonstrate a strong financial record and the ability to cover the costs of managing its own workers' compensation claims. This is because self-insurance substitutes a contract for the purchase of insurance coverage between the employer and a third party with establishment of the coverage through the setting aside of resources by the employer. Unions are firmly of the view that 'self-insurance is a privilege not a right' and only businesses who can point to a superior track record in all aspects of work health and safety and claims management should be eligible to apply for a licence.⁵⁸ The Taylor Fry Report also advocated that self-insuring employers should have a best practice approach. Its authors recommended:

⁵⁴ Eric Abetz, 'Private Corporations to Access Comcare Scheme' (Media Release, 2 December 2013).

⁵⁵ Safety, Compensation and Rehabilitation Legislation Amendment Bill 2014 (Cth) cls 100–100A.

⁵⁶ Taylor Fry Report, above n 8, 84.

⁵⁷ See, eg, Australian Council of Trade Unions, Submission No 13 to the Senate Education and Employment Committee, *Safety, Rehabilitation and Compensation Amendment Bill 2014*, 30 May 2014, 8–9.

⁵⁸ *Ibid.*

We suggest that [the Department of Education, Employment and Workplace Relations] consider: replacement of the competition test with stringent rules to ensure that potential self-insurers have best practice OHS arrangements, a sound financial base and the ability to manage the self-insurance process.⁵⁹

Some would argue that the current approach to granting and regulating self-insurance licences is sufficient. Under the present system, employers that meet the competition test can seek a ministerial declaration of their eligibility for self-insurance.⁶⁰ Once this declaration is made, an employer can apply to the SRCC for a self-insurance licence.⁶¹ Comcare carries out the evaluation of licence applications on behalf of the SRCC.⁶² To date, Comcare has never rejected a self-insurance licence application. Self-insurers are required to comply with the *SRC Act* and the *Work Health and Safety Act 2011* (Cth) relating to occupational health and safety matters. Self-insurers are subject to audits, investigations and other evaluations and must meet financial, prudential and performance reporting requirements as part of their licence conditions.⁶³ The performance standards of a licence require self-insurers to develop and implement effective management systems for prevention, rehabilitation and claims management, and to work towards the attainment of outcome-based performance goals. The SRCC receives reports on licensee performance against a number of key performance indicators and associated performance targets. The indicators cover prevention, rehabilitation, claims management and scheme administration. Self-insurers must also meet various prudential requirements which include obtaining a yearly actuarial assessment of current and projected workers' compensation liabilities and a bank

⁵⁹ Taylor Fry Report, above n 8, 84.

⁶⁰ *SRC Act* s 100(1)(c).

⁶¹ The SRCC was established under s 89A of the *SRC Act* at the same time as Comcare. Specific functions of the SRCC include, for example, the licencing of eligible corporations for self-insurance under the *SRC Act* s 89B. Operational support for the SRCC is provided by Comcare: at s 34E. Both Comcare and the SRCC sit within the portfolio of the Minister for Employment: Australian Government, *Government By Portfolio* <<http://www.australia.gov.au/about-government/departments-and-agencies/government-by-portfolio>>.

⁶² Australian Government, *Guidelines* (21 January 2015) Safety and Rehabilitation and Compensation Commission <http://www.srcc.gov.au/self_insurance/becoming_a_licensee/guidelines>.

⁶³ For a further elaboration on this process, see generally Hawke Report, above n 20, 31.

guarantee to cover 95 per cent of their outstanding liabilities.⁶⁴ The SRCC uses its 'Licensee Improvement Program' to evaluate licensees, which is predicated upon a three-tier model according to the level of risk associated with the self-insurer. Each self-insurer is given a tier ranking for each of its prevention, rehabilitation and claims management functions. First-tier self-insurers have the highest premiums and are audited by Comcare each year, whereas third-tier self-insurers have the lowest premiums and are only audited in the last year of their licence.⁶⁵

These requirements for self-insurers that currently exist in the national scheme are significant, but there should be sufficient resources deployed to ensure they are rigorously enforced. The role of the scheme regulator is critical in developing and enforcing regulations that govern applicants for a self-insurance licence and licensees. This is perhaps the more concerning issue arising from the expansion of the national workers' compensation scheme and is the focus below in Part III(B).

B *The National Workers' Compensation Scheme's Regulator*

Critical to the success of a workers' compensation scheme is the effectiveness of its regulator. Regulators have a pivotal role in monitoring and enforcing work health and safety standards, claims management standards and return to work practices for both self-insurers and premium payers. A key challenge emerging from any attempt to expand the national workers' compensation scheme is the operational and regulatory capacity of the scheme regulator, namely Comcare. By way of example, the SRC Bill's attempt to widen access to the national scheme could potentially see Comcare's regulatory role expand from 29 current licence holders to 1959, representing approximately a 67-fold increase in its role.⁶⁶ A key concern is that Comcare is already operating

⁶⁴ Ibid 19.

⁶⁵ Ibid 32–3.

⁶⁶ The figure of '1959' is quoted in the SRC Bill's Explanatory Memorandum: Explanatory Memorandum, Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth) xxxvii. Comcare stated that there were 29 self-insurers with current licences as at 30 May 2014: Comcare, Submission No 11 to Senate Education, Employment and the Workplace Relations Committee, *Inquiry into the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014*, 30 May 2014, 1 n 6.

below the performance level of regulators in the state and territory jurisdictions in a number of key areas.

1 *Ease of Submitting a Claim*

It is harder for an injured employee to submit a workers' compensation claim within the Comcare scheme when compared with the process in many of the states and territories. A best practice approach is one that encourages immediate injury reporting as the evidence shows that this leads to improved outcomes for employers and employees, leading to an earlier return to work by the injured employee.⁶⁷ For example, the length of the standard claim form used in the Comcare scheme is 20 pages (with nine pages the sole purview of the employee).⁶⁸ By way of comparison, in New South Wales, an employee needs to complete only four pages of the claim form. Furthermore, the *SRC Act* requires a written claim to be made,⁶⁹ whereas several of the state and territory jurisdictions have amended their processes to enable lodgement of claims electronically, or by facsimile or telephone.⁷⁰ Given that an expansion of the national workers' compensation scheme would permit a broader range of employers to enter the scheme as self-insurers, Comcare will need to adapt its claims process to allow for a much simpler claims process as is the case in most other jurisdictions.

2 *The Inspectorate's Role and Size*

A common criticism of the SRC Bill is that the scheme regulator only has 53 inspectors and there has been no concomitant commitment by the current government to expand the Comcare inspectorate in order to deal with the expected increase in their workload.⁷¹ Comcare has responded to this concern

⁶⁷ Hanks Report, above n 21, 159.

⁶⁸ A copy of the Comcare claim form can be found here: Australian Government, *Claim for Workers' Compensation (SRC 016)* (11 August 2015) Comcare <http://www.comcare.gov.au/Forms_and_Publications/forms2/claims_forms2/claims_forms/claim_for_workers_compensation>.

⁶⁹ *SRC Act* s 54(2)(a).

⁷⁰ Hanks Report, above n 21, 159.

⁷¹ Comcare, Submission No 11 to Senate, Education and Employment Legislation Committee, *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014*, 30 May 2014, 5.

by stating that it does have the operational capacity to cope with an increased workload because it will hire more inspectors if such a need arises.⁷²

Whilst it is true that Comcare only presently has a small number of inspectors, it is also true that Comcare's number of inspectors compared to state and territory inspectors per 10 000 employees is similar to that of New South Wales and Victoria but is lower than the ratio for the smaller jurisdictions. Thus, it is hard to sustain an argument that Comcare has a significantly lower level of inspectors as although this is true numerically, in terms of the proportion of workers within the scheme, Comcare's ratio of inspectors to number of workers covered by the scheme is comparable to that of the two largest states. Nonetheless, if more employers are involved in the Comcare scheme as envisaged under the SRC Bill, then the scheme will have significant geographical reach and more inspectors will be needed.

In a number of other important respects, the Comcare inspectorate operates at a diminished capacity when compared with inspectorates in other jurisdictions. This was identified in the Taylor Fry Report, which involved a comprehensive examination of the self-insurance scheme commissioned by the federal government in 2008. The report recommended the rectification of each of these issues before an expansion of Comcare's role can take place in order to prevent 'a regulatory vacuum'.⁷³

Firstly, the expertise, background and experience of Comcare inspectors are below par. The Taylor Fry Report notes the preponderance of ex-police amongst Comcare inspectors rather than those with industry expertise and recommended that Comcare broaden its recruitment practices.⁷⁴ This report also recognised that Comcare's training of inspectors tended to be narrower than the specialised, in-house training occurring within the state and territory regulators.⁷⁵ For example, Victoria and Western Australia offer specialist courses of around three to six months duration, including periods of supervised workplace interaction where skills can be tested and honed.

Secondly, as identified by the Beaconsfield mine example in this article's introduction, Comcare inspectors are organised in the capital cities and have less capacity to monitor geographically disparate areas. This is unlike state

⁷² Explanatory Memorandum, Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth) 1iii.

⁷³ Taylor Fry Report, above n 8, 5.

⁷⁴ *Ibid* 33.

⁷⁵ *Ibid* 34.

regulators which have their inspectors organised in regional and industry teams.⁷⁶ This concern was identified in the Taylor Fry Report, which stated:

This is especially the case with construction sites and transport company depots/warehouses, a number of which will be located outside capital cities and even in quite remote locations in vast states like Queensland and Western Australia.

Although Comcare has emphasised the mobility of its investigators the present structure and deployment of its investigators does not allow the sort of ready response that might be required to a serious incident ...⁷⁷

Thirdly, Comcare inspectors tend to be less rigorous in their investigation procedures. As concluded in the Taylor Fry Report, whose authors accompanied both Comcare inspectors and those from the states and territories on a significant number of workplace visits, 'Comcare investigators do not conduct the kinds of more wide ranging informal inspections that state OHS inspectors seem to conduct'.⁷⁸ The report's authors also noted that state and territory inspectors generally displayed 'significant skills in identifying priority OHS issues and dealing with difficult situations. ... Such skills were less evident in most of our visits with Comcare investigators'.⁷⁹

Fourthly, Comcare does not presently staff experts to provide specialist advice pertaining to high-risk industries or regarding certain hazards. By way of comparison, regulators in Victoria and Western Australia maintain separate teams to deal with high hazard workplaces (such as major chemical manufacturing and storage facilities). Those special hazards teams normally include technical experts able to offer specialised advice within that team or other teams when required. For its part, the Comcare inspectorate does not possess specialist resources in-house and only has a reference list of experts it can call upon.⁸⁰ According to the Taylor Fry Report, this approach

has disadvantages in terms of timing, cost and policy/practice coherence where

⁷⁶ Ibid 31.

⁷⁷ Ibid.

⁷⁸ Ibid 29.

⁷⁹ Ibid 34.

⁸⁰ Ibid 33.

there is a routine and ongoing demand for such expertise. If Comcare were to expand its coverage, such requirements could be expected to grow.⁸¹

The argument that a diminished Comcare inspectorate and enforcement capacity is acceptable because the Comcare scheme only includes large employers with more sophisticated approaches to systematic work health and safety management does not withstand close scrutiny. This is because even within the state and territory jurisdictions, over half the employees work for businesses with more than 100 employees, and as the Taylor Fry Report concludes:

It was not our observed experience that state OHS inspectors were unlikely to find grounds for issuing notices in the workplaces of large employers, including those with elaborate OHS management systems. In some we observed the 'elaborate' system had failed to identify and address serious hazards ... large companies with mature approaches to systematic OHS management are not immune to serious and even catastrophic failings.⁸²

Furthermore, large businesses experience serious work health and safety issues in a similar proportion to businesses of a smaller size. In 2012–13, private sector businesses with 1 to 19 employees experienced an incidence rate (claims per 1000 employees) of serious claims of 9.6 per cent. Businesses with 20 to 199 employees had an incidence rate of 12.8 per cent, and businesses with more than 200 employees had an incidence rate of 8.1 per cent.⁸³ Although larger businesses had the lowest incidence rate of the three categories, there are still a significant number of serious claims being made by employees of these businesses. Even though a business is large in size, it may have worksites which are potentially very small or geographically remote, with an immature approach to work health and safety management.

3 *Level of Enforcement Activity*

There are clear concerns about Comcare's approach to enforcement, which tends to favour workshops and presentations to employers, rather than non-

⁸¹ Ibid 30.

⁸² Ibid 41–2.

⁸³ Safe Work Australia, 'Comparative Performance Monitoring Report: Comparison of Work Health and Safety and Workers' Compensation Schemes in Australia and New Zealand' (Report, 16th ed, Safe Work Australia, October 2014) 12.

employer-initiated workplace visits and reactive workplace visits. The Taylor Fry Report back in 2008 identified this difference as a key drawback of Comcare's regulatory approach, stating:

Overall the workplace visit regime undertaken by Comcare differs from that of other OHS agencies in Australia or those within a number of other countries with which we are familiar (such as the UK, Sweden or Norway). State and territory regimes have moved away from a reactive approach because it is viewed as not securing the best outcomes and ineffective in terms of its use of available resources. Nor is it consistent with what we would understand to be generally accepted 'best practice' with regard to OHS enforcement ... This inconsistency needs to be addressed if genuinely a more uniform system of OHS regulation is to be established in Australia. There are other limitations with compliant-based enforcement. These include that the inspectorate may be unaware of an issue at a workplace where earlier intervention might prevent the situation escalating into an incident.⁸⁴

Despite the Taylor Fry Report identifying Comcare's approach to enforcement as a key weakness in its ability to be an effective regulator, recent statistics suggest that in the intervening five year period, Comcare is still well behind the state and territory jurisdictions in this regard. Unlike the state and territory regulators which tend to combine in relatively equal measure a mixture of reactive and proactive interventions, a far greater proportion of Comcare's enforcement activity is predicated on delivering workshops and presentations which are a far less effective method in securing compliance with workplace health and safety laws. For example, 21 per cent of Comcare's total enforcement activity is dedicated to delivering workshops and presentations whereas this figure is 0.4 per cent, 4.7 per cent and 1.1 per cent for New South Wales, Queensland and Western Australia respectively.⁸⁵ The Taylor Fry Report recognises the limitations of both the 'advise and persuade' approach and the deterrence approach and suggests a responsive enforcement model using an interactive and graduated enforcement response like that used in most of the states and territories.⁸⁶

⁸⁴ Taylor Fry Report, above n 8, 38.

⁸⁵ Safe Work Australia, above n 83, 16.

⁸⁶ Taylor Fry Report, above n 8, 43.

Another area of weakness in Comcare's enforcement capacity is that Comcare has historically initiated low rates of prosecutions. This is concerning because the Comcare scheme is a no-fault scheme which is not able to expose safety failure through common law or other examination processes. The available evidence indicates the use of prosecutions in the Comcare scheme is on par with the Australian Capital Territory and Northern Territory as the three least prosecutorial jurisdictions.⁸⁷ Furthermore, Comcare inspectors issue far fewer improvement notices and prohibition notices than inspectors in the state and territory jurisdictions. Even though the number of workers covered by the Comcare scheme is double that of those in the Australian Capital Territory and Northern Territory schemes, the number of notices issued is notably less.⁸⁸

4 *Monitoring Work Health and Safety across a Range of Industries*

A common assertion against the expansion of the Comcare scheme as envisaged by the SRC Bill is that Comcare is ill equipped to deal with a range of industries as it was primarily designed for white-collar workers in the public service. This has been rebutted by Comcare who identifies the range of industries it has experience with and is supported by the conclusion of the Taylor Fry Report that 'any reasonable analysis shows that the Commonwealth jurisdiction has always covered the entire spectrum of employment types and OHS risks'.⁸⁹

Whilst it may be true that Comcare has overseen a wide range of industries and activities, at issue is *the extent* of this coverage and Comcare's specialist expertise in these areas when compared to the scheme regulators in the states and territories. As has already been identified in our examination of Comcare's inspectorate, the other jurisdictions invest more in training their inspectors in monitoring high-risk industries and are structured to better identify breaches and enforce standards in these industries.

It seems apparent that the states and territories have greater sophistication and specialised practices around high-risk industries and occupations. For example, the New South Wales regulator, WorkCover, has developed a partnership approach with industry bodies to focus on industries that

⁸⁷ Ibid 41.

⁸⁸ Safe Work Australia, above n 83, 17.

⁸⁹ Taylor Fry Report, above n 8, 12.

experience high numbers of workplace injuries and illnesses and higher than average workers' compensation claims. In 2013–14, WorkCover focused on sheep and beef cattle farming, road freight transport and residential house construction, using a combination of industry specific action plans and industry rebates to encourage high-risk industries to develop better safety practices.⁹⁰ Furthermore, some of the large mining states such as Queensland and Western Australia have developed their own specialist regulator to deal with the particular issues arising from the mining, petroleum, gas and explosive industries. If employers in these industries move to the Comcare scheme, they will no longer be accountable to these specialist regulators, and Comcare does not possess sufficient knowledge or expertise in these areas.

Another issue is that an increasing initiative at the state and territory level is to drill down the relevant legislative requirements and articulate standards specific to the industry by producing industry-specific codes of practice.⁹¹ This development of industry-specific codes provides a single, comprehensive reference point for employers and other stakeholders. The Taylor Fry Report identifies that 'Comcare does not appear to have developed industry-specific codes to cover self-insurers in hazardous industries such as construction and road transport'.⁹²

5 *Timelines for Processing Claims*

The Comcare scheme is the only jurisdiction that administers its compensation scheme without mandated time frames for decision-making about liability and benefit payment. By way of comparison, in New South Wales provisional liability operates within seven days after notification of an injury,⁹³ in Queensland, claims must be determined within 20 business days,⁹⁴ in Western Australia within 14 days,⁹⁵ and in South Australia within 10 business days.⁹⁶ The Comcare scheme could be greatly improved if the *SRC Act* was

⁹⁰ WorkCover Authority of NSW, 'Annual Report 2012–13' (Report, New South Wales Government, 2013) 19.

⁹¹ Taylor Fry Report, above n 8, 22.

⁹² *Ibid.*

⁹³ *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 267(1).

⁹⁴ *Workers Compensation and Rehabilitation Act 2003* (Qld) s 134(2).

⁹⁵ Government of Western Australia, *Worker Forms* (27 May 2015) WorkCover WA <<http://www.workcover.wa.gov.au/resources/forms-publications/worker-forms/#claimform>>.

⁹⁶ *Return to Work Act 2014* (SA) s 31.

amended to provide prescribed time frames for the assessment and disputation of a claim, including penalties where those time frames are unmet. This was recommended by the Hanks Report which said that if statutory time frames were not met, the claim could be deemed to be rejected.⁹⁷ The advantages of mandating time frames are clear: it results in speedier dispute resolution and an earlier return to work for an injured employee. This is because early intervention is crucial in reducing the lifecycle of an injury. Delays in resolving claims lead to delays in recovery and additional expenses for all parties.

6 *Dispute Resolution*

Described by some scholars as ‘notoriously labyrinthine’,⁹⁸ the Comcare scheme’s dispute resolution process is by far the least efficient. This is an immediate problem that needs to be rectified before an expansion of the Comcare scheme can be considered. In addition to waiting long periods for insurers or employers to make decisions, injured workers under Comcare wait significantly longer for dispute resolution than injured workers in any other scheme. For example, in 2011–12, 51.6 per cent of injured workers with disputed claims under Comcare did not have their claims resolved within nine months.⁹⁹ This is compared with 4.9 per cent in New South Wales, 12.3 per cent in Victoria and 4.7 per cent in Queensland.¹⁰⁰

The dispute resolution system of Comcare is not equipped for the expanded workload that would result from the entry of more self-insurers into the scheme. If the dispute resolution process within Comcare is exhausted, the next step for a worker is to go to the Administrative Appeals Tribunal (‘AAT’). The AAT provides merits review of administrative decisions and determines whether the outcome of the claim was the ‘correct or preferable’ decision. Despite the intention that the AAT jurisdiction be efficient, informal, quick and fair, its burgeoning operation has meant that its processes are increasingly complex and lengthy. The Hanks Report recommended ‘that the AAT be encouraged to explore practical ways to achieve a further, and marked,

⁹⁷ Hanks Report, above n 21, 15 (recommendation 9.3).

⁹⁸ Guthrie, Meredith and Purse, above n 52, 50.

⁹⁹ Slater & Gordon, Submission No 8 to Senate Education and Employment Legislation Committee, *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014*, 30 May 2014, 7–9.

¹⁰⁰ *Ibid* 7–8.

reduction in the time taken to resolve compensation applications'.¹⁰¹ The Hanks Report also recommended that an employee's costs be borne by the insurer at the reconsideration stage so as to encourage the resolution of disputes prior to reaching the AAT and to mitigate against the tendency of employers and insurers to delay proceedings reaching the AAT, thereby further drawing out the dispute resolution process.¹⁰² This is important because claimants are usually 'one shot players' and thus far less experienced with the workers' compensation scheme than employers and insurers.¹⁰³ Most workers are unfamiliar with the scheme, whereas employers and insurers tend to develop expertise regarding the scheme's practices and procedures over time. Guthrie, Meredith and Purse argue that:

A fundamental change in the processes is needed to address delays in dispute resolution at commonwealth level. This would involve revamping the scheme to include emphasis on mediation and conciliation and the use of litigation as a last resort.¹⁰⁴

C The Impact of an Expansion of the National Workers' Compensation Scheme on Stakeholders

That workers' compensation schemes involve a multitude of stakeholders has been noted before.¹⁰⁵ These stakeholders can include workers and their representatives, businesses, insurers, government, medical care providers, law firms and a range of other service providers who all profess knowledge and experience of the schemes. Some of these 'stakeholders have a vested interest in [the] continuation of disparate and complex schemes',¹⁰⁶ whereas others, like multi-state employers, have voiced concern about the multiplicity of schemes and the complexity of regulations.¹⁰⁷ This Part explores the impact

¹⁰¹ Hanks Report, above n 21, 16 (recommendation 9.8).

¹⁰² Ibid 167 (recommendation 9.5).

¹⁰³ Guthrie, Meredith and Purse, above n 52, 49.

¹⁰⁴ Ibid 50.

¹⁰⁵ See Terence G Ison, 'The Politics of Reform in Personal Injury Compensation' (1977) *University of Toronto Law Journal* 385, 385.

¹⁰⁶ Guthrie, Meredith and Purse, above n 52, 41.

¹⁰⁷ Australian Chamber of Commerce and Industry, Submission No 10 to Senate Education and Employment Legislation Committee, *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014*, 30 May 2014, 1.

that an expansion of the national workers' compensation scheme would have on the states and territories, workers and businesses.

1 *States and Territories*

A key consideration regarding the expansion of the national scheme is the impact of this on the state and territory workers' compensation schemes. The possibility that significant numbers of employers would be attracted to an expanded national workers' compensation scheme was explicitly recognised by the Productivity Commission which concluded:

The opening up of a national scheme to all corporate employers would have potentially significant impacts on existing State and Territory schemes ... Some of the smaller schemes may ultimately become unviable on a stand-alone basis if a significant number of employers switch to the national scheme.¹⁰⁸

In fact, when the Productivity Commission proposed in 2004 that the Comcare scheme be expanded to incorporate multi-state employers, some business associations expressed clear reservations concerning the need for a national scheme.¹⁰⁹

On the one hand, it is possible to argue that because only 1959 employers are eligible to move to the national scheme under the model proposed by the SRC Bill, it is likely that the number of employers exiting the state and territory schemes will be fairly minimal. Indeed, this sentiment is expressed a number of times in the SRC Bill's explanatory memorandum,¹¹⁰ which quotes the conclusion in the Taylor Fry Report that:

All the available evidence suggests that the actual impacts on state and territory workers' compensation schemes of corporations exiting those schemes to join

¹⁰⁸ Productivity Commission Report, above n 18, 134.

¹⁰⁹ Australian Chamber of Commerce and Industry, Submission No IR196 to Productivity Commission Inquiry, *National Workers' Compensation and Occupational Health & Safety*, October 2003, 13; Australian Industry Group, Submission No 104 to Productivity Commission Inquiry, *National Workers' Compensation and Occupational Health and Safety Frameworks*, 20 June 2003, 6.

¹¹⁰ Explanatory Memorandum, Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth) xliii, xlix.

Comcare have been insignificant. The likelihood of future impacts being significant is low.¹¹¹

However, the accuracy of this conclusion is subject to the exact design and nature of the reforms expanding the Comcare scheme as the Taylor Fry Report's authors did not have a specific model to examine at the time. Thus, given that the SRC Bill allows more employers to move across and such a move will result in lower premiums, lesser protection of workplace health and safety, and a national regulator with a weaker enforcement capacity than its state and territory counterparts, it is likely that a large proportion of the 1959 eligible employers will elect to move to the Comcare scheme based on a fairly straightforward cost–benefit analysis.¹¹²

The concern that an expansion of the national scheme will produce a reduced premium pool for the state and territory schemes was identified by each of the state and territory governments in their submissions to the Senate inquiry on the SRC Bill. For example, the then Queensland Newman Coalition government was concerned that 'small businesses may not be in a position to absorb premium fluctuations from a reduced premium pool' and projected that the SRC Bill would result in a reduction in the state's premium income of over \$250 million (18 per cent of the \$1.4 billion premium pool).¹¹³ This means that because there are fewer businesses within the state and territory schemes to pay premiums, the premium pool as a whole will be reduced for each of the state and territory schemes. This reduced premium pool in the non-Comcare workers' compensation schemes will result in increased premiums for remaining businesses in those schemes and put pressure to reduce workers' entitlements. An expansion of the national scheme may also force some small businesses to close down because they will be unable to cope with increased premiums. As stated by the Queensland government in its submission:

¹¹¹ Taylor Fry Report, above n 8, 81.

¹¹² A similar sentiment is expressed by Guthrie, Purse and Meredith, who state that 'reduced entitlements under the Comcare system and the associated lower premiums, will act as a key incentive for employers to exit the State and Territory schemes': Guthrie, Purse and Meredith, above n 12, 265.

¹¹³ Queensland Government, Submission No 17 to Senate Education and Employment Legislation Committee, *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014*, June 2014, 2, 4.

The Amendment Bill will have potential impacts on business well beyond companies eligible for national self-insurance. In Queensland there are an estimated 138,000 private sector non-agricultural small businesses (employing fewer than 20 workers), many of these small businesses may not be in a position to absorb premium fluctuations from a reduced premium pool.¹¹⁴

This concern of a ‘mass exodus’ of employers from the state and territory schemes to the national scheme has been identified by Guthrie, Purse and Meredith, who argue that ‘[i]f a sufficiently large number of employers move to Comcare it is possible that premiums will be lost to the State and Territory schemes to such an extent that some will no longer be financially viable.’¹¹⁵

2 Workers

In addition to the concerns that Comcare is a less effective regulator, there are a number of other ways in which workers may be worse off from an expansion of the national workers’ compensation scheme. Workers moving across to the national scheme will lose access to common law protection and compensation in all jurisdictions other than the Northern Territory and South Australia. Other than in these two jurisdictions and the Comcare scheme, most other workers’ compensation schemes in Australia are hybrid schemes that include both ‘no-fault’ statutory entitlements and common law compensation for injuries. A number of arguments can be made as to why common law rights are a fundamental element of any workers’ compensation system. Awards at common law can more closely reflect community standards and expectations with regards to proven employer negligence. Awards at common law also provide scope for those more seriously injured as a result of the negligence of their employer to exit the workers’ compensation system with dignity while maintaining financial surety. The processes of the common law serve the work health and safety objectives of the scheme because they examine the causes of injury and expose negligent and harmful practices. The common law holds to account employers whose negligent actions or failures have caused or contributed to a workplace injury.

A number of other concrete examples can be provided of where a claimant is worse off under Comcare than other schemes. Firstly, in terms of entitlements to workers the *SRC Act* does not currently allow for redemptions or

¹¹⁴ Ibid 2.

¹¹⁵ Guthrie, Purse and Meredith, above n 12, 265.

commutations of weekly payments. As there is no common law access under the Act, workers are effectively trapped into long-term claims. Amending common law access or allowing payment of lump sums to finalise claims would be consistent with other jurisdictions. Notably in the case of a self-insurer, Comcare does not have a role in rehabilitation as this is left to the employer. Where the self-insured employer cannot retain a worker then Comcare should have a role in assisting that claimant. Secondly, Comcare has particularly harsh stress-related claim provisions as a result of the case of *Hart v Comcare* where the Federal Court held that if a single significant contribution to an injury or disease was a reasonable administrative action then the claim would no longer be considered sustainable.¹¹⁶ This rule is harsh and means that workers whose stress arises predominantly from work factors may not be able to claim by reason of a single administrative stressor. Thirdly, in terms of the calculation of wages, Comcare is the only system which requires wages be calculated to include superannuation payments so as to reduce the amount paid by the employer — this is unfair and in effect means that the claimant is underwriting to some extent their own claim. Similarly, the calculation of wages under Comcare is extremely complex and probably more so than any other jurisdiction. Fourthly, the impairment tables adopted under the *SRC Act*, and by reason of the decision in *Canute v Comcare*,¹¹⁷ are almost incomprehensible and at times inconsistent (as in the case of tables 9.7 and 9.14). Fifthly, Guthrie and Aurbach identify the Comcare scheme as the only jurisdiction not to provide protection for workers' entitlements in the event of insolvency.¹¹⁸ They argue that the prudential requirements under the *SRC Act* are different to the other state and territory governance arrangements for self-insurers which require strict prudential thresholds but also provide workers with nominal or uninsured funds upon which they can claim in the event of corporate insolvency.¹¹⁹ The Comcare scheme, in contrast, only requires protection of workers' entitlements via a bank guarantee based on the 95th percentile of outstanding workers' compensation liabilities.¹²⁰

¹¹⁶ (2005) 145 FCR 29.

¹¹⁷ (2006) 226 CLR 535.

¹¹⁸ Robert Guthrie and Robert Aurbach, 'Workers' Compensation Self Insurers in Australia: Insolvency and Worker Protection' (2010) 21 *Insurance Law Journal* 24, 40.

¹¹⁹ *Ibid.* The power to establish prudential requirements is found in the *SRC Act* s 108D.

¹²⁰ See SRCC, 'Annual Report 2008–09' (Report, Australian Government, 2009) 60.

3 *Businesses*

The clearest beneficiaries of an expansion of the national workers' compensation scheme are businesses eligible to move into the scheme. For example, the SRC Bill's Explanatory Memorandum relies on data from the Productivity Commission Report to suggest that the cost savings incurred by multi-state businesses will be considerable.¹²¹ The Productivity Commission relied on submissions from some multi-state employers to identify costs associated with having to report in multiple jurisdictions and the savings which would ensue from being able to operate under the one national system. The Explanatory Memorandum refers to Insurance Australia Group's estimate of an annual cost saving of \$1.7 million, Optus's estimate of \$2 million and Skilled Engineering's estimate of \$2.5 million.¹²² Using these submissions to the Productivity Commission, the Explanatory Memorandum forecasts that a multi-state business moving to the Comcare scheme will incur annual savings of \$400 000 for each state or territory that it operates in.¹²³

Whilst seemingly attractive, the evidential basis for these projected cost-savings for multi-state businesses is questionable. In a comprehensive review of the Productivity Commission Report, a number of leading scholars in this area wrote a damning review of its methodology and findings. Purse, Guthrie and Meredith argue:

That the Productivity Commission was prepared to entertain the demise of several State and Territory workers' compensation systems in pursuit of its agenda for change was not unexpected, given that it regarded compliance costs for multi-State firms as the central issue facing workers' compensation policy in Australia. Nevertheless, its case for change remained less than persuasive. Not only were compliance costs for multi-State [employers] firms not estimated with any semblance of precision, it was by no means clear that the benefits to these firms from a new national scheme would be substantial, let alone outweigh the costs that would be borne by the overwhelming majority of firms that would remain in the State and Territory schemes. For a change in public policy of this magnitude, a thorough examination of the nature and extent of the costs

¹²¹ Explanatory Memorandum, Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 (Cth) xxxvii.

¹²² *Ibid* xxxviii

¹²³ *Ibid* x1.

and benefits involved is an essential prerequisite. This, the Productivity Commission failed to provide.¹²⁴

It is concerning that the primary arguments for the SRC Bill are reliant on a dubious evidential basis predicated on the submissions of multi-state businesses, the very interest group lobbying the hardest for the expansion of the national scheme. It is clear that independent actuarial analysis needs to be done as to the cost savings likely to be incurred by multi-state businesses and the impact that an expansion of the national scheme will have on businesses remaining in the state and territory jurisdictions. Without this analysis, the case for moving to expand the national scheme is less persuasive.

Another adverse consequence for multi-state businesses is that the SRC Bill will provide them with less support, advice and monitoring of their work health and safety systems. The national scheme does not operate as effectively as its state and territory counterparts and Comcare cannot offer the same level of assistance, scrutiny and support that is offered by scheme regulators in these other jurisdictions.

Finally, it is important to recognise that small and medium sized businesses may be disadvantaged from an expansion of the national scheme. As illustrated in the section on the viability of the state and territory schemes, these businesses, which are not eligible to apply for a self-insurance licence under the national scheme, may be forced to pay higher premiums in order to cover the costs arising from a reduced premium pool. It was because of this concern that the Howard Coalition government chose not to implement the recommendations of the Productivity Commission Report and move to an expansion of the national workers' compensation scheme.¹²⁵

IV FUTURE DIRECTIONS FOR THE NATIONAL WORKERS' COMPENSATION SCHEME

The task of this final Part is to consider how the national scheme could be expanded given the regulatory challenges identified in this article. The Taylor Fry Report, the Hawke Report and the Hanks Report provide concrete recommendations as to how harmonisation between the schemes could occur. For example, the Taylor Fry Report identifies a number of recommendations

¹²⁴ Purse, Guthrie and Meredith, above n 29, 310–11.

¹²⁵ *Ibid* 307.

for how Comcare can improve its regulatory capacity based on the recruitment, training and organisation of its inspectorate. Further, all three reports identify how the approval process for self-insurance licences can be tightened so that only employers with a superior financial record and a best practice approach in all areas of injury prevention, claims management and occupational health and safety standards are eligible. Rather than rehash these recommendations here, this Part adopts a more thematic approach as to how the expansion of the national workers' compensation scheme could take place. The themes explored relate to the role of worker participation, auditing the best practice elements of the non-Comcare schemes and additional considerations relating to an expansion of self-insurance at the national level.

Firstly, any broadening of access to self-insurance licences needs to be accompanied by increased regulation around the application for licences and Comcare's continuing oversight role once a licence has been given.¹²⁶ The blueprint for this process is increased worker participation, a safety net for entitlements so as not to disadvantage workers and demanding superior standards for workplace safety and return to work practices. In terms of worker participation, the Comcare scheme pursuant to the *SRC Act* s 104(2)(c) stipulates that the SRCC must be satisfied that the granting of a self-insurance licence 'will not be contrary to the interests of the employees of the licensee whose affairs fall within the scope of the licence'. Although this provides the SRCC with considerable discretion to reject a licence application based upon the interests of employees, s 104(2)(c) does not create a legitimate expectation or similar requirement that employees have the right to be heard on a decision to grant a self-insurance licence.¹²⁷ This article recommends that this provision be amended to ensure that employers seeking to become or to remain self-insurers must be able to demonstrate that the majority of their workers generally favour this option. The Taylor Fry Report identifies a strong business case for involving workers in these types of decisions because:

A growing body of evidence demonstrates the positive benefits of worker participation in OHS ... in workplaces where structures of worker representation

¹²⁶ The Hanks Report recommended the regulatory role of the SRCC should be strengthened to ensure its effective monitoring of licence-holders' ongoing performance: Hanks Report, above n 21, 8 (recommendation 4.2).

¹²⁷ *Victorian WorkCover Authority v Andrews* (2005) 217 FCR 129, 141 [30]–[32] (Selway J).

are in place ... This evidence comes from many countries, including those where participatory mechanisms are not mandated by legislation.¹²⁸

It should not purely be the prerogative of employers to determine which workers' compensation scheme they prefer as this will lead to competition on premiums between federal and state schemes rather than on which scheme can offer the best entitlements.¹²⁹ Both parties to the employment relationship should have a role in determining which workers' compensation scheme governs them. In terms of the application process, Comcare should have clear criteria for rejecting licence applications and the process should include giving notice to those workers affected by the issuing of a licence and a period allowed for those affected to make submissions to Comcare.

Secondly, the harmonisation process should be guided by best practice evidence from the non-Comcare schemes. According to one report, 'there is remarkably little research evaluating the merits of alternative scheme arrangements [in Australia];¹³⁰ and the absence of this means that it will be difficult to incorporate the best elements of the non-Comcare schemes in an expanded national workers' compensation scheme. As such, this article recommends that there be an audit of the best practices in the state and federal workers' compensation schemes as a means of determining national best practice benchmarks for use in a national system. This audit would mean that expanding the national scheme draws upon the knowledge and experience resulting from the longer pedigree of the state and territory schemes. Although different stakeholders place different weight on the importance of key aspects of scheme performance such as efficiency, equity, cost, rates of rehabilitation, dispute resolution and coherence, a best practice audit of the state and territory schemes should seek to identify performance in relation to a range of yardsticks. This ensures that the harmonisation process is less likely to be a lowest common denominator approach as the national scheme would seek to incorporate the best elements of the state and territory schemes.

Thirdly, two other important considerations need to be taken into account before an expansion of the national scheme can occur. There needs to be independent actuarial analysis examining a particular model for expansion

¹²⁸ Taylor Fry Report, above n 8, 73.

¹²⁹ Purse, above n 14, 257.

¹³⁰ Melbourne School of Population Health, 'Rehabilitation and Compensation for Injured Workers: A Review of the Australian Schemes' (Report, University of Melbourne, 2010) ii.

and to forecast the financial impact of this proposed model upon state and territory schemes. This analysis should compare the cost savings likely to be incurred by businesses in the national scheme and the impact that an expansion of the national scheme will have on businesses remaining in the state and territory jurisdictions.

Finally, consideration also needs to be given to the eligibility requirements for self-insurance. The SRC Bill deregulates these requirements significantly by replacing the competition test with the national employer test and removing the requirement for ministerial approval before a licence application can be considered by the SRCC. Arguably, the national employer test is not an appropriate hurdle for determining whether an employer should be eligible to apply for a licence as its only stipulation is that an employer be operating in more than one state. This requirement does not incorporate consideration of whether an employer's business is of a sufficient size. This is unlike the position in a number of the non-Comcare schemes which stipulate that an employer's size is an important consideration, albeit to varying degrees.¹³¹ By way of comparison, New South Wales requires a minimum of 500 employees,¹³² Queensland requires a minimum of 2000 employees¹³³ and the 'Code of Conduct' promulgated by Return to Work SA provides that a standard minimum of 200 workers will be applied unless a smaller firm is able to make a case on merit.¹³⁴ Although Victoria does not have a minimum number of employees requirement, an applicant must provide the scheme regulator with workforce data,¹³⁵ and in Western Australia an applicant's number of employees is a relevant consideration in granting a licence.¹³⁶ It is important that the size of an applicant's business be considered in the determination of licence applications because larger firms are more likely to have sophisticated work health and safety practices and these firms are more likely to have the financial resources to insure against and prevent the risks arising from poor work

¹³¹ The only three schemes not to include consideration of an applicant's number of employees are the federal scheme and those operating in the Northern Territory and Tasmania.

¹³² WorkCover NSW, *Licensing Policy of the WorkCover Authority for Self-Insurers and Group Self-Insurers Licensed under Section 211 of the Workers Compensation Act 1987* (at December 2001) para 3.

¹³³ *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 71(1)(a), 72(1)(b).

¹³⁴ Return to Work SA, *Code of Conduct for Self-Insured Employers* (at 4 June 2015) 34 [3.5.3].

¹³⁵ *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 379(4).

¹³⁶ *Workers' Compensation and Injury Management Act 1981* (WA) s 164(1a).

health and safety practices.¹³⁷ Although size of business should not be the sole criterion, it certainly is a relevant factor as to whether self-insurance will work for an applicant.

With regards to the removal of the ministerial approval requirement under the SRC Bill, consideration needs to be given as to whether this should be replaced by a requirement that the SRCC consider the public policy implications of granting a licence to an applicant. It appears to have become standard practice for the Minister to weigh certain considerations of public policy when using her or his discretionary power under s 100(1)(a) of the *SRC Act*. The 2008 background paper to the 2009 departmental review of the self-insurance arrangements noted that, in exercising their discretion the Minister has regard to 'broad public policy considerations' when making a determination of eligibility and these include:

- the likely impact on employees of the corporation to the grant of a licence;
- the likely impact on the corporation to the grant of a licence;
- the likely impact on the integrity of the Commonwealth scheme of workers' compensation under the *SRC Act*;
- the likely impact on the operations of the State and Territory Government workers' compensation schemes.¹³⁸

This consideration of public policy issues allows the broader impact of licence applications to be accounted for. If the national scheme is expanded, it is likely that it will be seen as too inefficient and cumbersome for the Minister to consider each application in terms of its desirability. Nonetheless, s 100(1)(a) could be replaced by a similar requirement that the SRCC consider the public policy implications of a licence application.

V CONCLUSION

This article has examined the regulatory challenges arising from the expansion of the national workers' compensation scheme. Although not insur-

¹³⁷ Nonetheless, the size of a firm alone is insufficient to determine eligibility. See also Safe Work Australia, above n 83 and accompanying text.

¹³⁸ Department of Education, Employment and Workplace Relations 'Review of Self-Insurance Arrangements under the Comcare Scheme' (Background Information Paper, January 2008) 7.

mountable, these challenges are extensive, and are poorly addressed by the SRC Bill. Whilst the four most recent independent reviews into the national scheme each advocate greater harmonisation between the schemes and the expansion of the national scheme, each of these reports, other than that of the Productivity Commission, do not provide unequivocal support for expansion. The Taylor Fry Report cautions against the emergence of a ‘regulatory vacuum’,¹³⁹ whilst the Hawke Report argues for the establishment of a ‘more robust regulatory framework’¹⁴⁰ and the Hanks Report identifies a number of positive, concrete recommendations to reform the national scheme.¹⁴¹ Each of these perspectives finds no place in the reform agenda encapsulated by the SRC Bill. As the Beaconsfield mine collapse evocatively illustrates, the policy framework around workers’ compensation is critically important to managing work health and safety risks, to responding in a timely and appropriate way when an incident arises, and to fostering rehabilitation for injured workers. Drawing upon the four reports, and considering the best practice elements of the state and territory schemes, there should be a bipartisan and balanced approach to designing a nationally consistent workers’ compensation framework.

¹³⁹ Taylor Fry Report, above n 8, 3.

¹⁴⁰ Hawke Report, above n 20, 3.

¹⁴¹ See, eg, Hanks Report, above n 21, 9–15 (recommendations 6.2, 7.16, 9.3).