



Australian Government

# **SAFETY, REHABILITATION AND COMPENSATION ACT REVIEW**

REPORT—FEBRUARY 2013

PETER HANKS QC

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Dear Minister

I have concluded my Review of the Safety Rehabilitation and Compensation Act 1988 (the SRC Act), known as the Comcare scheme, which you asked me to undertake in your letter of 13 July 2012, and which was directed to paragraph 1 of the Terms of Reference published by you on 24 July 2012.

I now provide you with my Report on that part of the terms of reference – “legislative anomalies and updates that need to be addressed”.

With the support and assistance of a Secretariat established within the Department of Education, Employment and Workplace Relations, the Review has consulted extensively with participants in the Comcare scheme (including employers, employees, medical practitioners, lawyers and other professionals, and scheme administrators) and considered their views in arriving at the recommendations set out in this Report. That consultation commenced at the end of July 2012 and concluded in late November 2012.

As will be obvious from the list of recommendations in Chapter 2 of the Report, I have carried out a detailed examination of the operation of the SRC Act and the Comcare scheme; and I have recommended substantial changes in almost every area of the scheme, including:

- the design of the SRC Act;
- the basic rules on eligibility for compensation;
- rehabilitation and return to work;
- compensation for lost income;
- compensation for medical treatment;
- compensation for permanent impairment; and
- claims administration, including the review of decisions under the SRC Act.

I also had the opportunity to consider the report and recommendations prepared by Allan Hawke AC as a separate part of the Review, and presented to you on 7 December 2012. Dr Hawke reviewed the performance of the Comcare scheme and ways to improve its performance, and the scheme’s financial and governance framework. My report includes several recommendations for changes to the SRC Act that are required to implement Dr Hawke’s recommendations.

In carrying out the Review and developing my recommendations, I have borne in mind the final sentence in the terms of reference – that the Review should not consider any reduction in existing benefits afforded to workers covered by the Comcare scheme.

I have proceeded on the basis that the terms of reference do not prevent me recommending a shift in the distribution of benefits under the Comcare scheme, where that shift will enhance the scheme’s effectiveness in adequately compensating injured employees and assisting them to return to active participation in the workforce and community life.

Although some benefits would be pared back if my recommendations are accepted, other benefits will be significantly increased – particularly the benefits provided to the more seriously injured and incapacitated.

Overall, the Comcare scheme will better achieve its objectives as a fair and equitable system with an increased emphasis on rehabilitation of injured workers; and, again overall, the benefits provided to injured workers will improve.

I should emphasise my debt, acknowledged in Chapter 1 of the Report, for the outstanding work of the Review Secretariat and of Raelene Sharp (of the Victorian Bar), who acted as counsel assisting the Review. Between them, the Secretariat and Ms Sharp undertook the research for, and drafting of, the Report. They were assiduous in their focus on developing recommendations that are evidence-based and practical, as well as reflecting the Review’s terms of reference. Of course, any errors, omissions or oversights in the Report are my responsibility.

Yours sincerely



**Peter Hanks QC**  
22 February 2013

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## LIST OF ABBREVIATIONS AND DEFINED TERMS

<b>1922 Act</b>	<i>Public Service Act 1922</i>
<b>1971 Act</b>	<i>Compensation (Commonwealth Government Employees) Act 1971</i>
<b>1987 NSW Act</b>	<i>Workers Compensation Act 1987 (NSW)</i>
<b>1998 NSW Act</b>	<i>Workplace Injury Management and Workers Compensation Act 1998 (NSW)</i>
<b>1999 Act</b>	<i>Public Service Act 1999</i>
<b>2011 guidelines</b>	Commonwealth Fraud Control Guidelines 2011
<b>AAT</b>	Administrative Appeals Tribunal
<b>AAT Act</b>	<i>Administrative Appeals Tribunal Act 1975</i>
<b>ACIMSS</b>	Attendant Care Industry Management System Standard
<b>ACT</b>	Australian Capital Territory
<b>ACT Act</b>	<i>Workers Compensation Act 1951 (ACT)</i>
<b>Action Plan</b>	<i>National Workers' Compensation Action Plan 2010–13</i>
<b>ACTU</b>	Australian Council of Trade Unions
<b>ADF</b>	Australian Defence Force
<b>AE</b>	Earnings an employee receives from additional employment, to be taken into account by a determining authority
<b>AFP</b>	Australian Federal Police
<b>AHPRA</b>	Australian Health Practitioner Regulation Agency
<b>AMA</b>	Australian Medical Association
<b>AMA5</b>	<i>American Medical Association Guides to the Evaluation of Permanent Impairment</i> , fifth edition
<b>AMA6</b>	<i>American Medical Association Guides to the Evaluation of Permanent Impairment</i> , sixth edition
<b>Approved Guide</b>	Guide to the Assessment of the Degree of Permanent Impairment
<b>APS</b>	Australian Public Service
<b>ATO</b>	Australian Tax Office
<b>AWOTEFA</b>	Average weekly ordinary time earnings for full-time adults
<b>CAC Act</b>	<i>Commonwealth Authorities and Companies Act 1977</i>
<b>CDDA Scheme</b>	Compensation for Detriment caused by Defective Administration scheme
<b>CEO</b>	Chief Executive Officer
<b>CERC Act</b>	<i>Commonwealth Employees' Rehabilitation and Compensation Act 1988</i>
<b>Clinical Framework</b>	Clinical Framework for the Delivery of Health Services

<b>Compensation Arrangements Comparison Report</b>	<i>Comparison of Workers' Compensation Arrangements in Australia and New Zealand, April 2012</i>
<b>Consensus Statement</b>	Australasian Faculty of Occupational and Environmental Medicine, Australian Consensus Statement on the Health Benefits of Work, 2011
<b>CPI</b>	Consumer Price Index
<b>CPM Report</b>	<i>Comparison of work health and safety and workers' compensation schemes in Australia and New Zealand, Comparative Performance Monitoring Report, 14th Edition</i>
<b>CRF</b>	Consolidated Revenue Fund
<b>Criminal Code</b>	<i>Criminal Code Act 1995</i>
<b>CSO</b>	Claims Service Officer
<b>DAKPI</b>	Determining authority key performance indicator
<b>DEEWR</b>	Department of Education, Employment and Workplace Relations
<b>draft regulation policy</b>	<i>Comcare Regulation Policy</i> consultation draft
<b>DVA</b>	Department of Veterans' Affairs
<b>ex-employee</b>	Employee who is no longer employed by the Commonwealth or a licensee
<b>Fair Work Act</b>	<i>Fair Work Act 2009</i>
<b>Finance Circular 2009/09</b>	<i>Finance Circular 2009/09—Discretionary Compensation and Waiver of Debt Mechanisms</i>
<b>FMA Act</b>	<i>Financial Management and Accountability Act 1997</i>
<b>FTE</b>	Full-time equivalent
<b>GP</b>	General practitioner
<b>Grey Areas Paper</b>	<i>Grey Areas—Age Barrier to Work in Commonwealth Laws</i>
<b>Hawke Report</b>	Dr Hawke's Report on the Comcare Scheme's Performance, Governance and Financial Framework
<b>HCTP</b>	Heads of Compulsory Third Party
<b>HOSC Act</b>	<i>Health and Other Services (Compensation) Act 1995</i>
<b>HWCA</b>	Heads of Workers Compensation Authorities
<b>IMR code of practice</b>	Injury management and rehabilitation code of practice
<b>International Classification</b>	International Classification of Functioning, Disability and Health
<b>KPI</b>	Key performance indicator
<b>liable employer</b>	The employer who is liable for claim costs
<b>licensee</b>	A corporation licensed by the Commonwealth
<b>LQMP</b>	Legally qualified medical practitioner
<b>MAT</b>	Medical Assessment Tribunal
<b>MRC Act</b>	<i>Military Rehabilitation and Compensation Act 2004</i>

<b>MRC Act review</b>	Review of Military Compensation Arrangements
<b>MRCC</b>	Military Rehabilitation and Compensation Commission
<b>National Approval Framework</b>	Nationally Consistent Approval Framework for Workplace Rehabilitation Providers
<b>NDIS</b>	<i>National Disability Insurance Scheme</i>
<b>NEL</b>	Non-economic loss
<b>NH</b>	Average number of hours worked
<b>NT Act</b>	<i>Workers Rehabilitation and Compensation Act (NT)</i>
<b>NWE</b>	Normal weekly earnings
<b>NWH</b>	Normal weekly hours worked pre-injury
<b>OHS</b>	Occupational health and safety
<b>PI</b>	Permanent impairment
<b>Position Statement</b>	Australasian Faculty of Occupational and Environmental Medicine and Royal Australasian College of Physicians, <i>Position Statement: Realising the Health Benefits of Work</i> , 2011
<b>proposed National Guide</b>	proposed national permanent impairment assessment guide
<b>Queensland Act</b>	<i>Work Health and Safety Act 2011 (QLD)</i>
<b>Rehabilitation Guidelines</b>	Rehabilitation Guidelines issued by Comcare on 22 May 2012
<b>Review</b>	This review of the SRC Act
<b>RTW Inspectors</b>	Return to work inspectors
<b>SA Act</b>	<i>Workers Rehabilitation and Compensation Act 1986 (SA)</i>
<b>Seafarers Act</b>	<i>Seafarers Rehabilitation and Compensation Act 1992</i>
<b>SGA Act</b>	<i>Superannuation Guarantee (Administration) Act 1992</i>
<b>SIG WC</b>	Strategic Issues Group on Workers' Compensation
<b>SoP</b>	Statement of Principles
<b>SRC Act</b>	<i>Safety Rehabilitation and Compensation Act 1988</i>
<b>SRCC</b>	Safety Rehabilitation and Compensation Commission
<b>SRCOLA 2007</b>	<i>Safety, Rehabilitation and Compensation and Other Legislative Amendment Act 2007</i>
<b>Superannuation Guarantee Ruling</b>	"Superannuation Guarantee Ruling 2009/2: Meaning of the terms 'ordinary time earnings' and 'salary or wages'..."
<b>SWA</b>	Safe Work Australia
<b>TA Act</b>	<i>Transport Accident Act 1986 (Vic)</i>
<b>Tasmanian Act</b>	<i>Workers Rehabilitation and Compensation Act 1988 (TAS)</i>
<b>Taylor Fry</b>	Taylor Fry Consulting Actuaries
<b>VE Act</b>	<i>Veterans' Entitlements Act 1986</i>

<b>Victorian Act</b>	<i>Accident Compensation Act 1985 (VIC)</i>
<b>WA Act</b>	<i>Workers Compensation and Injury Management Act 1981 (WA)</i>
<b>WHODAS 2.0</b>	World Health Organization Disability Assessment Schedule
<b>WHS</b>	Work health and safety
<b>WHS Act</b>	<i>Work Health and Safety Act 2011</i>
<b>Working with Vulnerable People Act</b>	<i>Working with Vulnerable People (Background Checking) Act 2011 (ACT)</i>
<b>WPI</b>	Wage Price Index

# 1. INTRODUCTION

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- 1.1 On 24 July 2012, the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, announced a comprehensive review of the *Safety Rehabilitation and Compensation Act 1988* (the **SRC Act**).
- 1.2 The SRC Act underpins the Comcare scheme, which provides for the rehabilitation and compensation of injured employees employed by:
  - (a) Commonwealth Government agencies and statutory authorities that pay premiums to Comcare under the SRC Act;
  - (b) Australian Capital Territory Government agencies and authorities that also pay premiums to Comcare under the SRC Act; and
  - (c) Commonwealth authorities and eligible corporations that have been granted self-insurance licences by the Safety, Rehabilitation and Compensation Commission (the **SRCC**) under the SRC Act.
- 1.3 The SRC Act also applies to members of the Australian Defence Force (the **ADF**) who were injured before 1 July 2004 during non-operational service. The Department of Veterans' Affairs (**DVA**) administers those claims on behalf of the Military Rehabilitation and Compensation Commission (the **MRCC**).
- 1.4 The SRC Act establishes Comcare and the SRCC, which share regulatory responsibility for the SRC Act and the Comcare scheme.
- 1.5 A review of self-insurance arrangements under the Comcare scheme was undertaken in 2008. That review focused on arrangements in the Comcare scheme for corporations that apply for licences, or are licensed, to accept liability for, and/or manage, claims under the SRC Act. However, a comprehensive review of the SRC Act has not been undertaken since its introduction in 1988.
- 1.6 The Terms of Reference established by the Minister require that this review of the SRC Act (the **Review**) inquire and report on:
  - (a) any legislative anomalies and updates that need to be addressed;
  - (b) the performance of the Comcare scheme and ways to improve its operation; and
  - (c) the financial framework of the Comcare scheme.
- 1.7 The Terms of Reference are reproduced in Appendix A to this Report.
- 1.8 As part of the Review, Dr Allan Hawke AC has considered the performance, financial framework and governance of the Comcare scheme and has made a number of recommendations to address a range of identified issues.
- 1.9 This Report documents the issues that I have considered in undertaking the Review and outlines my recommendations for resolving those issues. My recommendations aim to improve the operation of the Comcare scheme, as defined by the legislation, and place particular emphasis on:
  - (a) a framework that will achieve equitable and cost-effective compensation within the Comcare scheme, and improve the rehabilitation outcomes of injured employees;
  - (b) ensuring fair and equitable financial, medical and rehabilitation support for injured employees and their families;
  - (c) a framework for fair, expedient and cost-effective dispute resolution; and
  - (d) removing age barriers to fair and equitable workers compensation provisions under the Comcare scheme into the future.
- 1.10 This Report also addresses the legislative impacts of the recommendations made by Dr Hawke.
- 1.11 There have been 59 Acts amending the SRC Act since its enactment in 1988. The purpose of those amendments has been largely to address anomalies as they have arisen, as a result of court decisions, or due to changes to the working arrangements, remuneration and employment dynamics of employees covered by the SRC Act. In this context, amendments to the SRC Act have sometimes been made in isolation and possibly in reaction to singular issues. The resulting evolution of the legislation has led to increasing complexity and inefficiency, and to some inequity in the provisions for employees covered by the scheme. It has also become apparent that the course of legislative amendment has left the SRC Act with rehabilitation processes that could be improved.
- 1.12 As noted in the Terms of Reference for the Review, the Government believes that the Comcare scheme should be exemplary in its scheme design as well as its service delivery. While there is a case for re-writing the SRC Act in order to modernise it in the context of current working conditions, best practice in rehabilitation and ease of administrative application, the process of re-writing the SRC Act needs considerable care and more extensive thought than I could undertake in the limited time available for the Review.

- 1.13 Consequently, the Review recommends a two-stage approach to reforming the SRC Act:
- (a) In the short term, the SRC Act should be amended to accommodate the changes recommended in Chapters 4–10 of this Report and the recommendations made in paragraphs 3.10–3.12 below.
  - (b) In the longer term, the SRC Act should be restructured in line with the principles I have outlined in Chapter 3.

## CONSULTATIONS

- 1.14 In the course of the Review, I consulted extensively and engaged with participants in the Comcare scheme to inform my assessment and assist me in developing the most comprehensive recommendations possible in the time allowed.
- 1.15 That consultation was conducted in three stages:
- (a) initial meetings with identified participants to develop a preliminary list of issues and possible recommendations;
  - (b) publication of an issues paper to stimulate and encourage public submissions to the Review; and
  - (c) focus workshops with select participants and participant groups to explore particular issues and matters arising in the submissions.
- 1.16 A list of organisations and individuals who made written submissions to the Review, met with me or attended workshops in the course of the Review appears in Appendix B to this Report.

## COSTINGS

- 1.17 Where I considered that the Review's recommendations may have significant cost implications for the Comcare scheme, actuarial consultants were engaged to provide a financial assessment of the changes to help inform the Government when considering whether (and how) my recommendations might be adopted.

## THE REPORT'S CHAPTERS

- 1.18 Chapter 3 of this Report provides high-level recommendations on the structure and content of the SRC Act, including principles for future legislative development.
- 1.19 Chapter 4 addresses the legislative considerations arising from Dr Hawke's recommendations to improve the performance of the Comcare scheme, its governance arrangements and the financial framework for the scheme.
- 1.20 Chapter 5 considers issues raised by the way in which the current SRC Act defines eligibility for workers compensation and rehabilitation.
- 1.21 Chapter 6 addresses rehabilitation, including exploring the principal factors that can contribute to good rehabilitation and early recovery from injury. Recommendations made in Chapter 6 deal with early intervention, provisional liability and the rehabilitation system in the SRC Act.
- 1.22 The focus of Chapter 7 is on compensation for incapacity and medical treatment. Chapter 7 considers compensation paid to injured employees for lost income, referred to as income replacement, and compensation for medical treatment expenses. My recommendations focus on the duration and level of incapacity payments and on the types of treatment for which compensation should be paid.
- 1.23 Compensation for permanent impairment is addressed in Chapter 8. Permanent impairment compensation can be described as compensation for non-economic loss (that is, loss other than lost earnings and expenses incurred because of injury) and is paid to compensate for loss of bodily functions and pain and suffering. I have recommended significant changes to the level and weighting of compensation for permanent impairment.
- 1.24 Chapter 9 considers the administrative mechanisms prescribed by the SRC Act that govern claim determination, and reconsideration and review processes. The chapter includes recommendations about a number of matters such as claims reporting and determination timeframes, the dispute resolution process under the SRC Act, information-gathering processes, fraud control, recovery of incapacity payments and compensation for defective administration.
- 1.25 Chapter 10 considers the availability and relative merits of common law damages for employment-related injuries and liabilities for injuries arising other than under the SRC Act.

## MY RECOMMENDATIONS

- 1.26 Chapter 2 of this Report contains a summary of my recommendations and the actuarial assessment of the financial impact of some of those recommendations. The recommendations have been developed after considerable thought, and I wish to stress the importance of considering them as a total package, in which each of the elements complements the other elements.

- 1.27 In addition to the matters emphasised in paragraph 1.9 above, my recommendations for amendments to the SRC Act reflect a number of principles and priorities:
- (a) First, work is generally good for health and wellbeing. Rehabilitation should be the number one priority of all claims. That is best recognised by an Act that supports and promotes a bio-psycho-social approach to rehabilitation and does not contribute to needless disability. The inclusion of provisional liability will remove the financial stress often generated by an injury and assist in retaining injured employees at work by providing early access to medical treatment and incapacity payments in the most critical phase of injury.
  - (b) Second, improving the way in which permanent impairment is assessed will provide national consistency and ensure that injured employees are entitled to receive compensation in recognition of their whole person impairment. Increasing the amount of compensation paid to injured employees based on severity of injury will provide better recognition of the loss of use of bodily functions and the pain and suffering of injured employees.
  - (c) Third, modernising the provision of incapacity payments will provide for consistently fairer remuneration for injured employees and assist in reducing age barriers to work. Superannuation should only be considered in the context of savings for retirement, and the receipt of workers compensation payments should not affect an employee's savings for retirement or increase the risk of reliance on social security benefits for compensation recipients in the later stages of life.
  - (d) Finally, disputes should be resolved as quickly, economically and fairly as possible. Dispute resolution processes should be flexible and ensure equity for all injured employees. The focus should be on the issues and the outcomes rather than the process.
- 1.28 My recommendations should not be viewed in a disparate or piecemeal manner; and, although there will be modest financial impacts arising from their adoption, they are a package that, in combination, addresses the Terms of Reference for this Review.

## ACKNOWLEDGEMENTS

- 1.29 I was greatly assisted in carrying out this Review by counsel assisting, Raelene Sharp of the Victorian Bar, and a Review Secretariat, formed from the DEEWR and Comcare. I could not have completed the Review without the dedication, insight and cooperation of Raelene and the Secretariat.
- 1.30 I wish to record my particular debt to Raelene for the sharp intelligence, willing cooperative approach and analytical rigour that she brought to the Review, as well as the great personal effort she has made to ensure that the Review has been as comprehensive as possible and has finished on time.
- 1.31 The members of the Review Secretariat brought equal commitment and energy to the tasks that faced the Review and enabled me to call on their considerable experience of the practical and policy-related aspects of administering the SRC Act. They also facilitated a most effective consultation and information-gathering process in the time available. I particularly want to acknowledge the expertise and the contributions of Denise Lowe-Carlus, Alan Piira, Ruth Hunt, Seyram Tawia and Phil Hartley. They have all been untiring in their thinking, constructive discussion and drafting of material for my Report.
- 1.32 Paul O'Connor, the Chief Executive Officer of Comcare, has been a constant source of encouragement and stimulating ideas throughout the work of the Review: he has smoothed what could otherwise have been a rocky path and planted many stimulating ideas for me and the Review team to develop. Simone Stevenson of the Minister's staff has greatly helped me in keeping lines of communication open throughout the Review.
- 1.33 I am very grateful to John Kovacic, Deputy Secretary for Workplace Relations and Economic Strategy; Kylie Emery, Group Manager for Workplace Relations Implementation and Safety; and Nikki Armour, then Acting Branch Manager of the Safety and Compensation Policy Branch, for their encouragement and support over the past five months, and to the other staff from DEEWR who have contributed to the Review.
- 1.34 I would also like to record my appreciation of the staff of Comcare for their assistance in providing extensive data, access to further expertise and in enabling the actuarial assessment undertaken by Taylor Fry. DVA has also been extremely supportive in considering and raising aspects of its administration of the SRC Act (and the complementary military rehabilitation and compensation scheme) for inclusion in my Report.
- 1.35 Finally, I must acknowledge the very substantial help that I received from all the people who made the time to talk with me, prepare written submissions to the Review and attend workshops as I developed my thinking and framed my recommendations. Although I take full responsibility for the content of this Report and for its recommendations, I could not have carried out the Review without the focused and constructive participation of so many of the active participants in the Comcare scheme.

# 2. SUMMARY OF RECOMMENDATIONS

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## RECOMMENDATIONS ABOUT THE STRUCTURE OF THE SRC ACT

### RECOMMENDATION 3.1

I recommend that the SRC Act be amended so that:

- (a) the term “Comcare” only be used to mean Comcare the regulator; and
- (b) provisions setting out the powers and obligations of determining authorities, whether Comcare, a Commonwealth authority, a licensed authority or a licensed corporation, should use the term “determining authority”.

### RECOMMENDATION 3.2

I recommend that the SRC Act include a statement of the Act’s objects and a purpose.

### RECOMMENDATION 3.3

I recommend that the SRC Act be re-designed with a more rational structure that reflects the priority to be given to rehabilitation, follows the typical course of a claim and then deals with structural aspects—or scheme governance.

## THE HAWKE REPORT RECOMMENDATIONS

### RECOMMENDATION 4.1

I recommend that s 72A(1) be amended by replacing the reference to Comcare with a reference to the Department, and further defining the Department as the department of State of the Commonwealth currently responsible for employment or workplace relations. I also recommend that the drafting of s 72A(1) be updated so that it is expressed in terms that are consistent with the drafting of s 72A(2).

### RECOMMENDATION 4.2

I recommend that a new paragraph be inserted in s 89B immediately after s 89B(a) giving the SRCC regulatory oversight over determining authorities’ claims management functions and authority to develop and implement a regulatory and performance monitoring framework for that purpose.

### RECOMMENDATION 4.3

I recommend that a new paragraph be inserted after s 89E(g) of the SRC Act extending membership of the SRCC to include a member from the department of State of the Commonwealth responsible for employment or workplace relations. I also recommend the inclusion of a new subsection, s 89E(4), to limit the SRCC’s membership to no more than one person from any one Commonwealth department or authority or any one licensee.

### RECOMMENDATION 4.4

I recommend that amendments be made to s 99 of the SRC Act.

I recommend that new definitions be added to s 99 of “related bodies corporate” and “eligible group of corporations” and that the definition of “eligible applicant” in s 99 be amended by deleting the words “an eligible corporation” and substituting the words “a corporation or an eligible group of corporations”.

### RECOMMENDATION 4.5

I recommend that s 100 of the SRC Act be repealed.

### RECOMMENDATION 4.6

I recommend that a new paragraph be inserted in s 104(2), immediately after s 104(2)(d), as follows:

- (e) the applicant is a national employer.

I recommend that the term “national employer” be defined in simple and direct terms, with the content of that definition a Government policy decision.

#### **RECOMMENDATION 4.7**

I recommend that the declaration of premium payers as determining authorities be considered as part of a legislative package together with the proposed reforms to the financial and regulatory framework of the SRCC and Comcare.

#### **RECOMMENDATION 4.8**

I recommend that s 90C of the SRC Act be amended to ensure transparency of Comcare's performance in managing claim liabilities.

## **RECOMMENDATIONS ABOUT ELIGIBILITY FOR COMPENSATION**

#### **RECOMMENDATION 5.1**

I recommend that the definition of "employee" in s 5(1) of the SRC Act be amended to introduce a deeming provision applicable across the scheme, in relation to contractors.

#### **RECOMMENDATION 5.2**

I recommend that the effect of the Federal Court's judgment in *Wiegand v Comcare* should be negated so that an employee's perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis.

#### **RECOMMENDATION 5.3**

I recommend that the SRC Act be amended so that incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, spinal disc ruptures caused by degenerative disease and similar phenomena) will be covered for workers compensation purposes on the same basis as a "disease"—that is, where the incident was contributed to, to a significant degree, by the employee's employment.

#### **RECOMMENDATION 5.4**

I recommend that DEEWR and DVA examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the SoP regime.

#### **RECOMMENDATION 5.5**

I recommend that the SRC Act be amended so that the reasonable administrative action exclusion in s 5A(1) operates only where the reasonable administrative action taken in a reasonable manner in respect of the employee's employment has contributed, to a significant degree, to the disease, injury or aggravation.

#### **RECOMMENDATION 5.6**

I recommend that s 5A(2) be amended by removing the words "and without limiting that subsection", so as to make it clear that the list in s 5A(2) is a complete list of the actions that are taken to be "reasonable administrative action".

#### **RECOMMENDATION 5.7**

I recommend that, where an employee is "on call", the employee's journey to work should be covered by workers compensation. However, there should be a requirement that the journey must only include travel between home, or the place where the employee receives the message to attend work, and the place of work itself.

## **RECOMMENDATIONS ABOUT REHABILITATION**

#### **RECOMMENDATION 6.1**

I recommend that the SRC Act explicitly provide for early intervention as the primary form of rehabilitation, recognised in the injury management and rehabilitation code of practice proposed in **Recommendation 6.9**.

#### **RECOMMENDATION 6.2**

I recommend that the SRC Act be amended to include a system of provisional liability that allows an injured employee access to a maximum of 12 weeks of incapacity payments and medical costs of up to \$3,000.

#### **RECOMMENDATION 6.3**

I recommend that the term "rehabilitation program" in the SRC Act be amended to "workplace rehabilitation plan", and that the definition of the term should be amended to emphasise the vocational nature of the services and remove reference to other treatment forms.

#### **RECOMMENDATION 6.4**

I recommend that the language in Part III of the SRC Act should be amended to reflect the focus on occupational or vocational rehabilitation program providers.

#### **RECOMMENDATION 6.5**

I recommend that the SRC Act be amended to remove the role of the rehabilitation authority and replace it with the concept of the liable employer, which will always have a right, and the responsibility, to arrange rehabilitation.

#### **RECOMMENDATION 6.6**

I recommend that the SRC Act be amended to include the requirement that the person vested with authority to assist the employer in the discharge of the employer's rehabilitation responsibilities undertake appropriate training, to be prescribed by regulations.

#### **RECOMMENDATION 6.7**

I recommend that, where an employee moves between employers (both of whom are covered by the SRC Act), dual rehabilitation responsibilities should be established for both the liable employer and the current employer. Where an employee moves to an employer outside the SRC Act, sole rehabilitation responsibility should revert to the liable employer.

#### **RECOMMENDATION 6.8**

I recommend that the SRC Act be amended to provide Comcare with an ultimate power to commence and/or take over rehabilitation when the liable employer fails to meet its obligations or ceases to exist.

#### **RECOMMENDATION 6.9**

I recommend that s 41 of the SRC Act be amended to provide for Comcare to issue an "injury management and rehabilitation code of practice", including obligations for employers to ensure that:

- (a) a rehabilitation management system is established for the employer's workers; and
- (b) the establishment, content and implementation of the rehabilitation management system is in accordance with the code of practice.

#### **RECOMMENDATION 6.10**

I recommend that the SRC Act be amended to provide for the development of an "injury management plan" that is developed by a determining authority for each injured employee who is incapacitated for 28 days or more (either total or partial incapacity).

#### **RECOMMENDATION 6.11**

I recommend that the SRC Act be amended to provide that:

- (a) the injury management plan must be prepared by the determining authority in consultation with the injured employee, employer and treating practitioner;
- (b) employees and employers must cooperate in the preparation and implementation of an injury management plan;
- (c) if an employee does not cooperate in the preparation or implementation of the injury management plan, the employee's rights to compensation are suspended (consistent with the obligation currently implicit in s 37(7) of the SRC Act); and
- (d) if an employer does not cooperate in the preparation or implementation of the injury management plan, penalty units may apply.

#### **RECOMMENDATION 6.12**

I recommend that the SRC Act be amended to require a determining authority to conduct a review of each active claim at 12 and 52 weeks.

#### **RECOMMENDATION 6.13**

I recommend that s 36 of the SRC Act be repealed.

#### **RECOMMENDATION 6.14**

I recommend that the current s 37(3) of the SRC Act be removed and replaced with the core requirements that an employer:

- (a) take all reasonable steps to return an injured employee to work as soon as possible; and
- (b) consult as far as practicable with the injured employee and nominated treating practitioner about the injured employee's return to work.

**RECOMMENDATION 6.15**

I recommend that s 57 of the SRC Act be amended to provide that a suitably qualified person may undertake a medical examination and that a medical examination may be undertaken by a panel.

**RECOMMENDATION 6.16**

I recommend that the definition of “suitable employment” be amended so that employment with any employer can be considered “suitable employment”.

**RECOMMENDATION 6.17**

I recommend that the SRC Act be amended so that, where the employer’s obligation to provide suitable duties under s 40 is not met, penalty units may apply.

**RECOMMENDATION 6.18**

I recommend that the SRC Act be amended to provide for the establishment of a scheme-wide job placement program appropriate to the unique attributes of the Comcare scheme, including a preference for placement with another scheme employer before looking outside the scheme.

**RECOMMENDATION 6.19**

I recommend that the injury management and rehabilitation code of practice provide the opportunity for employees to propose their suitable duties (where appropriate) as a first step.

**RECOMMENDATION 6.20**

I recommend that an inspectorate be developed within Comcare with a supervisory function and information-gathering and sanctioning powers in relation to the activities of employers with rehabilitation obligations, to ensure compliance with those obligations, namely:

- (a) to provide suitable employment;
- (b) to comply with the duties outlined in s 37; and
- (c) to comply with the IMR code of practice.

In addition, the inspectorate can also ensure compliance of approved rehabilitation providers with outcome and service delivery standards.

**RECOMMENDATION 6.21**

I recommend that the SRC Act be amended to provide Comcare with the power to issue improvement notices and to accept undertakings from employers in relation to contravention of employer rehabilitation obligations, including the duty to provide suitable employment. RTW inspectors should be provided with similar information-gathering powers to those provided to the regulator under s 155 of the WHS Act.

## RECOMMENDATIONS ABOUT COMPENSATION FOR INJURIES AND DISEASES

**RECOMMENDATION 7.1**

I recommend that the concept of NWE be renamed “average remuneration”, which is the average amount paid to the employee in each week of the relevant period and that ss 8(1)–(5) and (8) be repealed and replaced with a definition of “average remuneration”.

**RECOMMENDATION 7.2**

I recommend that s 9 of the SRC Act be repealed and replaced with a provision that fixes the relevant period at 13 weeks, with the flexibility to account for employment and remuneration arrangements where a 13-week period would not produce a fair and equitable outcome.

**RECOMMENDATION 7.3**

I recommend that the SRC Act be amended to provide for the annual indexation of an employee’s average remuneration, subject to any changes that the determining authority makes on the basis of information provided by the employee or employer (or otherwise obtained by the determining authority).

#### **RECOMMENDATION 7.4**

I recommend that s 19(6) of the SRC Act be amended to exclude its operation where the employee has been deemed to have an ability to earn.

#### **RECOMMENDATION 7.5**

I recommend that ss 20, 21 and 21A be repealed in their entirety. If those sections are repealed, ss 114A and 114B will no longer be relevant and should also be repealed.

#### **RECOMMENDATION 7.6**

If **Recommendation 7.5** is not implemented, I recommend that, as an absolute minimum, the deduction of “5 % of the employee’s normal weekly earnings” should be removed from the formula in each of ss 20(3), 21(3) and 21A(3).

#### **RECOMMENDATION 7.7**

Further, if **Recommendation 7.5** is not implemented, in addition to **Recommendation 7.6**, I recommend that:

- (a) the term “retired” should be removed from ss 20, 21 and 21A; the application of ss 20, 21 and 21A should be enlivened by the employee ceasing employment with the employer, reaching preservation age and being eligible to receive superannuation from the employee’s superannuation fund, OR when an employee ceases employment for invalidity reasons and becomes eligible to access superannuation, regardless of whether the employee has reached the preservation age; and
- (b) the powers in s 114B should be amended to include consequences for non-compliance similar to those contained in the HOSC Act.

#### **RECOMMENDATION 7.8**

Further, if **Recommendation 7.5** is not implemented, in addition to **Recommendation 7.6** and **Recommendation 7.7**

I recommend that:

- (a) the mechanism for taking into account deemed income on a lump sum in ss 21(3) and 21A(3) of the SRC Act should be based on the post-tax value of the lump sum (if income tax was paid on the lump sum benefit); and
- (b) the rate at which employees are deemed to earn income on any lump sum should reflect the interest that an employee can realistically expect to earn.

#### **RECOMMENDATION 7.9**

I recommend that immediate consideration be given to amending the SGA Act so that compensation payments made pursuant to s 19 of the SRC Act are deemed to be “ordinary time earnings” for the purposes of the SGA Act.

#### **RECOMMENDATION 7.10**

I recommend that the introduction to s 8(10) of the SRC Act be amended by including the words “from time to time”, to confirm its ambulatory operation.

#### **RECOMMENDATION 7.11**

I recommend that s 8(10)(a) of the SRC Act be amended to confirm that an employee who is suspended without pay continues to be employed for the purposes of s 8(10).

#### **RECOMMENDATION 7.12**

I recommend that s 37(5) of the SRC Act be repealed.

#### **RECOMMENDATION 7.13**

I recommend that weekly compensation be paid at 100 % of an employee’s NWE during the first 13 weeks of the employee’s incapacity for work, at 90 % of the employee’s NWE during weeks 14–26 of incapacity for work and thereafter at 80 % of the employee’s NWE while the employee remains incapacitated for work.

#### **RECOMMENDATION 7.14**

I recommend that compensation be calculated, at the levels recommended in **Recommendation 7.13**, by reference to the employee’s NWE less any earnings the employee receives from additional employment, deleting references to the “adjustment percentage”.

#### **RECOMMENDATION 7.15**

I recommend that the step-down periods be calculated on the basis that time will run for each period during any week when the employee is participating in a return to work program or absent from work for any reason other than undergoing medical treatment, for which compensation is payable under s 16 of the SRC Act.

#### **RECOMMENDATION 7.16**

I recommend that s 23(1) and (1A) of the SRC Act be amended so that:

- (a) the cut-off age is tied to the qualifying age for the age pension; and
- (b) employees who are injured at any time after five years prior to the age pension qualifying age can receive incapacity payments for a period of 260 weeks.

#### **RECOMMENDATION 7.17**

I recommend that the SRC Act be amended so that:

- (a) entitlement to weekly compensation is suspended during any period of more than 60 days when an employee is absent from Australia—subject to exceptions where the employee’s employment with the Commonwealth or a licensee or “suitable employment” undertaken by the employee require the employee to leave Australia; and
- (b) employees are obliged to notify the relevant determining authority of any absence from Australia that exceeds 60 days.

#### **RECOMMENDATION 7.18**

I recommend that the SRC Act be amended so that an employee may redeem her or his compensation payments on a voluntary basis.

#### **RECOMMENDATION 7.19**

I recommend that s 30 of the SRC Act be retained, but that the threshold for its operation be increased to \$150 per week, indexed by reference to the CPI.

#### **RECOMMENDATION 7.20**

I recommend that definitions of “legally qualified dentist” and “legally qualified medical practitioner” be inserted in s 4(1).

#### **RECOMMENDATION 7.21**

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to ensure that medical treatment is provided by legally qualified health practitioners with the relevant registration or by health practitioners who have been recognised and accredited by Comcare.

#### **RECOMMENDATION 7.22**

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to include treatment provided outside Australia where the determining authority is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare.

#### **RECOMMENDATION 7.23**

I recommend that s 69 of the SRC Act be amended to insert new paragraphs to include, as the functions of Comcare:

- (a) the recognition, accreditation and monitoring of medical treatment providers who are not subject to AHPRA regulation; and
- (b) the approval of appropriate medical, surgical, dental or other therapeutic treatment for employees outside Australia.

#### **RECOMMENDATION 7.24**

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to include treatment and maintenance as a resident in a nursing home.

#### **RECOMMENDATION 7.25**

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended so that “medicines” will be limited to those prescribed by a legally qualified medical practitioner or dentist and dispensed by a registered pharmacist, or provided to a patient at a hospital or resident in a nursing home.

#### **RECOMMENDATION 7.26**

I recommend that the SRC Act be amended to restrict compensation for Schedule 8 medications to those that are prescribed by the employee's nominated legally qualified medical practitioner.

I further recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prescribe a form in which an employee would nominate a legally qualified medical practitioner for the purpose of prescribing Schedule 8 medications.

#### **RECOMMENDATION 7.27**

I recommend that "nurse" and "nursing care" be defined.

#### **RECOMMENDATION 7.28**

I recommend that the SRC Act be amended so that, in order to be compensable, medical treatment must meet objective standards such as those in the Clinical Framework.

#### **RECOMMENDATION 7.29**

I recommend that the SRC Act be amended to provide for the referral of practitioners to the appropriate professional regulatory bodies where treatment is provided outside the Clinical Framework or where there are concerns about the adequacy, appropriateness or frequency of treatment—including where an LQMP has recommended the treatment.

#### **RECOMMENDATION 7.30**

I recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prepare and issue, as a legislative instrument, a table of medical service rates that are to apply throughout the Comcare scheme as the rates at which determining authorities are liable to pay compensation under s 16(1) of the SRC Act. The "appropriate" amount of compensation for medical treatment would be linked to those rates.

#### **RECOMMENDATION 7.31**

I recommend that any changes that are made to compensation for medical expenses under the SRC Act bear in mind the proposal to provide Repatriation Health Cards to ADF claimants under the SRC Act, so that those changes complement the implementation of Recommendations 24.1 and 24.2 of the MRC Act Review.

#### **RECOMMENDATION 7.32**

I recommend that a new term, "severe injury", be defined in s 4(1) of the SRC Act.

#### **RECOMMENDATION 7.33**

I recommend that s 29 of the SRC Act be repealed and a new legislative model based on a tiered system of services and support provided in the home be implemented. The new model would provide for compensation for three types of services provided in the home:

- (a) household services, payable for three years from the date of injury;
- (b) post-acute care services, payable for three years from the date of injury and for six months after specific events; and
- (c) ongoing household and attendant care services for the severely injured.

#### **RECOMMENDATION 7.34**

I recommend that the amount payable for ongoing care services for the severely injured be capped at a maximum of 40 hours per week, up to a maximum cost of \$1,700 (indexed).

#### **RECOMMENDATION 7.35**

I recommend that Comcare establish a formal framework for the assessment of need for services provided in the home, based on the International Classification, with the inclusion of requirements that the assessor:

- (a) liaise with any other interested parties in the course of the assessment; and
- (b) be responsible for recommending any required household services, post-acute services, or ongoing attendant care services.

#### **RECOMMENDATION 7.36**

I recommend that any need for household assistance and attendant care services be assessed by an independent party. That assessment could be by any physiotherapist or occupational therapist registered by AHPRA.

### **RECOMMENDATION 7.37**

I recommend that the SRC Act be amended to allow Comcare to prepare and issue, as a legislative instrument, a list of approved/registered attendant care providers.

That list should be based on the list of ACIMSS accredited providers and any approved provider lists established by Government departments, such as DVA, and State and Territory workers compensation schemes.

## **RECOMMENDATIONS ABOUT COMPENSATION FOR PERMANENT IMPAIRMENT**

### **RECOMMENDATION 8.1**

I recommend that Comcare adopt the proposed National Guide as the Approved Guide, and the proposed permanent impairment assessor document.

### **RECOMMENDATION 8.2**

I recommend that the SRC Act be amended so that separate impairments arising from a single injury occurrence can be combined to achieve a combined impairment value.

### **RECOMMENDATION 8.3**

I recommend that, following payment of permanent impairment compensation, the permanent impairment threshold under the SRC Act for any worsening of the original or secondary condition (other than a hearing loss) be reduced to 5 %.

### **RECOMMENDATION 8.4**

I recommend that the maximum benefit payable for permanent impairment (being the combined amount payable pursuant to s 24 and s 27) be the same amount as the lump sum compensation payable pursuant to s 17 for a death that results from an injury, with the maximum s 24 payment being 72.72 % of the death benefit and the maximum s 27 payment being 27.27 % of the death benefit.

### **RECOMMENDATION 8.5**

I recommend that an algorithmic model be introduced for calculating permanent impairment compensation, consistent with the model outlined in Figure 5.

## **RECOMMENDATIONS ABOUT CLAIM DETERMINATION, RECONSIDERATION AND REVIEW**

### **RECOMMENDATION 9.1**

I recommend that the SRC Act be amended to allow for electronic notification of injury and electronic lodgement of claim forms.

### **RECOMMENDATION 9.2**

I recommend that the SRC Act be amended to require employers to forward claims received to the determining authority within three days.

### **RECOMMENDATION 9.3**

I recommend that the SRC Act be amended to include statutory timeframes for the determination of claims and that, on a failure to meet those timeframes, the claim be deemed to be rejected.

The determining authority must determine the claim:

- (a) within 30 days for injury;
- (b) within 60 days for disease; or
- (c) if provisional liability is being met as a result of a previously lodged injury notification, by the end of the provisional liability period;

whichever is the longer.

### **RECOMMENDATION 9.4**

I recommend that the SRC Act be amended so that, for liability to pay compensation to continue in respect of a psychological injury after 12 weeks from the date of a claim, the diagnosis must be confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare—if not initially made by such a practitioner.

#### **RECOMMENDATION 9.5**

I recommend that the SRC Act be amended to provide for the payment of an employee's costs at the reconsideration stage, including the cost of obtaining medical support (capped at the cost of obtaining one report, including incidental diagnostic costs) and legal costs (capped at \$1,500, indexed).

#### **RECOMMENDATION 9.6**

I recommend that regulations be made to prescribe the period within which a decision on a request for reconsideration must be made, for the purposes of s 62(6) of the SRC Act, as contemplated by SRCOLA 2011, and that this prescribed period should be 60 days.

#### **RECOMMENDATION 9.7**

I recommend that consideration be given to amending the SRC Act and the MRC Act so that determinations made on claims managed by the MRCC under Part XI of the SRC Act are dealt with at the reconsideration stage in the same way as reconsideration of determinations made under the MRC Act.

#### **RECOMMENDATION 9.8**

I recommend that the AAT be encouraged to explore practical ways to achieve a further, and marked, reduction in the time taken to resolve compensation applications.

#### **RECOMMENDATION 9.9**

I recommend that licensees be required to follow the model litigant requirements in the Legal Services Directions.

#### **RECOMMENDATION 9.10**

I recommend that all determining authorities:

- (a) be prohibited from making submissions against the wishes of Comcare;
- (b) be obliged to advise Comcare of any proceedings brought against them; and
- (c) upon request by Comcare, provide Comcare with any documents relating to those proceedings.

#### **RECOMMENDATION 9.11**

I recommend that Comcare apply to the Attorney-General for permission to settle cases involving Comcare as a determining authority in the AAT on a limited commercial basis, by the payment of an applicant's legal costs, without an admission of liability.

#### **RECOMMENDATION 9.12**

I recommend that s 66(1) of the SRC Act be amended to provide that all parties to a matter before the AAT must disclose any evidence to the AAT at least 28 days before the hearing of the matter.

#### **RECOMMENDATION 9.13**

I recommend that the SRC Act be amended to permit the AAT to hear matters not the subject of a reviewable decision, with the consent of the parties.

#### **RECOMMENDATION 9.14**

I recommend that:

- (a) immediate consideration be given to identifying those determinations made by the Fair Work Commission that consider and determine the reasonableness or otherwise of an employer's action that could be a reasonable administrative action within s 5A(1) of the SRC Act; and
- (b) if determinations of that kind can be identified, the employer and the employee should be entitled to rely on that determination when a determining authority or the AAT is determining whether the employer's conduct amounted to reasonable administrative action for the purposes of s 5A(1) of the SRC Act.

#### **RECOMMENDATION 9.15**

I recommend that immediate consideration be given to defining a jurisdiction for the Fair Work Commission to review reviewable decisions under the SRC Act that involve workplace issues, with a view to transferring that part of the AAT's review jurisdiction under the SRC Act to the Fair Work Commission and defining the relationship between the Fair Work Commission's review jurisdiction and the AAT's review jurisdiction under the SRC Act.

### **RECOMMENDATION 9.16**

I recommend that priority be given to defining a review jurisdiction for the Fair Work Commission under Division 3 of Part II of the SRC Act, with a view to giving the Fair Work Commission jurisdiction to review all reviewable decisions relating to rehabilitation programs.

### **RECOMMENDATION 9.17**

I recommend that the SRC Act be amended so that:

- (a) information requested under s 58 be provided within the period specified in the request (as with a notice issued under s 71);
- (b) penalties are prescribed for a failure to comply with a s 71 notice;
- (c) determining authorities have the power to request information relevant to a claim from parties other than the employer and the employee (for example, the employee's legal practitioners, a previous employer or an insurer); and
- (d) determining authorities have the power to request information relevant to the administration of liabilities under the SRC Act (for example, information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).

### **RECOMMENDATION 9.18**

I recommend that the SRC Act be amended to include an obligation, reinforced by a penalty, to provide information of a change in circumstances.

### **RECOMMENDATION 9.19**

I recommend that the SRC Act be amended to allow Comcare to recover overpayments of compensation that have been made to an employer by Comcare to recompense the employer for payments of salary or wages.

### **RECOMMENDATION 9.20**

I recommend that s 69 of the SRC Act be amended to confer on Comcare an additional function authorising Comcare to provide compensation to claimants for financial detriment caused by defective administration. In support of that function, the Minister should issue guidelines on how the function is to be carried out. Comcare should fund defective administration payments out of moneys available to meet its annual operating costs and not out of premium funds.

## **RECOMMENDATIONS ABOUT LIABILITIES ARISING APART FROM THE SRC ACT**

### **RECOMMENDATION 10.1**

I recommend that the SRC Act be amended to give Comcare and licensees a statutory right of recovery, similar to the right in s 151Z of the 1987 NSW Act.

### **RECOMMENDATION 10.2**

I recommend that the SRC Act be amended to confirm that s 50 includes the power to do all things necessary for the making of a claim, including the taking of any preliminary steps.

### **RECOMMENDATION 10.3**

I recommend that the SRC Act be amended to ensure that any damages recovered by Comcare pursuant to s 50 are limited to the damages recoverable by the employee.

## **ACTUARIAL IMPACT ASSESSMENT OF RECOMMENDATIONS**

- 2.1. As part of the Review, Taylor Fry Consulting Actuaries (**Taylor Fry**) were engaged to analyse anticipated financial effects of various possible changes to the SRC Act that the Review was considering. That analysis is intended to help inform the Government when considering whether (and how) my recommendations might be adopted.
- 2.2. Throughout this Report, and where an impact assessment has been undertaken for a specific recommendation, I have noted the projected financial impact of that recommendation. A summary of the analysis undertaken by Taylor Fry is included at Appendix C. A summary of the financial effects of my final recommendations as estimated by Taylor Fry appears below in **Table 2**.

- 2.3. Workers compensation claims arising from most peacetime and certain other service by ADF personnel before 1 July 2004 are governed by the SRC Act and administered by the MRCC. Because those claims are administered separately, Taylor Fry was not able to include the projected financial impact of my recommendations on ADF claims in its projections; however, the Australian Government Actuary has been able to undertake a limited financial impact assessment of nominated changes to the SRC Act as they could apply to ADF claims. A summary of the analysis undertaken by the Australian Government Actuary is included at Appendix D. A summary of the financial effects estimated by the Australian Government Actuary is listed below in Table 3.
- 2.4. For the purposes of this Review, the actuarial assessment assumed that the recommendations considered would take effect on 1 January 2014.
- 2.5. For each possible change to the SRC Act that Taylor Fry was instructed to consider, up to six estimates of the financial effects were provided, as follows:
- (a) for Commonwealth current customers only—the annual effect for a future injury year;
  - (b) for Australian Capital Territory (**ACT**) Government customers only—the annual effect for a future injury year;
  - (c) for all licensees combined—the annual effect for a future injury year;
  - (d) for Commonwealth current and former customers—the effect on estimate of existing outstanding claims liability;
  - (e) for ACT Government customers only—the effect on estimate of existing outstanding claims liability; and
  - (f) for all licensees combined, effect on estimates of existing outstanding claims liabilities.
- 2.6. Items (a), (b) and (c) are relevant for each possible change to the SRC Act. Items (d), (e) and (f) are relevant only for possible changes that would affect some claims with a date of injury or disease before 1 January 2014.
- 2.7. No explicit premium is charged for the costs of compensation for military personnel who are covered under the SRC Act. The Australian Government Actuary was, therefore, asked to estimate the impact on the projected liability for military personnel at the time the proposed changes would take effect. As such, the figures provided in the Australian Government Actuary advice are not directly comparable to the estimates provided by Taylor Fry.

**TABLE 1: SRC ACT CHANGE OPTIONS ASSESSED FOR FINANCIAL IMPACT**

Taylor Fry Option number	Description	Recommendation number	Possible date of effect
<b>Eligibility</b>			
3(a)	Manifestations of underlying diseases (for example, heart attacks and strokes as a result of cardiovascular diseases, spinal rupture as a result of skeletal degeneration and diseases) which occur while the employee is at work would be classified as “diseases” and therefore compensable only where employment contributes to the disease or to the manifestation “to a significant degree”.	5.3	Manifestations which occur on or after 1 January 2014.
3(b)	Injuries suffered while travelling from home to work where the employee is “on-call” would be compensable.	5.7	Injuries which occur on or after 1 January 2014.
<b>Rehabilitation</b>			
4(a)	Strengthen obligations on employers to provide suitable employment.	6.17	Requests for suitable employment on or after 1 January 2014.

Taylor Fry Option number	Description	Recommendation number	Possible date of effect
<b>Compensation</b>			
5(a)(i)	<p>Change the maximum age until which incapacity compensation is payable from the current age 65 to equal the qualifying age for the age pension. The latter will increase progressively from the current age 65 to age 65.5 on 1 July 2017 and then by a further six months every two years, reaching age 67 by 1 July 2023.</p> <p>An employee who suffers an injury or disease within 2 years of the increased qualifying age for the age pension would be eligible for incapacity compensation for a period of 2 years.</p>	7.16	Incapacity payments on or after 1 July 2017.
5(a)(ii)	<p>An employee who suffers an injury or disease within five years of the qualifying age for the age pension at that time would be eligible for incapacity compensation for a period of five years.</p>	7.16	Incapacity payments on or after 1 July 2017, but the eligibility for five years of incapacity compensation would apply only for injuries on or after 1 January 2014.
5(c)	<p>Change the definition of “maximum rate compensation week” 19(2A) of the SRC Act, so that an employee would be deemed to be totally incapacitated for any week in which the employee is participating in an RTW program or absent from work for any reason other than seeking medical treatment: that is, the whole week would count towards the 45 weeks period before the step-down in the rate of incapacity compensation payable.</p>	7.15	Injuries which occur on or after 1 January 2014.
5(d)(i), 5(d)(ii) & 5(d)(iii)	<p>Change the step-down provisions (without changing the definition of “maximum rate compensation week”) from the current single step-down after 45 maximum rate compensation weeks, to compensation based on:</p> <ul style="list-style-type: none"> <li>● Option 5(d)(i)—100 % of NWE for the first 13 weeks, 90 % of NWE for the next 13 weeks and 80 % of NWE thereafter.</li> </ul>	7.13	Injuries which occur on or after 1 January 2014.
5(e)(i)	<p>Repeal 20, 21 and 21A of the SRC Act, which would result in the amount of incapacity compensation being determined in accordance with 19 for all claimants. This would abolish the current deductions from incapacity compensation in respect of superannuation pensions or lump sums received by claimants, and hence result in an increase in compensation payable.</p>	7.5	Claimants who first receive a superannuation pension or lump sum on or after 1 January 2014.
5e(ii)	<p>As for option 5(e)(i), but applicable for all incapacity compensation payments on or after 1 January 2014.</p>	7.5	All incapacity compensation payments on or after 1 January 2014.

Taylor Fry Option number	Description	Recommendation number	Possible date of effect
5(f)(i), 5(f)(ii) & 5(f)(iii)	Combination of option 5(e)(i) with options 5(d)(i), 5(d)(ii) or 5(d)(iii) respectively.	7.13 and 7.5	Changes in step-down rates applicable for injuries which occur on or after 1 January 2014. Repeal of 20, 21 and 21A applicable for claimants who first receive a superannuation pension or lump sum after 1 January 2014.
5(f)(iv), 5(f)(v) & 5(f)(vi)	Combination of option 5(e)(ii) with options 5(d)(i), 5(d)(ii) or 5(d)(iii) respectively.	7.13 and 7.5	Changes in step-down rates applicable for injuries which occur on or after 1 January 2014. Repeal of 20, 21 and 21A applicable for all incapacity compensation payments on or after 1 January 2014.
5(g)(i)	Leave 20, 21 and 21A of the SRC Act in force, but amend them to abolish the current (5% of NWE) deduction from the amount of compensation.	7.6	Claimants who first receive a superannuation pension or lump sum on or after 1 January 2014.
5(g)(ii)	As for option 5(g)(i), but applicable for all incapacity compensation payments on or after 1 January 2014.	7.6	All incapacity compensation payments on or after 1 January 2014.
5(h)(i) & 5(h)(ii)	Change redemption provisions to allow less restricted access to redemptions. Two options are being considered:  Option 5(h)(i)—compensation for incapacity, medical costs, attendant care and household services costs may all be redeemed, and  Option 5(h)(ii)—only compensation for incapacity compensation may be redeemed.	7.16	1 January 2014, regardless of date of injury or disease.
6(c)	Remove the current limit on the amount of compensation for attendant care services	7.34	Attendant care provided on or after 1 January 2014.
6(d)	Change the definition of medical treatment so that only treatment provided by practitioners registered with the AHPRA would be compensable.	7.22	Treatment provided on or after 1 January 2014.
6(e)	Comcare to determine “appropriate” rates specifying the maximum compensation payable for defined medical and other treatments.	7.30	Treatment provided on or after 1 January 2014.
<b>Compensation for permanent impairment</b>			
7(a)	Combine assessments of multiple impairments arising from a single incident to produce an overall assessment of whole person impairment, with compensation for permanent impairment ( <b>PI</b> ) to be determined based on that overall assessment of whole person impairment.	8.2	Injuries which occur on or after 1 January 2014.
7(c)	Increase the maximum amount payable due to PI—that is, the total of the maximum amounts payable for PI and non-economic loss ( <b>NEL</b> )—to equal the lump sum payable on death.  The increased amounts payable for PI would be determined using a non-linear scale.	8.4 and 8.5	Date of PI assessment on or after 1 January 2014.

Taylor Fry Option number	Description	Recommendation number	Possible date of effect
7(d)	Following payment of PI compensation, any worsening or secondary condition arising from the same incident must meet a threshold of a 5% increase in whole person impairment for additional PI compensation to become payable.	8.3	Claims for PI received on or after 1 January 2014.
<b>Dispute resolution</b>			
8(a)	Provide for payment of claimants' costs, including legal and medical report costs subject to limits, for reconsiderations.	9.5	Reconsideration requests received on or after 1 January 2014.

**TABLE 2: SUMMARY OF SELECTED COST ESTIMATES FOR RECOMMENDATIONS (EXCLUDING ADF CLAIMS)**

Recommendation number	Commonwealth Government, estimate of increase or (reduction) in:		ACT Government, estimate of increase or (reduction) in:		All licensees combined, estimate of increase (or reduction) in:	
	Future annual premiums	Outstanding claims liabilities	Future annual premiums	Outstanding claims liabilities	Future annual claims costs	Outstanding claims liabilities
	\$M	\$M	\$M	\$M	\$M	\$M
<b>Eligibility</b>						
5.3	-7.4	0	-1.1	0	-3.7	0
5.7	0.9	0	0.1	0	0.4	0
<b>Rehabilitation</b>						
6.17	-4.8	0	-1.2	0	0	0
<b>Compensation</b>						
7.16	0.0	44	0.0	9	2.9	12
7.16	0.4	44	0.1	9	0.2	12
7.15	-3.2	0	-0.8	0	-1.7	0
7.13	-4.5	0	-1.1	0	-2.5	0
7.5 <sup>a</sup>	18.3	132	4.5	32	9.9	36
7.5 <sup>b</sup>	18.3	274	4.5	67	9.9	74
7.5 and 7.13 (combined impact) <sup>c</sup>	13.7	132	3.4	32	7.5	36
7.5 and 7.13 (combined impact) <sup>d</sup>	13.7	274	3.4	67	7.5	74
7.6 <sup>g</sup>	2.7	20	0.7	5	1.5	5
7.6 <sup>f</sup>	2.7	42	0.7	10	1.5	11
7.22	-3.1	-26	-0.5	-4	-1.6	-6
7.30	-2.0	-16	-0.3	-3	-1.0	-4
7.34	0.5	3	0.1	2	0.3	1

Recommendation number	Commonwealth Government, estimate of increase or (reduction) in:		ACT Government, estimate of increase or (reduction) in:		All licensees combined, estimate of increase (or reduction) in:	
	Future annual premiums	Outstanding claims liabilities	Future annual premiums	Outstanding claims liabilities	Future annual claims costs	Outstanding claims liabilities
	\$M	\$M	\$M	\$M	\$M	\$M
<b>Compensation for permanent impairment</b>						
8.2	1.6	0	0.5	0	0.9	0
8.3	0.3	2	0.1	1	0.2	1
8.4 and 8.5	1.4	10	0.5	3	0.8	3
<b>Claim determination, reconsideration and review</b>						
9.5	0.6	2	0.2	0	0.3	0

- a. Option has been costed assuming that it applies to an employee who first receives a superannuation pension or lump sum on or after 1 January 2014.
- b. Option has been costed assuming that it applies to all incapacity payments made on or after 1 January 2014.
- c. Option has been costed assuming that it applies to an employee who first receives a superannuation pension or lump sum on or after 1 January 2014.
- d. Option has been costed assuming that it applies to all incapacity payments made on or after 1 January 2014.
- e. Option has been costed assuming that it applies to an employee who first receives a superannuation pension or lump sum on or after 1 January 2014.
- f. Option has been costed assuming that it applies to all incapacity payments made on or after 1 January 2014.

**TABLE 3: SUMMARY OF SELECTED COST ESTIMATES (FOR ADF CLAIMS UNDER THE SRC ACT)**

Recommendation number	ADF rehabilitation and compensation costs , estimate of additional liability (\$M)
<b>Compensation</b>	
7.5	140
7.6	20
7.16	30
<b>Compensation for permanent impairment</b>	
8.4 and 8.5	50–100

# 3. THE STRUCTURE OF THE SRC ACT

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- 3.1 As noted in the terms of reference for this Review (see Appendix A), the Government believes that the Comcare scheme should be exemplary in its scheme design as well as its service delivery.

## THE WORKING ENVIRONMENTS OF PARTICIPANTS IN THE SCHEME

- 3.2 The Comcare scheme was designed with one employer in mind—the Australian Public Service (the **APS**)—and it was introduced at a time when employment conditions (including the administrative arrangements around employment, superannuation conditions and other entitlements) were relatively consistent across a workforce that was engaged in generally similar types of work.
- 3.3 The environment in which the scheme now operates has changed significantly over the past 24 years. In the public sector, workplace agreements have replaced industrial awards, employment under individual contract has become far more common and superannuation arrangements are much less standardised and far more flexible than they were in 1988.
- 3.4 In addition, the scheme has been opened to self-insurers—corporations that operate in the private sector. Several provisions in the SRC Act are difficult to apply to private industry employment arrangements.

## THE CASE FOR RE-WRITING THE SRC ACT

- 3.5 There have been 59 Acts amending the SRC Act since it was enacted in 1988. Many of those amendments have been minor in nature; however, changes to the SRC Act in the past decade have been quite significant.
- 3.6 The amendments have resulted in employees covered by the SRC Act experiencing different outcomes due to the changes operating prospectively from a specified commencement date rather than retrospectively. That can make the SRC Act difficult to navigate, especially for those who are new to the Comcare scheme.
- 3.7 There is a strong case to be made for re-writing the SRC Act in order to bring it up to date with current working conditions, to reflect current best practice in rehabilitation and to ensure that it is laid out in a logical and functional structure that is easy to follow and apply. However, the process of re-writing the SRC Act needs considerable care and thought—and more time than has been allowed for this Review. In the meantime, this Review has identified many aspects of the SRC Act where immediate legislative change is justified and can be accomplished relatively quickly.
- 3.8 Hence, the Review recommends a two-stage approach to reforming the SRC Act:
- (a) In the short term, the Act should be amended to accommodate the changes recommended in Chapters 4–10 of this Report and the recommendations made in paragraphs 3.10–3.12 below.
  - (b) In the longer term, the Act should be restructured in line with the principles outlined in paragraphs 3.14–3.18 below.

## IMMEDIATE CHANGES TO THE SRC ACT

- 3.9 In Chapters 4–10 of this Report, I have recommended a series of changes to the SRC Act designed to remedy anomalies and enhance the Act's operation in the areas of rehabilitation and compensation as well as to address the recommendations developed by Dr Allan Hawke. Those legislative changes can and should be implemented as soon as the Government's legislative agenda permits.
- 3.10 Further, a distinction should be made between references to Comcare as the regulator of the scheme and references to Comcare acting as a determining authority. Currently, "Comcare" is used to mean either Comcare the regulator (as in s 28 and Parts III, V, VI, VII and VIII) or Comcare the determining authority (as in ss 8(8), 16–19, 22 etc), with no textual indicator of the intended meaning. To avoid confusion and ensure that all users of the Comcare scheme are aware of their roles and obligations, I recommend that:
- (a) the term "Comcare" only be used to mean Comcare the regulator; and
  - (b) provisions setting out the powers and obligations of determining authorities, whether Comcare, a Commonwealth authority, a licensed authority or a licensed corporation, should use the term "determining authority".

- 3.11 In addition to those detailed changes, I recommend that the SRC Act include a statement of the Act's objects and a purpose:
- The current focus of the SRC Act is on an employee's incapacity—in particular, on compensating for incapacity and then rehabilitating the employee. A more positive approach would be to focus on an employee's "capacity" for work.
  - The focus should be identified in the expression of the objects and purposes of the SRC Act. The objects and purpose of the SRC Act should aim to articulate the desirable outcomes that are expected from the legislative provisions.
  - The objects and purpose should also set out the desirable objectives of the SRC Act with regard to the governance arrangements and the long-term financial viability of the scheme.
- 3.12 I recommend that a section in the following terms be inserted immediately before the principal definition section, s 4:
- The main purpose of this Act is:
- to assist in protecting the health, safety and wellbeing;
  - to enhance the work capacity; and
  - to secure the economic position;
- of employees through the establishment and regulation of a prompt, fair, responsive and financially viable system for:
- rehabilitating employees injured at work so that their capacity for work can be fully restored;
  - the provision of medical treatment to employees injured at work;
  - compensating employees for losses caused by injuries at work;
  - resolving disputes about rehabilitation and compensation; and
  - collecting premiums and other contributions from Commonwealth agencies and licensees in order to cover the cost of rehabilitation, treatment, compensation and administration of the system.

## RECOMMENDATIONS

### RECOMMENDATION 3.1

I recommend that the SRC Act be amended so that:

- the term "Comcare" only be used to mean Comcare the regulator; and
- provisions setting out the powers and obligations of determining authorities, whether Comcare, a Commonwealth authority, a licensed authority or a licensed corporation, should use the term "determining authority".

### RECOMMENDATION 3.2

I recommend that the SRC Act include a statement of the Act's objects and a purpose.

## KEY ISSUES FOR AMENDING AND RENOVATING THE SRC ACT

- 3.13 Building on the principles identified in paragraphs 3.14–3.18 below, I have considered the key issues, taken from other schemes in operation nationally and internationally, that need to be taken into account when amending, as well as when renovating, the SRC Act in order to ensure best practice in the compensation and rehabilitation of injured workers:
- Those key issues should guide the preparation of amendments to the SRC Act that are required to implement the recommendations for change made in Chapters 4–10 of this Report.
  - The key issues have also contributed to the development of the basic elements of a re-written SRC Act: see paragraphs 3.21–3.29 below.
  - Building on those key issues and basic elements, I have outlined a new structure for the SRC Act: see paragraph 3.30 below.

## PRINCIPLES TO GUIDE AMENDMENTS TO, AND THE RE-DESIGN OF, THE SRC ACT

- 3.14 There has been significant research into and developments in the rehabilitation of injured workers since the SRC Act was enacted.

- 3.15 Safe Work Australia as part of its *National Workers' Compensation Action Plan 2010–13*<sup>1</sup> (the **Action Plan**) states that workers compensation arrangements should be aimed at delivering consistent and improved responses to and management of work-related injuries, illnesses and deaths. Ultimately, modifications to workers compensation arrangements should aim to achieve a reasonable balance between the interests of employers and workers while at the same time:
- (a) supporting effective and early return to work;
  - (b) providing fair compensation for work-related injuries, illnesses and deaths;
  - (c) reducing the overall social and economic costs to the community of work-related injuries, illness and fatalities; and
  - (d) ensuring that employer costs are equitably distributed and contained within reasonable limits.
- 3.16 The Action Plan states that Australian workers compensation schemes should aim to provide:
- (a) equity for employees or employers;
  - (b) certainty in the operation and application of the legislation;
  - (c) clarity and consistency of process;
  - (d) clarity of guidance and information for workers and employers; and/or
  - (e) improved relationships between workers, employers and others.
- 3.17 In addition, the *Work Health and Safety Act 2011* (the **WHS Act**) and the National Disability Insurance Scheme (the **NDIS**) overlap in a number of ways with the SRC Act and the Comcare scheme. Even though the title of the SRC Act includes the word "Safety", it does not deal with work safety matters in any significant way; rather, it concentrates on workplace injury compensation and rehabilitation and the governance of the scheme. When the SRC Act is re-written, it would be beneficial if the SRC Act, the WHS Act and the NDIS legislation could be harmonised to provide for consistency of approach. Consideration should be given to using, as much as possible, equivalent terms, concepts and obligations relating to entitlement, rehabilitation and return to work in these Acts.

## GUIDING PRINCIPLES

- 3.18 In my view, the key principles that should guide the immediate task of preparing amendments to the SRC Act, as well as the longer term task of re-writing the SRC Act, are as follows:
- (a) There is a positive relationship between health and work and there are negative consequences of long-term work absence and unemployment. The bio-psycho-social model of health, illness and disability should be used.
  - (b) The active involvement by both employer and employee in the rehabilitation and return to work process should be encouraged. The SRC Act should clearly set out the rights and obligations of both parties and the consequences for non-participation in the process.
  - (c) Entitlement to compensation should be on a "no-fault" basis.
  - (d) Common law access should be limited.
  - (e) Medical and like treatment services provided to an injured employee should be based on evidence-based principles and should focus on supporting recovery and return to work as soon as possible.
  - (f) Compensation should be fair and accessible. An injured employee should receive prompt attention and intervention appropriate to the employee's needs.
  - (g) The legislation should be expressed in a way that improves understanding and usability. Comcare should be a neutral administrator of the scheme.
  - (h) The legislation should achieve a balance between collective liability and individual accountability. The benefit and premium structure should promote incident prevention and reduce risk of loss.
  - (i) The legislation should promote early resolution of workers compensation disputes. The dispute resolution processes should be fair, impartial, independent and accessible. Appeals should be resolved as early as possible in the process.
  - (j) The cost of work-related injuries should be the responsibility of the employer, with limited cost shifting to the public health and social security system.
  - (k) Comcare should decide the nature, sufficiency and amount payable for medical and other benefits.
  - (l) Compliance with the SRC Act should be secured through effective and appropriate compliance and enforcement measures.

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1. The *National Workers' Compensation Action Plan 2010–13* was endorsed by all the tripartite SWA members in December 2010.

- 3.19 Those principles, and the need to ensure that the SRC Act reflects the changed working environments of participants in the Comcare scheme, have informed my recommendations for immediate amendment of the SRC Act, as developed in Chapters 4–10 of this Report.
- 3.20 In the longer term, those principles should also guide the re-writing of the SRC Act, as outlined in paragraphs 3.21–3.29 below.

## KEY ELEMENTS IN A RE-WRITTEN SRC ACT

- 3.21 The layout of the SRC Act should, as much as possible, follow the logical sequence of a claim. Reading the Act should be similar to following a narrative, with sequential provisions outlining the necessary matters in the order in which they typically occur. Issues relating to the governance and financial arrangements of the Comcare scheme should be set out in a separate section.
- 3.22 The current SRC Act has attempted to adopt this approach by setting out the legislation in various Parts, each dealing with a specific issue. However, the “flow” of the various Parts is disjointed and sometimes difficult to follow. For example, the provisions relating to the lodgement of claims for compensation are contained in Part V of the SRC Act, even though lodgement is one of the first steps in the claims process. Similarly, provisions relating to the calculation of incapacity benefits by taking into consideration superannuation payments are contained in ss 20, 21 and 21A in Part II, and ss 114A and 114B in Part IX.
- 3.23 The elements outlined below are suggested with the objective of implementing the guiding principles identified in paragraph 3.18 above. They are arranged in a logical, intelligible and functional structure, which would eliminate obsolete or contradictory provisions and which would be more transparent than the current legislation. I have proposed a new structure for the SRC Act in paragraph 3.30 below.

## CLAIM LODGEMENT AND LIABILITY DETERMINATION

- 3.24 Provisions relating to the lodgement of claims by injured employees and timeframes for decision making should be clearly spelt out in order to ensure that claims are processed in a timely and efficient manner.

## REHABILITATION AND RETURN TO WORK

- 3.25 Rehabilitation and return to work should be the primary focus of the SRC Act. The rehabilitation provisions should be updated to create an environment that emphasises effective rehabilitation and the successful return to work of injured employees. The provisions will identify the primary role and obligations of employers in the provision of rehabilitation. The provisions should also spell out the rights and obligations of employees with regard to their participation in the rehabilitation and return to work process.

## BENEFITS AND ENTITLEMENTS

- 3.26 The provisions relating to employee entitlements should be laid out logically to enable ease of understanding and application to individual circumstances. The focus of the benefits and entitlements section should be on encouraging ability to work rather than on establishing disability.
- 3.27 The design of incapacity benefits structures should aim for best practice by encouraging return to work by injured employees. It can do this by ensuring that the incapacity benefits for employees who return to work are structured so as to create incentives for the injured employee to return to full-time work to the greatest extent possible.

## SCHEME GOVERNANCE ARRANGEMENTS

- 3.28 All matters relating to the overall governance of the Comcare scheme should be grouped together. This includes issues relating to the SRCC, Comcare, premiums, and licensees.
- 3.29 Dr Hawke’s Report of the Comcare Scheme’s Performance, Governance and Financial Framework (the **Hawke Report**) contains a number of recommendations aimed at improving the overall operation of the scheme. Those recommendations cover issues such as the role of the SRCC and Comcare, the regulation of the licensees, authorising some premium payers to act as determining authorities, and financial arrangements. They are discussed in Chapter 4 of this Report, and reproduced in Appendix E.

## PROPOSED NEW STRUCTURE

3.30 I recommend that the SRC Act be redesigned with the following structure:

Part 1—Preliminary

- objects and interpretation.

[Developed from Part I of the current SRC Act]

Part 2—Claims for compensation

- injury notification, claims;
- provisional liability;
- power to request information, power to require medical examination.

[Developed from Part V of the current SRC Act]

Part 3—Rehabilitation

- early intervention;
- the ongoing rehabilitation obligation, including:
  - suitable employment;
  - rehabilitation programs.

[Developed from Part III of the current SRC Act]

Part 4—Compensation

- basic liability/eligibility;
- eligibility for different heads of compensation;
- redemption.

[Developed from Part II of the current SRC Act]

Part 5—Determinations, reconsiderations and review

- making determinations on claims, including timing;
- reconsideration, including timing and employees' costs;
- external review (AAT or Fair Work Commission).

[Developed from Part VI of the current SRC Act]

Part 6—Liabilities arising apart from this Act

- no action for damages against the Commonwealth etc;
- election to sue for non-economic loss;
- relationship between compensation and damages against third parties.

[Developed from Part IV of the current SRC Act]

Part 7—Comcare

- constitution;
- CEO, Deputy CEO and staff;
- functions and powers;
- obtaining information;
- directions by Minister;
- guidelines by SRCC;
- finance.

[Developed from Part VII, Divisions 1, 2 and 4 of the current SRC Act]

Part 8—Premium-paying agencies

- determination of premiums and regulatory contributions;
- review of premiums and regulatory contributions;
- Comcare may declare an agency to be a determining authority;
- consequences of declaration.

[Developed from Part VII, Division 4A of the current SRC Act]

Part 9—Licensees

- eligibility;
- application and grant, including conditions;
- consequences of grant;
- renewal and cancellation.

[Developed from Part VIII of the current SRC Act]

Part 10—SRCC

- constitution;
- appointments by Minister;
- functions and powers;
- directions by Minister.

[Developed from Part VII, Division 3 of the current SRC Act]

Part 11—Miscellaneous

[Developed from Part IX of the current SRC Act]

Part 12—Transitional provisions

[Developed from Part X of the current SRC Act]

Part 13—Operation of Act in relation to defence-related injuries

[Developed from Part XI of the current SRC Act]

**RECOMMENDATION 3.3**

I recommend that the SRC Act be re-designed with a more rational structure that reflects the priority to be given to rehabilitation, follows the typical course of a claim and then deals with structural aspects—or scheme governance.

# 4. THE HAWKE RECOMMENDATIONS

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- 4.1 In this chapter, I consider the recommendations in the report on the Comcare scheme by Dr Allan Hawke.<sup>2</sup> The Hawke Report makes a total of 33 recommendations, 14 of which may require amendments to the SRC Act for their implementation.
- 4.2 Only those recommendations that may require legislative change are discussed in this chapter. It is not my intention to re-visit the reasons behind the recommendations but to focus on the legislative changes that may be required in order to give effect to the recommendations.

## RECOMMENDATIONS IN RELATION TO THE SRCC

### HAWKE REPORT RECOMMENDATION 2

- 4.3 Recommendation 2 in the Hawke Report relates to the discrete issue of secretarial and other support provided to the SRCC. It reads:
- The Department of Employment and Workplace Relations (**DEEWR**) should provide administrative support to the Safety Rehabilitation and Compensation Commission (the **SRCC**) to provide a separation of powers from the body (**Comcare**) that the SRCC is regulating.
- 4.4 Comcare is currently required to make available to the SRCC such secretarial and other assistance as the SRCC reasonably requires for the proper performance of its functions and powers: s 72A(1) of the SRC Act.
- 4.5 I note that Comcare is also required to give the Seafarers Safety, Rehabilitation and Compensation Authority such secretarial and other assistance as that Authority requires: s 72A(2) of the SRC Act. (The *Seafarers Rehabilitation and Compensation Act 1992* is currently under review by Mr Stewart-Crompton.<sup>3</sup>)

### RECOMMENDATIONS

- 4.6 I recommend that s 72A(1) be amended by replacing the reference to Comcare with a reference to the Department, and further defining the Department as the department of State of the Commonwealth<sup>4</sup> currently responsible for employment or workplace relations. I also recommend the drafting of s 72A(1) be updated so that it is expressed in terms that are consistent with the drafting of s 72A(2).
- 4.7 Section 72A(1) as amended would read:
- (1) ~~Comcare~~ The Department must:
- (a) give the Commission such secretarial and other assistance; and
- (b) make available to ~~it~~ the Commission the services of such members of ~~Comcare's~~ the Department's staff and such other resources;
- as the Commission reasonably requires from time to time for the proper performance of its functions or exercise of its powers.
- 4.8 A similar adjustment to the wording of s 72A(2) could be made if the review of the *Seafarers Rehabilitation and Compensation Act 1992* recommends such a change.
- 4.9 New s 72A(3) would read:
- (3) For the purposes of this section, the **Department** means the Department of State of the Commonwealth responsible for employment or workplace relations.

### RECOMMENDATION 4.1

I recommend that s 72A(1) be amended by replacing the reference to Comcare with a reference to the Department, and further defining the Department as the department of State of the Commonwealth currently responsible for employment or workplace relations. I also recommend the drafting of s 72A(1) be updated so that it is expressed in terms that are consistent with the drafting of s 72A(2).

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2. Reproduced at Appendix E of this Report.

3. Available at: <http://www.ministers.deewr.gov.au/shorten/review-national-compensation-scheme-seafarers>

4. The term used in s 64 of the Commonwealth Constitution.

## HAWKE REPORT RECOMMENDATIONS 3, 18, 21 AND 23

- 4.10 Recommendations 3, 18, 21 and 23 in the Hawke Report all relate to the SRCC's regulation of Comcare's claims management. Recommendation 3 proposes a more robust regulatory framework and Recommendations 18, 21 and 23 propose the elements of that framework.
- 4.11 Recommendation 3 in the Hawke Report reads:
- The SRCC should establish a more robust regulatory framework to monitor the claims management performance of Comcare as a determining authority, using relevant aspects of the arrangements currently in place for licensees.
- 4.12 Recommendations 18, 21 and 23 in the Hawke Report read as follows:
- 18(a): Comcare should establish a reporting and monitoring framework that assesses performance improvements to measure the ongoing effectiveness of its claims management outcomes and report to SRCC.
- 18(b): Comcare should provide a comprehensive training program for its Claims Service Officers (CSOs) to arm them with the necessary skills and support tools for their roles.
- 21: As part of the enhanced regulatory framework for Comcare proposed in this Report, Audit Committee reports should be made available to the SRCC.
- 23(a): In order to improve claims management outcomes for the premium payer side of the scheme, SRCC should, as part of its improved regulatory framework for Comcare, develop and implement a detailed and structured program to regularly audit and improve the claims management systems tool and claims management systems.
- 23(b): Comcare implement a follow up claims management systems audit conducted by an external firm with experience in conducting similar audits with licensees.
- 4.13 The primary functions of the SRCC are set out in s 89B of the SRC Act. They include a function of ensuring that, as far as practicable, there is equity of outcomes resulting from administrative practices and procedures used by Comcare and a licensee in the performance of their respective functions: s 89B(a). One way the SRCC achieves that equity is by identifying the best practice of any determining authority and, where practicable, implementing that best practice with all of the determining authorities.
- 4.14 The SRCC also has the power to prepare and issue general policy guidelines in relation to the operation of the SRC Act to Comcare's Chief Executive Officer (**CEO**): s 73A(1); and to licensees: s 73A(2). However, that power is of a general nature<sup>5</sup> and does not provide the SRCC with regulatory oversight of Comcare or licensees.
- 4.15 The SRCC regulates and monitors licensees by imposing conditions on their licences pursuant to s 108D of the SRC Act. Licensees are required to meet financial, prudential and performance reporting requirements as part of the conditions of their licences. The performance standards require licensees to develop and implement effective management systems for prevention, rehabilitation and claims management, and to work towards the attainment of outcome-based performance goals.
- 4.16 However, the SRCC does not have any equivalent power in relation to Comcare. In order to implement Recommendations 3, 18, 21 and 23 in the Hawke Report, legislative change is required to give the SRCC clear regulatory oversight of Comcare. Bearing in mind Recommendation 9 in the Hawke report (see paragraphs 4.46–4.51 below), I recommend that the SRCC be given regulatory powers over all determining authorities.

## RECOMMENDATIONS

- 4.17 I recommend that a new paragraph be inserted in s 89B immediately after s 89B(a) giving the SRCC regulatory oversight over determining authorities' claims management functions and authority to develop and implement a regulatory and performance monitoring framework for that purpose. The new paragraph could be in the following terms:
- (aa) to ensure that determining authorities manage claims in accordance with standards set by the Commission for the management of claims;
- 4.18 The SRCC already sets standards for the management of claims in relation to the functions of licensees, as contemplated by s 104(2)(b) of the SRC Act: see paragraph 4.40(b) below.

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5. Section 73A(3) requires the guidelines to be consistent with any ministerial directions issued pursuant to s 73. Those ministerial directions may be about the performance of functions under the SRC Act, otherwise than in relation to a particular case: s 73(1).

## RECOMMENDATION 4.2

I recommend that a new paragraph be inserted in s 89B immediately after s 89B(a) giving the SRCC regulatory oversight over determining authorities' claims management functions and authority to develop and implement a regulatory and performance monitoring framework for that purpose.

## HAWKE REPORT RECOMMENDATION 4

- 4.19 Recommendation 4 in the Hawke Report has two parts, both relating to the composition of the SRCC. The recommendation reads:
- 4(a): The Minister appoint a member other than from DEEWR to represent the Australian Government premium payers on the SRCC.
  - 4(b): DEEWR continue to be an SRCC member in its capacity as the policy "owner" of the SRC Act.
- 4.20 Section 89E of the SRC Act lists the 11 members of the SRCC. They are: a Chairperson, three members nominated by the Australian Council of Trade Unions, a member representing the licensees, a member representing the Commonwealth authorities, the CEO of Safe Work Australia, a member representing the ADF, a member representing the ACT's public sector employers and two members with qualification or experience relevant to the SRCC's functions or the exercise of its powers.

## RECOMMENDATIONS

- 4.21 As I understand Recommendation 4(b) in the Hawke Report, it is proposed to add one member to the SRCC: a representative of DEEWR. That recommendation is coupled with a recommendation that the person representing the interests of Commonwealth premium payers (Commonwealth department and authorities) not come from DEEWR. On the basis that the composition of the SRCC should be divergent, and in order to give effect to Recommendation 4 in the Hawke Report, I recommend including a limitation on membership of the SRCC to no more than one person from any one Commonwealth department or authority or any one licensee.
- 4.22 I recommend that a new paragraph and a proviso be inserted immediately after s 89E(g) as follows:
- (h) a member from the department of State of the Commonwealth responsible for employment or workplace relations;
- provided that no two members of the Commission are employed by the same department of State of the Commonwealth, Commonwealth authority or licensed authority.

## RECOMMENDATION 4.3

I recommend that a new paragraph be inserted after s 89E(g) of the SRC Act extending membership of the SRCC to include a member from the department of State of the Commonwealth responsible for employment or workplace relations. I also recommend the inclusion of a new subsection, s 89E(4), to limit the SRCC's membership to no more than one person from any one Commonwealth department or authority or any one licensee.

## RECOMMENDATIONS IN RELATION TO LICENSEES

- 4.23 Recommendations 6, 7 and 8 in the Hawke Report propose changes to the requirements for corporations wanting to become licensees.

## HAWKE REPORT RECOMMENDATION 6, 7 AND 8

- 4.24 Recommendations 6, 7 and 8 in the Hawke Report relate to procedural requirements for corporations wanting to become licensees.
- 4.25 Recommendation 6 relates to the types of licences that are available under the SRC Act. It reads:
- The *Safety, Rehabilitation and Compensation Act 1988* (the **SRC Act**) should be amended to allow the SRCC to grant group licenses to companies of licenced self-insurers with more than one entity, subject to satisfying all prudential requirements, in order to reduce administrative costs for scheme participation.

4.26 Recommendation 7 reads:

The moratorium and competition test should be lifted, allowing national employers to join the Comcare scheme.

4.27 Recommendation 8 proposes that, in place of the competition test, national employers be able to apply for a self-insurance licence. The recommendation reads:

The SRCC should establish a process to satisfy itself that each applicant for self-insurance under the SRC Act meets the criteria associated with determining that they are a national employer.

4.28 The granting of a licence under the SRC Act is currently a three-step process.

- (a) The first step is a declaration by the Minister under s 100 that a corporation is eligible to be granted a licence (a declaration that makes the corporation an “eligible corporation”, as defined in s 99).
- (b) The second step is an application by the eligible corporation to the SRCC under s 102 for a licence.
- (c) The third step is the decision by the SRCC whether to grant a licence under s 104.

4.29 The declaration by the Minister under s 100 that a corporation is an eligible corporation (which is essential to any application for a licence by a corporation) can only be made where the corporation is carrying on business in competition with a Commonwealth authority or with a corporation that was previously a Commonwealth authority: s 100(1)(c).

4.30 In order to give effect to Recommendations 6, 7 and 8 in the Hawke Report, I propose the following condensed process:

- (a) The first step should be an application under s 102 to the SRCC by a corporation, or group of corporations, for a licence. This first step will include consideration by the SRCC as to whether the corporation, or group of corporations, is a national employer.
- (b) The second step should be a decision by the SRCC as to whether to grant a licence under s 104.

## GROUP LICENCES

4.31 In order for group licences to be granted, s 99 of the SRC Act requires amendment.

4.32 Consideration will need to be given to how the SRC Act defines what is meant by a group of companies that can be eligible for a group licence. A number of Australian workers compensation jurisdictions, notably New South Wales, Queensland, South Australia and Victoria, provide for self-insurance of groups; however, the criteria used to define the members of the group of companies differ from jurisdiction to jurisdiction. Table 4 below summarises the eligibility criteria for group insurance in those jurisdictions where it exists.<sup>6</sup>

**TABLE 4: ELIGIBILITY CRITERIA FOR GROUP SELF-INSURANCE LICENCES**

Jurisdiction	Eligibility criteria for group insurance
New South Wales	Under a group licence, there is no selective inclusion of subsidiaries by the applicant. The legislation specifies that only wholly owned subsidiary companies are to be included in the group licence. For group licenses the applicant company would generally be the ultimate holding company in Australia.
Queensland	Group licences are restricted to groups of employers that are made up as follows: <ul style="list-style-type: none"><li>• employers who are in the same industry and have a pre-existing stable business relationship; or</li><li>• related bodies corporate (as defined by the <i>Corporations Act 2001</i>).</li></ul>
South Australia	A group of employers may apply for registration as a group of self insured employers provided they are related companies.
Victoria	A company that is not a subsidiary of another body corporate may apply for registration of itself and its subsidiaries as a self insurer.

4.33 It is important that the definitions used to determine the criteria for applications for, and ongoing governance of, group licences under the Comcare scheme are transparent and consistent with other Commonwealth laws affecting corporations operating throughout Australia. All companies wishing to apply for group licences are subject to the provisions of the *Corporations Act 2001*, which contains provisions defining holding companies and subsidiaries.

6. Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, April 2012, p 149. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

## MORATORIUM AND COMPETITION TEST

- 4.34 The moratorium that is currently in place<sup>7</sup> expresses a policy position maintained by the Government. It was introduced on 11 December 2007, subject to a review of the Comcare scheme arrangements and in recognition of concerns raised by the States and Territories about the impacts on their respective schemes of the migration of large private companies to the Comcare scheme.
- 4.35 No legislative amendment is required in order to lift the moratorium. The moratorium was imposed by the responsible Minister and can be lifted in the same way.
- 4.36 However, Recommendation 6 in the Hawke Report would also involve removal of the competition test. As discussed in paragraph 4.28 above, a corporation can now only apply for a licence after a declaration has been made by the Minister pursuant to s 100(1) of the SRC Act. As noted in paragraph 4.29 above, the Minister may only make such a declaration in relation to a corporation that:
- (a) is, but is about to cease to be, or was previously a Commonwealth authority: s 100(1)(a) and (b); or
  - (b) is carrying on a business “in competition” with a Commonwealth authority or with another corporation that was previously a Commonwealth authority: s 100(1)(c).
- 4.37 In order to give effect to Recommendation 6 in the Hawke Report, the competition test in s 100(1)(c) should be removed. I note that Recommendation 8 in the Hawke Report proposes a “national employer” test (see paragraphs 4.40–4.42 below) in lieu of the competition test, but that test is to be administered by the SRCC, not the Minister.<sup>8</sup>
- 4.38 If the competition test is removed, none of the paragraphs in s 100(1) needs to be retained. Once those paragraphs are removed, the step of having the Minister first declare a corporation to be an “eligible corporation”, pursuant to s 100(1) of the SRC Act, would be redundant because there would be no criteria for the Minister to consider in making that declaration; and the SRCC would assume the sole responsibility for determining whether an employer can enter the Comcare scheme. For those reasons, s 100 of the SRC Act should be repealed.
- 4.39 Recommendation 6 in the Hawke Report also involves lifting the moratorium. As discussed in paragraphs 4.34–4.35 above, the moratorium was imposed by the responsible Minister and can be lifted in the same way – that is, without any legislative amendment. (Once s 100 is repealed, the decision whether to permit a new entrant to the scheme would be made by the SRCC, not the Minister; although, if the Minister wished to retain the moratorium, the Minister could invoke the power conferred by s 89D of the SRC Act to direct the SRCC with respect to the performance of its functions or the exercise of its powers.)

## THE NATIONAL EMPLOYER TEST

- 4.40 Before the SRCC is satisfied that it is appropriate to grant a licence under the SRC Act as it now stands, the SRCC must be satisfied of a number of matters, as set out in s 104(2). Those matters include that:
- (a) the applicant for the licence has sufficient resources to meet its responsibilities under the licence: s 104(2)(a);
  - (b) the applicant has the capacity to ensure claims are managed in accordance with the standards set by the Commission: s 104(2)(b);
  - (c) the grant of the licence will not be contrary to the interests of the applicant’s employees: s 104(2)(c); and
  - (d) the applicant has the capacity to meet rehabilitation and occupational health and safety standards: s 104(2)(e).
- In order to implement Recommendation 7 in the Hawke Report, a further requirement could be added to s 104(2) – namely, that the applicant for the licence is a “national employer”.
- 4.41 There is no settled meaning for the term “national employer”. There are many possible ways to define the concept— for example:
- (a) a corporation employing staff in more than one State or Territory;
  - (b) a corporation employing staff in each of the States and Territories;
  - (c) a corporation carrying on business in more than one State or Territory, regardless of the number of States and or Territories in which its staff are employed; or
  - (d) a corporation employing a certain percentage of its staff in at least two or more States or Territories.
- 4.42 I recommend that a definition be included in the legislation so that corporations and the SRCC alike are able to determine, quickly and unequivocally, whether a corporation is a national employer. The form of that definition is a matter of policy for the Government.

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7. As discussed in paragraphs 1.28–1.37 of the Hawke Report.

8. See paragraph 2.58 of the Hawke Report.

## RECOMMENDATIONS

4.43 Amendments should be made to s 99 of the SRC Act. New definitions should be added to s 99 of “related bodies corporate” and “eligible group”; and the definition of “eligible applicant” in s 99 should be amended. The new and amended definitions would read as follows:

**“eligible applicant”** means a Commonwealth authority, a corporation or an eligible group of corporations.

**“eligible group of corporations”** means a group of corporations that are related bodies corporate.

**“related bodies corporate”** has the meaning given by section 50 of the Corporations Act 2001.

The terms “corporation” and “corporations” will then take their meaning from the definition of “corporation” in s 4(1) of the SRC Act.

### RECOMMENDATION 4.4

I recommend that amendments be made to s 99 of the SRC Act.

I recommend that new definitions be added to s 99 of “related bodies corporate” and “eligible group of corporations” and that the definition of “eligible applicant” in s 99 be amended by deleting the words “an eligible corporation” and substituting the words “a corporation or an eligible group of corporations”.

4.44 Section 100 of the SRC Act should be repealed.

### RECOMMENDATION 4.5

I recommend that s 100 of the SRC Act be repealed.

4.45 I recommend that a new paragraph be inserted in s 104(2), immediately after s 104(2)(d), to provide an additional criterion for the SRCC’s decision to grant a licence under Part VIII of the SRC Act, as follows:

(e) the applicant is a national employer.

The term “national employer” should be defined in simple and direct terms, with the content of that definition a Government policy decision.

### RECOMMENDATION 4.6

I recommend that a new paragraph be inserted in s 104(2), immediately after s 104(2)(d), as follows:

(e) the applicant is a national employer.

I recommend that the term “national employer” be defined in simple and direct terms, with the content of that definition a Government policy decision

## HAWKE REPORT RECOMMENDATION 9

4.46 Recommendation 9 in the Hawke Report recommends that certain premium payers be permitted to determine their own claims. It reads:

The SRC Act be amended to allow the ACT Government and other SRC Act premium payers to apply and be approved as a determining authority, subject to meeting the same audit and performance reporting requirements for licensees under the Comcare Scheme.

4.47 There are several quite complex and interrelated issues to be determined if premium payers are to become determining authorities. There are two key decisions to be made:

(a) what requirements must a premium payer meet in order to be declared a determining authority; and

(b) once declared, what powers and functions does that premium-paying determining authority have?

- 4.48 However, in order to determine what requirements the premium payer (including the ACT Government) must meet, the nature of the functions and powers of the premium payers that are to become determining authorities must first be settled. In particular, a decision will need to be made whether a premium payer that is also a determining authority will:
- (a) continue to pay premiums to Comcare but will be given a delegation to act as the determining authority in relation to claims by its employees;
  - (b) no longer pay premiums to Comcare but will rely on Comcare to make claims payments (and will seek reimbursement from the premium payer); or
  - (c) no longer pay premiums to Comcare but will meet the costs of claims directly from its own budget.
- 4.49 Any legislative changes required to support this recommendation will, to a large extent, depend on the details of the financial and regulatory framework to be developed pursuant to Hawke Report Recommendation 10. A new Division in current Part VII (proposed Part 8—see paragraph 3.30 above) will need to be inserted once the financial and other arrangements have been finalised. It is therefore important that this matter be prioritised in the Government’s response to the Review so that work can progress as soon as possible on the drafting of the legislative amendments.
- 4.50 To that end, I note that, pursuant to s 103(2) of the SRC Act, the SRCC currently determines the scope of any licence so far as concerns the degree to which the licensee may accept liability for compensation: s 103(2)(b); and the degree to which the licensee is authorised to manage claims: s 103(2)(c). Those considerations may also be relevant to any declaration that a premium payer is to be a determining authority.

## RECOMMENDATIONS

- 4.51 The declaration of premium payers as determining authorities should be considered as part of a legislative package together with the proposed reforms to the financial and regulatory framework of the SRCC and Comcare.

### RECOMMENDATION 4.7

I recommend that the declaration of premium payers as determining authorities be considered as part of a legislative package together with the proposed reforms to the financial and regulatory framework of the SRCC and Comcare.

## RECOMMENDATIONS IN RELATION TO REHABILITATION

- 4.52 The Hawke Report makes a number of recommendations in relation to rehabilitation. I consider the rehabilitation provisions in Chapter 6 of this Report and discuss claims management in Chapter 9 of this Report.

### HAWKE REPORT RECOMMENDATION 12

- 4.53 Recommendation 12 in the Hawke Report reads:

Further consideration be given to clarifying Comcare’s role in rehabilitation under the SRC Act, as part of the Hanks Review.

- 4.54 That issue has been considered as part of my Review and can be found in Chapter 6 of this Report, paragraph 6.102.

### HAWKE REPORT RECOMMENDATION 13

- 4.55 Recommendation 13 in the Hawke Report reads:

In order to improve rehabilitation and return to work outcomes for the premium payers, Comcare should deploy an audit program to selected premium payers against the requirements of the rehabilitation management systems tool, and work with them to improve their rehabilitation management systems to a comparable level of the licensees, and report progress to the SRCC.

- 4.56 That issue has also been considered as part of my Review and is supported by Chapter 6 of this Report:

- (a) It is evident to me that effective rehabilitation and injury management systems and strategies are so fundamental that mechanisms to optimise RTW outcomes for employees should be a part of the SRC Act itself.
- (b) At paragraphs 6.105–6.109 below, I recommend that s 41 of the SRC Act be amended to provide for Comcare to issue an “injury management and rehabilitation code of practice”, including specific obligations for employers.
- (c) It is against those obligations that audit and performance monitoring should be undertaken by Comcare, for consideration by the SRCC.

## HAWKE REPORT RECOMMENDATION 14

4.57 Recommendation 14 in the Hawke Report relates to the functions of the SRCC. It reads:

The SRCC should modify the LIP and tier model to provide a framework so that the level of regulatory contribution paid by premium payers is linked to their rehabilitation performance. This would provide a direct incentive for improvements to rehabilitation performance.

4.58 Section 97E(2) of the SRC Act already empowers the SRCC to issue guidelines for the determination by Comcare of premiums and regulatory contributions. There is no need for any amendment to the SRC Act to enable the SRCC to implement Recommendation 14 in the Hawke Report.

## RECOMMENDATIONS IN RELATION TO THE FINANCIAL ARRANGEMENTS OF COMCARE

4.59 A number of the recommendations in the Hawke Report relating to the financial management and structure of the Comcare scheme require legislative amendments.

### HAWKE REPORT RECOMMENDATION 26

4.60 Recommendation 26 in the Hawke Report reads:

- Comcare be converted to an FMA Act agency to resolve the complexities and inconsistencies around Comcare as a CAC Act body, while allowing Comcare to retain as little or as much independence to conduct its business as the Government deems appropriate.
- As part of converting Comcare to an FMA Act agency, consideration be given to establishing an advisory board, made up of industry experts, for the purposes of advising and supporting the Chief Executive.

4.61 The conversion of Comcare to an agency under the *Financial Management and Accountability Act 1997* (the **FMA Act**) would require a number of legislative amendments to the SRC Act. The purpose of this Review is not to determine the detailed changes that would be required in order to implement the change of Comcare to an FMA Act agency. No doubt, further work will be done at departmental level to work out the details in line with Government policy.

4.62 Section 90 of the SRC Act makes the *Commonwealth Authorities and Companies Act 1977* (the **CAC Act**) applicable to Comcare. At a minimum, s 90 would need to be repealed in order to convert Comcare to an FMA Act agency. Amendments to other provisions in the SRC Act, notably ss 70B(2), 73(3), 74, 76, 89E(2A) and 90C of the SRC Act, would also be required to reflect any necessary changes in Comcare's governance arrangements.

### HAWKE REPORT RECOMMENDATIONS 27 AND 33

4.63 Recommendations 27 and 33 in the Hawke Report relate to the funding of Comcare. Recommendation 27 includes five bullet points, three of which require consideration. Recommendation 27 reads in full:

- The Commonwealth Government's role in providing supplementary funding to Comcare when its liabilities exceed its assets should be clearly established;
- Comcare should work with DEEWR to finalise the prudential management strategy;
- Consideration should be given to amending the SRC Act to enable Comcare to recognise the full value of the premium fund assets in the CRF [that is, the Consolidated Revenue Fund] in its financial statements;
- Comcare should report a 75 per cent probability of sufficiency for its liability reserving basis in its financial reports; and
- the SRC Act should be amended to make it clear to what extent the Government is able to provide supplementary funding to the Comcare premium-funded scheme (over and above the provisions in Section 90C(3) of the SRC Act) in the event of a catastrophe.

4.64 The second and fourth bullet points are administrative in nature, relating to the basis on which Comcare manages and reports on the Comcare-retained funds (a term that is defined in s 90C(5) of the SRC Act). They do not require legislative change in order to be implemented.

4.65 The first and fifth bullet points require legislative change. However, before any amendments can be made, further work will need to be done to define the exact nature of the changes to be made, based on this and other recommendations in the Hawke Report.

4.66 Bullet points one and five will require the insertion of a new section in the current Part VII, Division 4, of the SRC Act detailing the extent to which supplementary funding would be available to Comcare in circumstances where its liabilities exceed its assets, and/or in the event of a catastrophe. However, those matters will need to be the subject of further consideration.

- 4.67 Legislative change will be required to address bullet point three. The effect of ss 90C(1) and (2) of the SRC Act is that the amount that the Commonwealth is liable to pay to Comcare from the Consolidated Revenue Fund (the **CRF**) is limited to the value of Comcare's unfunded liabilities. The formula in s 90C(3) of the SRC Act then limits the amount that can be paid out of the CRF to the premiums and regulatory contributions from premium payers received before 1 July 2002,<sup>9</sup> plus an amount of notional interest, less any previous payments by the Commonwealth to Comcare or its predecessor.
- 4.68 Paragraph 4.21 of the Hawke Report draws attention to one of the difficulties caused by the limiting effect of ss 90C(1), (2) and (3):
- By only recognising the amount in the CRF in accordance with the SRC Act provisions, Comcare's financial statements cannot consistently provide an accurate representation of its actual financial performance. This issue is recognised by Comcare and it has also been acknowledged by PricewaterhouseCoopers in its 2012 report into Comcare's financial management framework.
- 4.69 Recommendation 33 in the Hawke Report relates to how the CRF is valued. It reads:
- Comcare should seek to have the Minister for Finance and Deregulation reconsider the current notional interest rates applied to the CRF in an effort improve their ability to keep pace with the increasing costs of claims liabilities.
- 4.70 The Minister responsible for the CAC Act has the power to determine the notional interest that is paid on the CRF: s 90C(4). No legislative amendment is required to implement Recommendation 33. The Minister for the SRC Act or Comcare should approach the Minister responsible for the CAC Act to ensure that the notional interest rate is set so as to result in an accurate reflection of the value of the CRF.

## RECOMMENDATIONS

- 4.71 To address the weakness identified in paragraph 4.21 of the Hawke Report, s 90C of the SRC Act should be amended to ensure transparency of Comcare's performance in managing claim liabilities. The exact form of that amendment will need to be given further consideration.

### RECOMMENDATION 4.8

I recommend that s 90C of the SRC Act be amended to ensure transparency of Comcare's performance in managing claim liabilities.

- 4.72 I am not in a position to recommend any further immediate amendments to the SRC Act. Recommendation 33 does not require any legislative change and bullet points one and five of Recommendation 27 will need to be the subject of further consideration.

## HAWKE REPORT RECOMMENDATION 28

- 4.73 Recommendation 28 in the Hawke Report relates to the way Comcare manages the funds it receives from premium payers. It reads:
- Comcare should establish two separate funds (one for the Commonwealth and one for the ACT) in the interests of transparency and to enhance the incentives and price signals.
- 4.74 The requirement in s 90C(1) of the SRC Act that Comcare use "Comcare retained funds" in the first instance to discharge its claims liabilities for claims that relate to premium payers is silent on the number of accounts that Comcare can operate for those "Comcare retained funds". There appears to be nothing in the SRC Act that prevents Comcare from implementing Recommendation 28 in the Hawke Report, either by operating separate bank accounts or by maintaining separate records of the funds received from the ACT Government and from the Commonwealth.
- 4.75 Therefore, no amendment to the SRC Act is required.

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9. For the history of the retention, in the CRF, of premiums and regulatory contributions paid by premium payers before 1 July 2002, see paragraph 4.4 of the Hawke Report.

# 5. ELIGIBILITY FOR COMPENSATION

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## WHO IS COVERED BY THE SCHEME

- 5.1 The Comcare scheme provides for the compensation of injured “employees”, a term which is defined in s 5 of the SRC Act.
- 5.2 An employee is a person who is employed by the Commonwealth or by a Commonwealth authority, either under a law of the Commonwealth or Territory, or under a contract of service: s 5(1)(a), or a person who is employed by a licensed corporation (a **licensee**): s 5(1)(b). A person is taken to be an employee of a licensee if the person is performing work for that corporation under a law or a contract and, pursuant to that law or contract, the person would be entitled to compensation in relation to an injury or death if the corporation were not a licensee (that is, if the person would be covered by the relevant State or Territory compensation scheme): s 5(1A).
- 5.3 Section 5 contains a number of other subsections dealing with particular types of employees, including those taken to be employed by the Commonwealth: ss 5(2) and (3); and those declared by the Minister to be employees: ss 5(6), (6A) and (15). Section 5 also sets out various exclusions. For example, the SRC Act does not apply to a member of the Commonwealth Parliament or a Minister of State, or a judge: s 5(8); nor does it apply to the service of certain members of the Defence Force: s 5(10).
- 5.4 A reference to an employee in the SRC Act includes, unless the contrary intention appears, a reference to a person who has ceased to be an employee: s 5(9).
- 5.5 The definition of “employee” (or “worker” in some schemes) differs between the various workers compensation schemes in Australia, and between various pieces of Commonwealth legislation. Some injured workers may be covered by workers compensation arrangements if their injury occurs in one jurisdiction but would not be covered if they were injured in another jurisdiction.
- 5.6 The question needs to be asked: is the current definition of “employee” in s 5 of the SRC Act appropriate, taking into account the development of employment arrangements and the definitions used in the State and Territory schemes; or should the definition be amended?
- 5.7 The Heads of Workers Compensation Authorities (**HWCA**) has estimated that some 90 % of all workers in Australia are covered under the major workers compensation schemes.<sup>10</sup> However, that may be an overstatement of coverage. Some workers hold more than one job during the year and would be double-counted under HWCA’s estimate. Furthermore, the Australian Bureau of Statistics has estimated that a sizeable percentage of the workforce hold two or more jobs and nearly all second jobs are not of a standard nature.<sup>11</sup> The Productivity Commission, in its 2004 inquiry into *National Workers Compensation and Occupational Health and Safety Frameworks*, concluded that approximately 75 % of workers are covered by workers compensation schemes.<sup>12</sup>
- 5.8 In recent decades, there has been a shift away from traditional employer–employee full-time work arrangements; and that shift has contributed to the decrease in the number of people undertaking work who are covered by workers compensation schemes. Data which show the detail of the shift are limited. Those who are not covered include temporary workers, part-time workers, the self-employed, those employed on fixed-term contracts, labour hire workers, outworkers, seasonal workers and unrecorded workers.
- 5.9 The lack of formal coverage of many workers, or lack of awareness on the part of workers that they are covered, can result in part of the costs of injury, disease or fatality being shifted onto Commonwealth programs such as Medicare and the social security program (administered by Centrelink).
- 5.10 In its 2004 report, the Productivity Commission identified the following principles as relevant when defining “employee” for workers compensation purposes:
- (a) employer control, with the common law contract of service providing a solid basis for defining an employee in most circumstances;
  - (b) certainty and clarity, so that coverage for workers compensation is clear to both workers and employers at the commencement of the work relationship;

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10. Productivity Commission, *National Workers Compensation and OHS Frameworks*, Inquiry Report, 2004, p 158. Available at: [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0006/18546/workerscomp.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0006/18546/workerscomp.pdf)

11. Australian Bureau of Statistics, *Forms of Employment* (2002), catalogue number 6359.0. Available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6359.0Explanatory%20Notes1Nov%202001?OpenDocument>

12. Productivity Commission, *National Workers Compensation and OHS Frameworks*, Inquiry Report, 2004, p 159.

- (c) administrative simplicity, to reduce the costs of administration and enforcement;
  - (d) consistency with other legislation, to achieve informational benefits and cost savings; and
  - (e) durability and flexibility, to deal with a wide variety of work arrangements.
- 5.11 People undertaking work but not covered by workers compensation would generally have access to common law damages for work-related injuries and diseases, although any damages would be negligence-based, unlike workers compensation. Hence, the more limited the coverage for workers compensation, the more people who will have to rely on negligence-based access to common law damages.
- 5.12 Employees covered by statutory workers compensation schemes may have limited access to common law damages because there has been reduction in access to common law damages for work-related injuries in the past three decades: see paragraphs 10.1–10.8 below.
- 5.13 Each jurisdiction has its own definition of employee or worker, and therefore unique coverage. Table 3.1a of Safe Work Australia's *Comparison of workers' compensation arrangements in Australia and New Zealand* for 2011–12 (the **Compensation Arrangements Comparison Report**),<sup>13</sup> sets out the various definitions used by workers compensation schemes in Australia and New Zealand. Some schemes use the term "employee" and others use the term "worker", and all schemes have slightly different definitions of those terms.
- 5.14 The definition of the work relationship that is covered by workers compensation schemes in Australia is based on the common law definition of "employee".
- (a) Generally, where a person holds a contract of service (as distinct from a contract for services) with another person (including a company), the first person is considered to be an employee of the second person. Under a contract of service, the employer controls what will be done by the employee at work and how it will be done. This is so even when an employee has freedom of action to perform a particular task. What matters is that the employer has the right to control the details of the tasks that are performed.
  - (b) Under a contract for services, a company or individual pays for a task or series of tasks to be performed but does not control the details of what is done and how it is done.
- 5.15 Each jurisdiction supplements the common law definition of employee with a unique set of inclusions and exclusions, so that people who would not otherwise meet the definition are deemed to be "employees", and people who would otherwise meet the definition are deemed not to be "employees".
- 5.16 The State and Territory schemes deem a wider range of people to be "employees" (or "workers") than is the case with the SRC Act. However, many of the categories of deemed employees under the State and Territory schemes (for example, entertainers, licensed jockeys, clergy) are not relevant to the scheme established by the SRC Act.
- 5.17 Table 3.1b of the Compensation Arrangements Comparison Report, "Coverage of contractors and labour hire workers",<sup>14</sup> lists those employees and workers who are deemed to be "employees" (or "workers") in the various Australian jurisdictions and in New Zealand. Table 3.2 of the Compensation Arrangements Comparison Report, "Deemed workers",<sup>15</sup> sets out the range of persons who are deemed to be employees in each of the Australian schemes and in New Zealand.

## CONTRACTORS

- 5.18 All State and Territory schemes deem contractors to be "employees" or "workers" of the principal in certain circumstances. The circumstances vary from jurisdiction to jurisdiction. For example, in some schemes where a contractor does not sub-contract the work or employ workers, and the contractor is engaged for the purposes of the principal's main business, then the contractor is deemed to be an employee.
- 5.19 The deeming of contractors as "employees" or "workers" by the State and Territory schemes is aimed at ensuring all persons who should be covered by the scheme are, by dealing with artificial arrangements that have the effect of excluding certain contractors from the workers compensation schemes. Those arrangements include instances where workers carry out the same duties as employees, and have a similar long-term relationship with an employer, but have been engaged as contractors.

13. Safe Work Australia, *Comparison of workers' compensation arrangements in Australia and New Zealand*, April 2012, pp 54–55. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

14. Compensation Arrangements Comparison Report, pp 56–57. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

15. Compensation Arrangements Comparison Report, pp 58–60. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

- 5.20 The question of inconsistency in the definition of “employee” (and “worker”) between the Commonwealth, State and Territory workers compensation schemes has been raised a number of times over the past decade. It has been raised, in particular, by multi-State employers and their employees, who are subject to different definitions (and workers compensation coverage) from one jurisdiction to another. To date, the inconsistency in the definition between jurisdictions has not been addressed; and it is not within this Review’s terms of reference to seek harmonisation of the definition as between different jurisdictions.

## SUBMISSIONS RECEIVED

- 5.21 In their submissions to this Review, some premium payers have raised the inconsistency between the definition of “employee” under the SRC Act and the definition of “worker” under the Commonwealth’s WHS Act: the latter definition also includes contractors who work on the premises of employers under the SRC Act. However, premium payers do not support expanding the definition of “employee” under the SRC Act in the same terms as the definition of “worker” under the WHS Act.
- 5.22 The Department of Families, Housing, Community Services and Indigenous Affairs notes that:<sup>16</sup>
- ... the cost to the Commonwealth of including all persons deemed a worker by the definition of the WHS Act, and currently covered for workers compensation by other means (direct employer or common law) would be very expensive, and the cost would need to be recovered in the supply of services to the Commonwealth.
- 5.23 Some premium payers also noted the difference in the definition of “employee” under the SRC Act and the definition of “worker” under the Commonwealth’s *Fair Work Act 2009* (the **Fair Work Act**).

## DISCUSSION

- 5.24 Apart from licensees’ contractors (see paragraph 5.2 above), the Comcare scheme does not deem any contractors to be “employees” for workers compensation purposes. The SRC Act relies on the common law definition of “employee” based on a worker who is employed under a contract of service (as distinct from a contract for services) and in this sense is essentially similar to the State and Territory schemes. Where a contractor is operating under a contract of service, he or she falls within the definition of employee in the SRC Act and is eligible to receive compensation.
- 5.25 As noted in paragraph 5.2 above, an employee of a licensee is defined in s 5(1A) of the SRC Act as a:
- person who performs work for that corporation under a law or a contract ... [and] ... the person would, if the corporation were not a licensed corporation, be entitled to compensation in respect of injury, loss or damage suffered by, or in respect of the death of, the person in connection with that work.
- 5.26 That is to say, if a person performs work for a licensed corporation in a particular State or Territory, that person’s eligibility for workers compensation under the SRC Act depends on whether the person would be covered for compensation in that State or Territory if the corporation had remained subject to the State or Territory scheme. In that way, the deeming provisions of the State and Territory schemes apply to licensees, because of s 5(1A) of the SRC Act.
- 5.27 That leads to yet another difference: the range of people undertaking work for licensees who will be entitled to compensation under the SRC Act is, through s 5(1A) of the SRC Act, wider than the range of people undertaking work for the Commonwealth and for Commonwealth authorities.
- 5.28 Commonwealth agencies (which employ 55 % of employees covered by the Comcare scheme) are not subject to s 5(1A) of the SRC Act. There has been no suggestion, to the Review’s knowledge, that any of those Commonwealth agencies have engaged in artificial arrangements to avoid workers compensation. However, it is at least possible that those agencies will expand their use of contractors; and, if the Comcare scheme is to be exemplary in its scheme design (as my terms of reference state), there is a strong argument for consistent treatment of contractors under the Comcare scheme, and for consistent treatment of individual licensees who are likely to engage contractors in different parts of Australia.
- 5.29 For those workers who may fall outside any new definition, the operation of s 108A(7) of the SRC Act ensures that any person who is engaged by a licensee but whose injuries are not compensable under the SRC Act (because that person falls outside the extended definition of “employee”) will still be covered by the relevant State and Territory workers compensation scheme.

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16. Department of Families, Housing, Community Services and Indigenous Affairs, Submission to the Review, p 3.

## LABOUR HIRE WORKERS

- 5.30 In several State and Territory schemes, labour hire workers are deemed to be “employees” of the labour hire company (rather than the host to which they are hired out) for workers compensation purposes.
- 5.31 The SRC Act does not expressly deem labour hire workers to be employees for workers compensation purposes. It is not clear whether any such workers have been treated as eligible for compensation under the SRC Act, because they were determined to be performing a contract of service with the relevant host agency.
- 5.32 Labour hire workers are closer to employees than contractors and it is no doubt appropriate that they be covered by workers compensation. However, a strong argument can be made that workers compensation coverage is more appropriately provided to labour hire workers by the labour hire company they are employed by, rather than by host agencies. That is consistent with the treatment of labour hire workers in most State and Territory jurisdictions.<sup>17</sup> Furthermore, labour hire companies will be better placed than host agencies to take responsibility for the rehabilitation of their injured workers: the host agency may have only hosted the workers for a few weeks or even less.

## VOLUNTEERS

- 5.33 Apart from ordinary employees, Commonwealth employers and licensees also use a number of volunteers in various areas.
- 5.34 As noted in paragraph 5.3 above, the Minister can declare (under s 5(6) of the SRC Act) that:  
... persons who engage in activities or perform acts ... at the request or direction, or for the benefit ..., of the Commonwealth ... or ... a Commonwealth authority or a licensed corporation ... shall, for the purposes of this Act, be taken to be employed by the Commonwealth or by that authority or corporation, as the case may be.
- 5.35 Similarly, s 5(15) of the SRC Act authorises the Minister, at the request of the Chief Minister for the Australian Capital Territory, to declare:  
... that persons specified in the declaration engaging in activities ... at the request or the direction, or for the benefit, of the Australian Capital Territory; or ... of an authority or body established by ACT enactment; are to be taken to be employees of the Australian Capital Territory.
- 5.36 Those provisions enable volunteers to be declared “employees” for the purposes of workers compensation coverage.
- 5.37 Since the commencement of the Act in December 1988, there have been 52 declarations. However, in Commonwealth agencies where no Ministerial declaration has been made, volunteers will not be covered by the SRC Act (although there may be accident cover available through Comcover). This raises the question whether all volunteers who engage in activities, or perform acts, for Commonwealth agencies should be covered for workers compensation purposes.
- 5.38 There is no data to indicate how many injured volunteers have been denied compensation coverage since 1988 because of the absence of a Ministerial declaration. However, in its inquiry into age barriers to work in the Commonwealth, the Australian Law Reform Commission identified the absence of consistent coverage of volunteers under workers compensation schemes as a problem.<sup>18</sup>

## RECOMMENDATIONS

- 5.39 In order to standardise the definition of “employee” as between premium payers and licensees and clarify the position of contractors working for the Commonwealth, Commonwealth authorities and licensees, I recommend changes to the definition of “employee” in s 5(1) of the Act to introduce a deeming provision applicable across the scheme. I recommend repealing s 5(1A) and enacting a new s 5(1A) in the following terms:
- (1A) For the purposes of the definition of employee in subsection (1), a person is taken to be employed by the Commonwealth or by a Commonwealth authority or by a licensed corporation if the person is engaged under a contract for services, unless:
- (a) the person –
- (i) is paid to achieve a stated outcome; and
- (ii) has to supply the plant and equipment or tools of trade needed to carry out the work; and
- (iii) is, or would be, liable for the cost of rectifying any defect in the work carried out; or
- (b) a personal services business determination is in effect for the person carrying out the work under the *Income Tax Assessment Act 1997*, section 87–60.

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17. See Table 3.1b of the Compensation Arrangements Comparison Report, referred to at paragraph 5.17 above.

18. Australian Law Reform Commission, *Grey Areas—Barriers to Work in Commonwealth Laws*, Discussion Paper (DP 78), September 2012, paragraph 3.21. Available at: [http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_78\\_0.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_78_0.pdf)

- 5.40 Alternatively, the recommendation could also be achieved by repealing the current s 5(1A) and inserting a new paragraph (c) in s 5(1) in substantially the same terms as the proposed s 5(1A).
- 5.41 I have concluded that no steps should be taken to deem labour hire workers to be employees under the SRC Act. Liability to provide workers compensation for labour hire workers should continue to lie with the labour hire company which employs those workers. Liability should not be placed on the host entity, which will ordinarily have only a short-term relationship with each labour hire worker and will be very poorly placed to undertake rehabilitation activities for any labour hire worker who is incapacitated for work. Currently, no labour hire companies are licensed corporations under the Comcare scheme.
- 5.42 I have also concluded that the current provisions in the SRC Act by which volunteers can be deemed employees for the purposes of the Comcare scheme are working satisfactorily. There is no case for amending those provisions. The system of Ministerial directions to provide workers compensation coverage for volunteers enables a degree of control to be exercised by employers under the scheme as to which volunteers should, and should not, be covered for workers compensation purposes.

### RECOMMENDATION 5.1

I recommend that the definition of “employee” in s 5(1) of the SRC Act be amended to introduce a deeming provision applicable across the scheme, in relation to contractors.

## WHAT IS COVERED BY THE SCHEME

- 5.43 The Comcare scheme provides for the compensation of employees who suffer an “injury” or “disease” in certain circumstances.
- 5.44 An injury is defined as an injury (other than a “disease”) suffered by an employee that is a physical or mental injury arising out of (a causal relationship), or in the course of (a temporal relationship), the employee’s employment: s 5A(1)(b).
- 5.45 A disease is an ailment or aggravation of an ailment that was “contributed to, to a significant degree, by the employee’s employment”: s 5B(1). Section 5B(2) provides a list of matters that may be taken into account in determining whether an ailment or aggravation was contributed to, to a significant degree, by an employee’s employment. Section 5(3) provides that “significant degree” means “a degree that is substantially more than material”.

## PSYCHOLOGICAL INJURIES

- 5.46 Between 2006–07 and 2009–10, psychological injury<sup>19</sup> claims accounted for 10 % of all claims under the Comcare scheme. However, those claims represented 35 % of the total cost of claims. During 2010–11, psychological injury claims accounted for 12 % of all claims and 32 % of the total cost of claims.<sup>20</sup>
- 5.47 In 2010–11,<sup>21</sup> the average duration of incapacity for injured employees with claims for psychological injuries was 12.3 months. By contrast, the duration for other types of injuries was as follows:
- (a) falls, slips and trips: 4.1 months;
  - (b) body stressing: 3.6 months;
  - (c) vehicle incidents: 3.2 months;
  - (d) hitting / being hit by objects: 2.0 months; and
  - (e) other injuries and diseases: 4.2 months.
- 5.48 Psychological injuries can cover a range of conditions, including stress, adjustment disorder, anxiety, post-traumatic stress disorder and depression.
- 5.49 There can be difficulties diagnosing psychological injuries, over and above the difficulties of diagnosis involved with physical injuries; and the diagnosis often involves subjective as well as objective elements. Furthermore, multiple factors often contribute to the onset of psychological conditions (for example, underlying personality disorders, relationship problems and financial pressures, as well as work-related pressures) and it can be difficult to isolate the employment contribution to the injury.

19. I use the term “psychological injury” to refer to a psychological ailment that will be classified as a “disease” (and therefore an “injury”) if employment has contributed, to a significant degree, to the ailment or to its aggravation: see ss 5A(1) and 5B(1) of the SRC Act.

20. As supplied by Comcare.

21. As supplied by Comcare.

- 5.50 Psychological injuries can also arise from an employee's perception of and reaction to external events, which can be different to other employees' perception of and reaction to the same events. In *Wiegand v Comcare*<sup>22</sup> the Federal Court held that an employee's perception about something related to her or his employment would be a sufficient basis to connect the employee's psychological reaction to her or his employment, provided that the perception was a perception about an incident or state of affairs that actually happened and regardless of whether the perception was reasonable or itself reflected reality. (I return to the issue of perception in paragraph 5.64 below.)
- 5.51 The rate of claims for psychological injuries for premium payers has increased by 30 % in the past three years and is four times higher than the incidence among licensees.<sup>23</sup> This suggests that psychological injuries may be more of an issue in the public sector than the private sector. In a discussion with the Review, WorkCover Western Australia indicated that psychological injury claims were also more prevalent in the public sector than the private sector in that State.
- 5.52 The increased incidence of psychological injury claims has been attributed to a range of causes, including the increased pressures of work life, employment instability, increases in employee expectations and a more litigious society. It may be reasonable to suggest that a principal explanation for the increased incidence of psychological injury claims can be found in the increasing demands placed on employees through such mechanisms as efficiency dividends, constant performance evaluation and the restructuring of employment arrangements. A further explanation may be found in poor management practices, which might be said to reflect a low priority given to preventing or resolving workplace stress.
- 5.53 The United Kingdom Civil Service Health and Safety Executive has identified six areas which are central in affecting work-related stress:<sup>24</sup>
- (a) demand—including such things as workload, work patterns and working environment;
  - (b) control—how much say employees have in the way they do their work;
  - (c) support—the encouragement, sponsorship and resources provided by the organisation, line managers and colleagues;
  - (d) relationships—including positive working practices in place to avoid conflict and deal with unacceptable behaviour;
  - (e) role—whether employees understand their role within their organisation and whether their organisation ensures employees do not have conflicting roles; and
  - (f) change—how organisational change (large and small) is managed and communicated.
- 5.54 It might be argued that an employee should not receive compensation if the employee's psychological condition is caused by undertaking normal work duties that the average person with the requisite skills and experience can undertake without suffering a psychological injury. However, such an approach would represent a move away from no-fault compensation, and would discriminate against a type of injury that is already stigmatised. In my view, it is appropriate that an employer bear the cost of appointing an employee to a position which is so stressful that it causes a medically diagnosed psychological injury to the employee.
- 5.55 All State and Territory schemes allow compensation for psychological injuries; although, if psychological injuries are more prevalent in the public sector than in the private sector, the proportion of psychological injuries compared to other injuries would be lower in the State and Territory schemes, where the public sector comprises a smaller component of the respective scheme, than it does in the Comcare scheme.
- 5.56 In New Zealand, workers compensation is only payable for psychological injuries that are an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment (for example, a bank employee witnessing a shooting or a train driver involved in a fatal accident).<sup>25</sup>
- 5.57 Similarly, Canadian provinces provide only limited access to compensation for psychological injuries. In British Columbia and Ontario, for example, a psychological injury must be caused by an acute reaction to a sudden and unexpected traumatic event. In Quebec, the cause of a psychological injury must be beyond the normal scope of the work and outside the normal and foreseeable relationship between the employer and employee. Claims involving interpersonal conflict or involving the employer's right to manage employees will not usually be accepted.<sup>26</sup>

22. [2002] FCA 1464; (2002) 72 ALD 795 at [24].

23. As supplied by Comcare.

24. See: <http://www.hse.gov.uk/stress/standards/step1/index.htm>. Set out in the Management Standards detailed in the leaflet: How to tackle work-related stress. A guide for employers on making the Management Standards work. Available at: <http://www.hse.gov.uk/pubns/indg430.pdf>

25. Accident Compensation Act Review: Final Report, August 2008, p 77.

26. Accident Compensation Act Review: Final Report, August 2008, p 78.

- 5.58 The restrictions in the Canadian provinces were introduced from 2005 in response to a significant increase in psychological injury claims, which was greater than the increase seen in the Comcare scheme. Canada's policy of restricting access to psychological injury claims was also influenced by the experience in parts of the United States that had previously had a non-restrictive approach to psychological injury claims and had seen a huge increase in those claims.<sup>27</sup>
- 5.59 It might be argued that many workplace issues resulting in psychological injury claims are, in their genesis, human resource management issues (resulting, for example, from interpersonal conflict and performance management matters) rather than medical issues. That raises the question whether there should be a role for the Fair Work Commission in relation to those workplace issues that result in workers compensation claims. I discuss that idea further in paragraphs 9.157–9.172 below.
- 5.60 However, there seems little doubt that many work-related psychological injuries are significant medical conditions, requiring treatment by psychiatrists or clinical psychologists. There is no straightforward way to distinguish those workplace issues that should be treated as workers compensation matters from those that should be treated as human resource grievances.
- 5.61 Nor is there any reason to treat psychological injuries differently from physical injuries. Provided that scientific rigour is applied to the diagnosis of psychological injuries, incapacity resulting from those injuries should be compensated in the same way as incapacity resulting from physical injuries.

## RECOMMENDATIONS

- 5.62 I do not recommend any change to the basic approach in the SRC Act that compensation is payable for psychological injuries, just as it is for physical injuries. However, I recommend some changes that would introduce a modest degree of rigour into the payment of compensation for psychological injuries.
- 5.63 To improve the management of ongoing psychological injuries, in Chapter 9 I recommend that the SRC Act be amended to require that compensation in respect of psychological injuries will continue beyond 12 weeks only where the diagnosis of those psychological injuries has been made or confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare: see paragraphs 9.39–9.47 and **Recommendation 9.4** below.
- 5.64 I also recommend that the effect of the Federal Court's judgment in *Wiegand v Comcare* (referred to in paragraph 5.50 above) be negated so that an employee's perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis. It is an unfair burden on employers to make them liable to pay compensation for a psychological injury that is caused by an employee's fantasising rather than by any aspect of employment.
- 5.65 I recommend that new subsections be added to s 5A immediately after s 5A(2), and to s 5B immediately after s 5B(2), as follows:
- 5A (3) For the purposes of subsection (1), a mental injury will only arise out of the employee's employment if any perception on which the injury is based has a reasonable basis.
- 5B (2A) For the purposes of subsection (1), a mental ailment or the aggravation of such an ailment will only be taken to have been contributed to, to a significant degree, by the employee's employment by the Commonwealth or a licensee if any perception on which the injury is based has a reasonable basis.

### RECOMMENDATION 5.2

I recommend that the effect of the Federal Court's judgment in *Wiegand v Comcare* should be negated so that an employee's perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis.

## HEART ATTACKS, STROKES AND SIMILAR INJURIES

- 5.66 Originally, Comcare and other determining authorities did not accept liability under the SRC Act for heart attacks and strokes that occurred at the workplace unless employment contributed to the underlying disease. A heart attack or a stroke was treated as a manifestation of a "disease", rather than an "injury other than a disease", and liability to pay compensation was only accepted where employment had contributed to the disease (or its aggravation) to a material

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27. Accident Compensation Act Review: Final Report, August 2008, p 78.

degree. If the incident had been treated as “an injury other than a disease”, it would have been compensable if the injury arose in the course of employment (a temporal relationship), as well as if it arose out of employment (a causal relationship).

- 5.67 In 1998, that position was rejected by the Full Federal Court,<sup>28</sup> which followed a High Court decision from 1996, dealing with equivalent provisions in the 1987 NSW Act.<sup>29</sup> The High Court held that a cerebral haemorrhage was an “injury”, not a “disease”, under the NSW legislation; and the Full Federal Court held that a heart attack was an “injury”, not a “disease”, under the SRC Act.
- 5.68 On that analysis, if those “injuries” occur at the workplace (and therefore “in the course of employment”), the employer is liable to pay compensation under the SRC Act, regardless of whether employment contributed to the “injuries”. This includes an employee injured outside work hours at a live-in remote site workplace. The compensation payable would include compensation for any death resulting from an injury of that kind: s 17(1) of the SRC Act.
- 5.69 A number of Australian workers compensation schemes (including those of the Australian Capital Territory, New South Wales, Queensland, Tasmania and Victoria) have amended their legislation to cover events such as heart attacks and strokes and similar events only where an employment contribution test (however defined) is met.
- 5.70 The various State and Territory schemes have adopted one of three approaches for excluding incidents such as heart attacks and strokes from workers compensation coverage if there is no significant work contribution. Those approaches are:
- (a) to exclude all injuries from workers compensation where there is no significant employment contribution (a broad exclusion)—**Approach 1**;
  - (b) to limit the exclusion to heart attacks and strokes, unless there is a significant work contribution (a narrow exclusion)—**Approach 2**; and
  - (c) to exclude certain events prescribed by regulation (for example, heart attacks, strokes, aneurysms, epileptic fits) unless there is a significant employment contribution (a compromise exclusion)—**Approach 3**.
- 5.71 New South Wales and Queensland have adopted Approach 1; Victoria has adopted Approach 2; and the Australian Capital Territory and Tasmania have adopted Approach 3.
- 5.72 Approach 1 has the advantage of providing a comprehensive solution, whereby all injury occurrences are treated consistently for workers compensation purposes. However, it could have unintended consequences if it made certain claims more difficult (for example, by requiring injured employees to prove that work contributed to a muscle strain to a significant extent).
- 5.73 Approach 2 is a less comprehensive solution, but is focused on those injuries (heart attacks and strokes) that have traditionally been the most prevalent of these types of incidents and therefore the most costly for the schemes.
- 5.74 Approach 3 provides a more comprehensive solution than Approach 2; but, because all the incidents that Approach 3 includes must be specifically prescribed in regulation, there is less risk than with Approach 1 of inadvertently including events that were not intended to be included.
- 5.75 All of these approaches have some potential to increase disputes between employees making claims for heart attacks, strokes and other events, and the relevant determining authority.
- 5.76 Nevertheless, there is little justification for employers having to fund the costs of heart attacks, strokes and similar incidents that are manifestations of an underlying genetic or lifestyle-based disease process, which may be entirely non-work-related, where the only connection to employment is that the incidents happen to occur at the workplace.

## SUBMISSIONS RECEIVED

- 5.77 In its submission, John Holland notes that:<sup>30</sup>
- ... heart attacks and strokes ought to be treated as diseases and the one test relating to diseases should be applied. This will bring the Comcare scheme into line with other state and territory schemes and ensure a more consistent and fair approach is taken.
- 5.78 On the other hand, the Commonwealth Public Sector Union submits that:<sup>31</sup>
- As Comcare is a no-fault scheme, these conditions should be covered. It would be very hard to develop and administer an employment contribution test. So there should be automatic coverage when events of this kind happen at work.

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28. *Australian Postal Corporation v Burch* [1998] FCA 944; (1998) 85 FCR 264.

29. *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; (1996) 187 CLR 310.

30. John Holland Group, Submission to the Review, p 2.

31. Commonwealth Public Sector Union, Submission to the Review, Part 2, p 2.

- 5.79 As to the asserted difficulty of an employment contribution test, it should be pointed out that most State and Territory schemes have developed and administer viable and practicable employment contribution tests for these types of injuries.

## RECOMMENDATIONS

- 5.80 I recommend the SRC Act incorporate a broad-based version of Approach 2. The SRC Act should be amended so that all incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, aneurisms, spinal disc ruptures caused by degenerative diseases and similar phenomena) will be covered for workers compensation purposes on the same basis as a “disease”—that is, where the incident was contributed to, to a significant degree, by the employee’s employment. An employee may still be able to establish that employment made a significant contribution to the development or aggravation of the underlying disease process or to the particular incident; in either case, the incident would qualify as a disease and therefore an injury for the purposes of the SRC Act.
- 5.81 Such an approach provides a comprehensive and consistent solution to the issue of workers compensation coverage for heart attacks, strokes, aneurisms, cerebral haemorrhages, epileptic fits etc at the workplace, without impacting on injuries such as muscle strains which might be inadvertently affected by adopting Approach 1.
- 5.82 I recommend insertion of a new subsection into s 5A, immediately after s 5A(1), as follows:
- 5A (1A) For the purpose of subsection (1), a heart attack, stroke, aneurism, spinal disc rupture or other manifestation of an underlying disease process, including a degenerative disease process, shall be taken to be a disease and not an injury (other than a disease).

### RECOMMENDATION 5.3

I recommend that the SRC Act be amended so that incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, spinal disc ruptures caused by degenerative disease and similar phenomena) will be covered for workers compensation purposes on the same basis as a “disease”— that is, where the incident was contributed to, to a significant degree, by the employee’s employment.

- 5.83 **Recommendation 5.3** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, Table 2.

## ASSESSING LIABILITY FOR PART XI CLAIMS

- 5.84 For claims under the *Military Rehabilitation and Compensation Act 2004* (the **MRC Act**) and the *Veterans’ Entitlements Act 1986* (the **VE Act**), Statements of Principles (**SoPs**) are used to determine liability for injuries, diseases and deaths. SoPs are legislative instruments that define the factors that establish a connection between a medical condition and service in the ADF—that is, they are instruments to determine the causation or work-relationship of injuries, diseases and deaths. SoPs are prepared by the Repatriation Medical Authority according to “sound medical-scientific evidence”, and their aim is to provide an equitable, efficient and non-adversarial system of dealing with claims for liability.
- 5.85 However, under the SRC Act, the work-relationship of injuries, diseases and deaths is determined on a case-by-case basis using evidence provided by medical practitioners.
- 5.86 In its submission to the Review, the MRCC proposes that investigation be undertaken into the possibility of allowing claims for ADF members under Part XI of the SRC Act to be determined by reference to SoPs. The MRCC notes, however, that there are a number of issues that would need to be discussed in greater detail between DEEWR and DVA before such an arrangement could be considered.<sup>32</sup>
- 5.87 Under the MRC Act there are two SoPs for each condition, because there are different standards of proof required for operational service and peacetime service.
- 5.88 A claim for liability arising out of operational service must be accepted by the MRCC unless it is satisfied “beyond reasonable doubt” that the injury, disease or death does not (or did not) relate to service.
- 5.89 A claim for liability arising out of peacetime service will be accepted only where the MRCC has a reasonable satisfaction—that it is “more likely than not”—that the injury, disease or death does (or did) relate to peacetime service.

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32. Military Rehabilitation and Compensation Commission, Submission to the Review, at “Final Comments”.

- 5.90 The Review of Military Compensation Arrangements (the **MRC Act Review**) reported that ex-service organisation representatives supported the SoP regime. However, those organisations also claimed that SoPs are not keeping up with advances in medical science.<sup>33</sup>
- 5.91 The MRC Act Review accepted that the system had improved equity and efficiency and reduced the adversarial nature of the veterans' disability pensions system since its introduction in 1994.<sup>34</sup>
- 5.92 An independent review of the SoP system in 1997 concluded that the standard of proof applying in the veterans' system was far less onerous than that applying in civil proceedings. It assessed that, on average, there was a 5–10 % chance that a successful claim was actually related to operational service. That is, 5–10 successful claims out of every 100 were justified by true causal connection while the remaining 90–95 successful claims were not.<sup>35</sup>
- 5.93 However, submissions to the MRC Act Review argued that the MRC Act liability provisions (supported by the SoP regime) had also brought about unintended limitations on compensation coverage in claims involving peacetime service for some medical conditions which are caused by ongoing wear and tear over a significant period.<sup>36</sup>
- 5.94 For example, in the case of chondromalacia patellae (or runner's knee), a research study commissioned by DVA indicated there was a stark difference in claim acceptance rates: 97.6 % for SRC Act claims (which are not determined by reference to SoPs) and 57.8 % for MRC Act claims (which are determined by reference to SoPs). No reasons were found for the difference in acceptance rates other than the requirement for the use of SoPs under the MRC Act.<sup>37</sup>
- 5.95 While there would be benefits in having consistent treatment applying to ADF members under the SRC Act and the MRC Act, there are issues with the existing SoP regime, namely that in some instances the SoP regime may be overly generous while in other instances it may be too stringent.

## RECOMMENDATIONS

- 5.96 While there is considerable support among the military community for the SoP regime applying under the VE Act and MRC Act, it is also clear there are some concerns about certain aspects of the operation of the SoP regime in practice. It has not been practicable, in the time I have had available to conduct my review, to consider in detail the workings of the SoP regime or how to address the concerns with the current arrangements.
- 5.97 I therefore recommend that the Government direct DEEWR and DVA to examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the Repatriation Medical Authority's SoP regime and, if so, how such a proposal might address the concerns with the current SoP arrangements.

### RECOMMENDATION 5.4

I recommend that DEEWR and DVA examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the SoP regime.

## WHAT IS NOT COVERED BY THE SCHEME

- 5.98 There are a number of exclusions in the SRC Act. They are:
- (a) wilful and false representations by an employee;
  - (b) serious and wilful misconduct and self-inflicted injuries;
  - (c) injuries or diseases suffered as a result of a "reasonable administrative action"; and
  - (d) injuries suffered during journeys from home to work and work to home.

33. *Review of Military Compensation Arrangements*, February 2011, Volume 2, p 17, paragraphs 5.10–5.14. Available at: [http://www.dva.gov.au/pensions\\_and\\_compensation/Military%20Compensation%20Review/report/Pages/default.aspx](http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx)

34. *Review of Military Compensation Arrangements*, February 2011, Volume 2, p 21. Available at: [http://www.dva.gov.au/pensions\\_and\\_compensation/Military%20Compensation%20Review/report/Pages/default.aspx](http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx)

35. D Pearce and D Holman, *Review of the Repatriation Medical Authority and the Specialist Medical Review Council*, Department of Veterans' Affairs, 1997.

36. *Review of Military Compensation Arrangements*, February 2011, Volume 2, p 17, paragraphs 5.10–5.14. Available at: [http://www.dva.gov.au/pensions\\_and\\_compensation/Military%20Compensation%20Review/report/Pages/default.aspx](http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx)

37. *Review of Military Compensation Arrangements*, February 2011, Volume 2, p 21, paragraph 5.34. Available at: [http://www.dva.gov.au/pensions\\_and\\_compensation/Military%20Compensation%20Review/report/Pages/default.aspx](http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx)

## WILFUL AND FALSE REPRESENTATION

- 5.99 A disease suffered by an employee, or an aggravation of a disease, is not covered for workers compensation purposes if the employee made a wilful and false representation that he or she did not already suffer, or had not previously suffered, from that disease: s 7(7) of the SRC Act. The exclusion is intended to address the situation of an employee attempting to claim that a non-work-related disease was caused by work.
- 5.100 I believe that this provision is working satisfactorily and do not recommend any changes to it.

## SERIOUS AND WILFUL MISCONDUCT AND SELF-INFLICTED INJURIES

- 5.101 Compensation is not payable in respect of an injury that is intentionally self-inflicted: s 14(2) of the SRC Act. Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted: s 14(3). However, s 14(3) does not apply if the injury results in death, or serious and permanent impairment. That is, in such instances compensation is still payable.
- 5.102 I also believe that these provisions are working satisfactorily and do not recommend any changes to them.

## REASONABLE ADMINISTRATIVE ACTION

- 5.103 An injury (including a disease) suffered as a result of “reasonable administrative action, taken in a reasonable manner, in respect of the employee’s employment” is excluded from compensation: s 5A(1). The exclusion is aimed at psychological injuries sustained in the workplace as a result of particular circumstances. That was acknowledged in the *Explanatory Memorandum to the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006*.<sup>38</sup>
- 5.104 Section 5A(2) contains a non-exhaustive list of what constitutes “reasonable administrative action”. It includes, but is not limited to:
- (a) a reasonable appraisal of the employee’s performance;
  - (b) a reasonable formal or informal counselling action;
  - (c) a reasonable suspension action;
  - (d) a reasonable formal or informal disciplinary action;
  - (e) anything reasonable done in connection with any of the above; and
  - (f) anything reasonable done in connection with the employee’s failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit.
- 5.105 The reasonable administrative action exclusion was introduced in April 2007 to replace a more narrowly expressed exclusion that focused on “reasonable disciplinary action” and “failure ... to obtain a promotion, transfer or benefit in connection with employment”. It also brought the SRC Act closer in line with most workers compensation schemes in Australia.
- 5.106 The exclusion has been the subject of a considerable volume of litigation, for the most part in the AAT but also in the Federal Court, including in *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21; (2012) 199 FCR 463, which is discussed in paragraphs 5.111–5.115 below.
- 5.107 The difference between the exclusionary provisions applying with regard to “reasonable action” or “reasonable administrative action” in the various workers compensation schemes in Australia is now relatively minor. The relevant exclusionary provisions across the Commonwealth and the State and Territory schemes are set out in Table 3.13 of the Compensation Arrangements Comparison Report, “Exclusionary provisions for psychological injuries”.<sup>39</sup>
- 5.108 The provisions primarily affect psychological injury claims, and are intended to protect employers’ capacity to manage their staff by undertaking “legitimate human resource management actions ... in a reasonable manner”. The exclusionary provisions are an exception to the standard approach in workers compensation legislation, whereby most aspects of coverage are “no-fault”.<sup>40</sup>

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38. Part I, p 4.

39. Compensation Arrangements Comparison Report (referred to at paragraph 5.13 above), pp 85–87.

40. Beasley Legal goes further and suggests that this provision “places undue hardship on employees, is legally inconsistent and morally unjust”: Beasley Legal, Submission to the Review, p 5.

## SUBMISSIONS RECEIVED

5.109 The Australian Industry Group notes that:<sup>41</sup>

... it is crucial that a worker is not able to claim compensation for a mental injury when an employer is taking reasonable action in a reasonable manner ... Employers must be able to make the necessary decisions to manage the business effectively, respond to poor performance and investigate concerns/complaints about an employee's behaviour (including complaints about harassment and bullying). If the action of the employer relates to complaints about harassment or bullying, they not only have the right to manage the issue, they have a legal obligation to manage the issue. They must be able to do so in an appropriate manner, without the result of a successful workers compensation claim.

5.110 The Law Council of Australia notes that:<sup>42</sup>

... workers compensation systems are intended to be beneficial schemes ... Employers should not be permitted to avoid their obligations to compensate injured workers simply because administrative action was taken, which may have exacerbated or contributed to a workplace injury which is more appropriately attributable to other factors or incidents.

## DISCUSSION

5.111 The Full Federal Court judgment in *Commonwealth Bank of Australia v Reeve*<sup>43</sup> has provided important guidance on the scope of the provision, by drawing a distinction between "administrative" and "operational" actions of an employer. An instruction to an employee to perform work at a particular location, or to perform particular duties, is not administrative action but would be regarded as operational and would not trigger the exclusionary provision, so that any injury to an employee resulting from an operational action is compensable.

5.112 The Full Court concluded that weekly teleconferences held by the Commonwealth Bank to discuss the performance of the Bank's Perth branches, including the results of customer satisfaction surveys, were operational actions, which were intended to assess the performance of CBA branches across a range of customer services, and were not an assessment of the performance of branch managers (including Mr Reeve). The actions were not taken "in respect of the employee's [namely, the branch manager's] employment".

5.113 Although some employers have expressed concern that the Reeve decision has narrowed the reasonable administrative action exclusion beyond what was intended by Parliament, I am not persuaded that the decision had that effect. By November 2012, the *Reeve* decision had been considered in 12 AAT cases and in two Federal Court cases (one of which was a Full Court judgment). Seven of those cases affirmed the decision to exclude liability on the basis that an injury was caused as a result of reasonable administrative action, one case merely discussed the exclusion but did not apply it because the injury in question pre-dated the introduction of the exclusion, and only six cases set aside a decision that had been based on the exclusion.

5.114 The *Reeve* decision has certainly clarified the meaning of "reasonable administrative action in respect of an employee's employment". While the exclusion gives protection to managers in the management of staff, the requirement that the administrative action be reasonable and that it be taken in a reasonable manner provides a significant corrective against a too stringent application of the exclusion, and imposes an appropriate standard of care on managers.

5.115 However, there are several aspects of the exclusion that justify some attention:

- (a) the degree of contribution to the claimed injury that is required before the "reasonable administrative action" will operate to exclude an injury from the SRC Act;
- (b) the list of reasonable administrative actions in s 5A(2); and
- (c) the relevance of determinations of the Fair Work Commission.

## THE REQUIRED DEGREE OF CONTRIBUTION

5.116 The reasonable administrative action provisions of the SRC Act were introduced in their current form in April 2007; and the *Reeve* decision was handed down in March 2012, so it may not be possible to assess their full implications at this stage. It could be said that the 14 cases decided since the *Reeve* decision (see paragraph 5.113 above) suggest that the exclusion has allowed decisions on compensation liability to reflect an appropriate balance between allowing employers to manage the quality of workforce performance (including by sanctioning activities that threaten other employees' safety and wellbeing) and protecting the health of employees.

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41. Australian Industry Group, Submission to the Review, p 7.

42. Law Council of Australia, Submission to the Review, p 6.

43. [2012] FCAFC 21; (2012) 199 FCR 463.

- 5.117 However, there are two reasons why s 5A(1) should be amended to define the required connection between “reasonable administrative action” and the injury (almost always the disease) that will trigger the exclusion.
- 5.118 First, substantial disagreement has emerged within the AAT as to the required connection.
- (a) For example, in *Re Wang and Comcare* [2012] AATA 242 at [54], the AAT said that the administrative action relied upon must be shown to contribute to the disease to a significant degree before the exclusion can operate. See also *Re Beasley and Comcare* [2012] AATA 411 at [81] and [82].
- (b) On the other hand, in *Re Ferguson and Commonwealth Bank* [2012] AATA 718 at [125]–[126], the AAT said that nothing in s 5A(1) required the reasonable administrative action to make a significant contribution to the employee’s condition; all that was required was an operative causal relationship between the relevant “reasonable administrative action” and the relevant “disease”. See also *Jablonka and Comcare* [2012] AATA 627 at [31]; *Re Silk and Comcare* [2012] AATA 638 at [68]; and *Re Dunstan and Comcare* [2012] AATA 567 at [280].
- 5.119 I believe that the view expressed in, for example, *Re Ferguson and Commonwealth Bank* [2012] AATA 718 at [125]–[126] accurately reflects the ruling made by the Full Federal Court in *Hart v Comcare* [2005] FCAFC 16; (2005) 145 FCR 29. That view is confirmed by the Full Court’s recent discussion in *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21; (2012) 199 FCR 463 at [54]–[55]; and in *Drenth v Comcare* [2012] FCAFC 86 at [34]. However, in view of the disagreement, a definitive statement would be useful.
- 5.120 Secondly, there is an element of unfairness about the results of the ruling in *Hart v Comcare* [2005] FCAFC 16; (2005) 145 FCR 29. Although a psychological ailment will only be regarded as a disease, and therefore an injury, for the purposes of the SRC Act where employment has made a significant (that is, substantially more than material) contribution to the ailment, the same ailment may be denied classification as an injury for the purposes of the SRC Act where “reasonable administrative action” is no more than one of many operative causes of the ailment.

#### **THE LIST OF REASONABLE ADMINISTRATIVE ACTIONS IN S 5A(2)**

- 5.121 The current list in s 5A(2) of the SRC Act, which is non-exhaustive, leads to some uncertainty as to exactly how far the exclusions extend and invites expensive litigation. There would be greater certainty and clarity with the concept of reasonable administrative action if the list were to be made an exhaustive list of actions.
- 5.122 I have considered whether the list of the types of action that are taken to be “reasonable administrative action” should, in an amended version of s 5A(2), include a reasonable restructuring of the workforce through relocation, reclassification or transfer as an administrative action. Several employers raised with me the need to extend the exclusion in order to protect restructuring decisions, given the increasing demands on employers to achieve efficiencies by responding to technological change and competition.
- 5.123 However, it is clear from the Full Federal Court’s discussion in *Reeve* that decisions and action of that kind fall outside the concept of “administrative action in respect of the employee’s employment”, and would be properly characterised as operational action: see paragraphs 5.111 and 5.113 above. To include restructuring decisions and action in s 5A(2) would not only contradict the concept of “administrative action in respect of the employee’s employment”, and involve a significant reduction in the benefits available under the SRC Act, but also place a significant part of the cost of advancing employers’ business objectives on their employees. In my opinion, employers who pursue profitability or enhanced efficiency through restructuring their workforce should continue to be responsible for the personal health consequences that affect their employees.

#### **THE RELEVANCE OF DETERMINATIONS BY THE FAIR WORK COMMISSION**

- 5.124 In some situations, an incident that gives rise to a claim for compensation is also the subject of a dispute before the Fair Work Commission: see paragraphs 9.157–9.172 below. There is a great deal to be said for the proposition that employers and employees should not be permitted or required to re-litigate issues of that kind if the issues have also been brought before the Fair Work Commission. I consider this matter further in Chapter 9 at paragraphs 9.168–9.173 below.

#### **RECOMMENDATIONS**

- 5.125 I recommend that s 5A(1) be amended so that the exclusion will operate where the reasonable administrative action has made a significant (that is, substantially more than material) contribution to the disease, injury or aggravation.
- 5.126 I recommend that the final paragraph of s 5A(1) be amended as follows:
- but does not include a disease, injury or aggravation suffered as a result of that was contributed to, to a significant degree, by reasonable administrative action taken in a reasonable manner in respect of the employee’s employment.

5.127 I further recommend that s 5A(2) be amended by removing the words “and without limiting that subsection”, so as to make it clear that the list in s 5A(2) is a complete list of the actions that are taken to be “reasonable administrative action”. The proposed s 5A(2) would read as follows:

For the purposes of subsection (1) and without limiting that subsection, **reasonable administrative action** is taken to include the following:

#### RECOMMENDATION 5.5

I recommend that the SRC Act be amended so that the reasonable administrative action exclusion in s 5A(1) operates only where the reasonable administrative action taken in a reasonable manner in respect of the employee’s employment has contributed, to a significant degree, to the disease, injury or aggravation.

#### RECOMMENDATION 5.6

I recommend that s 5A(2) be amended by removing the words “and without limiting that subsection”, so as to make it clear that the list in s 5A(2) is a complete list of the actions that are taken to be “reasonable administrative action”.

### COVERAGE OF INJURIES SUFFERED DURING HOME TO WORK TRAVEL

- 5.128 An injury will be treated as having arisen out of, or in the course of, an employee’s employment if the injury occurred while the employee was, at the direction or request of the Commonwealth or a licensee, travelling for the purpose of that employment: s 6(1)(d) of the SRC Act. However, travel between the employee’s residence and the employee’s usual place of work (that is, home to work travel) is taken not be at the direction or request of the Commonwealth or a licensee: s 6(1C). That effectively removes coverage under the SRC Act for what are generally described as “journey claims”.
- 5.129 The limited effect of the removal was demonstrated in the Federal Court’s judgement in *Telstra Corporation Limited v Bowden* [2012] FCA 576. The Court dismissed an appeal by Telstra from a decision of the AAT that Telstra was liable to pay compensation for an injury suffered by an employee while attempting to park his motor vehicle, in a space leased by Telstra and which the employee was permitted to use, at the conclusion of the employee’s home to work travel. The Court confirmed the AAT’s decision that the injury had arisen out of employment, even if not suffered in the course of employment. The reasoning was based on the premise that the general exclusion of journey injuries does not preclude an employee demonstrating a causal connection between a particular injury and employment.
- 5.130 The coverage of travel to and from work varies across jurisdictions. A minority of schemes (the Australian Capital Territory, Northern Territory and Queensland) treat this type of travel as within the course of employment and therefore compensable. However, most jurisdictions do not provide general workers compensation coverage for journeys. Most recently, New South Wales ceased providing coverage for home to work travel as part of the package of amendments announced in June 2012.<sup>44</sup>
- 5.131 Unless some causal connection can be shown with employment, the SRC Act does not provide compensation for an injury sustained during home to work travel. Compensation is provided where travel:
- (a) is at the direction or request of the employer for the purpose of employment (for example, a trip from home or work to another location for the purpose of a work meeting): s 6(1)(d); or
  - (b) is from work to a place of education (for example, a university), and the employee’s participation in the education course has been approved by the employer: s 6(1)(ea); or
  - (c) is from work to a medical or related appointment, in cases where the medical appointment is related to a work-related injury or disease: s 6(1)(g).
- 5.132 In jurisdictions where journeys are not covered by workers compensation, alternative coverage is provided for most motor vehicle journeys under each jurisdiction’s compulsory third party insurance schemes. Generally, there is a parallel between a jurisdiction excluding journey claims and having “no-fault” compulsory third party coverage. Of course, that may not assist employees travelling to and from work by other means (for example, walking or cycling), unless the injury results from interaction with a car, bus, tram or train.

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44. NSW WorkCover, “Workers compensation changes: information for workers,” Fact Sheet, 1 October 2012. Available at: <http://www.workcover.nsw.gov.au/formspublications/publications/Documents/wc-changes-fact-sheet-workers-3828.pdf>

- 5.133 Employers claim that, because they cannot control the circumstances associated with home to work travel so as to secure the safety of their employees, injuries suffered during that travel should not be compensable. Employers also rely on the availability of third party insurance coverage, or no-fault schemes such as the *Transport Accident Act 1986* (Vic).
- 5.134 For example, the Department of Families, Housing, Community Services and Indigenous Affairs notes that:<sup>45</sup>
- In principle, travel from home to work should not be covered. The employer has no control to mitigate the risk. It would be inconsistent with the majority of other jurisdictions; and, the ATO determination that costs incurred with travel from a place of residence to work are not work related expenses.
- 5.135 Employees argue that injuries suffered during home to work travel have a sufficient connection with employment (and therefore arise out of, or in the course of, employment) because of the requirement that employees attend their places of work. That travel involves, so it is said, the physical relocation of employees from home to the place of employment in order to undertake activities for the benefit of the employer and should therefore be covered. Further, employees say that relying on third party insurance schemes for cover is simply cost shifting of an employer's obligations.
- 5.136 The Australian Council of Trade Unions notes that:<sup>46</sup>
- The Comcare scheme is a no-fault jurisdiction and journeys to and from work are necessary for workers to give effect to their employment relationship with their employer.
- 5.137 The broad principle underpinning the exclusion of journey claims in the SRC Act is that an employee is personally responsible for the choices he or she makes, and precautions taken, when travelling between that employee's home and usual place of work. The SRC Act recognises that, where an employee is injured while travelling at the direction of the employer, other than between home and work, the injury will be compensable.
- 5.138 An issue may arise with an employee who is "on call" and required to attend a particular place as part of the employee's work. Because he or she is "on call", the employee will necessarily be travelling from home to work. If an employee who is "on call" is required to travel to work at an unusual time (perhaps in the middle of the night), the travel may be analogous to that of an employee who is required to travel somewhere other than the employee's usual place of work and it may be appropriate that this travel be treated in the same way for workers compensation purposes—that is, the journey should be covered.

## SUBMISSIONS RECEIVED

- 5.139 In its submission, the Australian Industry Group suggests that:<sup>47</sup>
- ... travel associated with being on-call is different to normal processes of travelling between work and home. On-call arrangements are usually put in place to deal with out-of-hours emergencies/response: they are in addition to normal work hours and involve responding to a situation at short notice. For this reason, it would be appropriate to cover these journeys; however, it would be essential that on-call was appropriately defined to ensure it only applied in the circumstances described above.

## RECOMMENDATIONS

- 5.140 I recommend that home to work travel should generally continue not to be covered for workers compensation because:
- (a) employees should be personally responsible for decisions made about how safely they travel from home to work, and employers have little control over those decisions or over the factors that influence an employee's safety;
  - (b) home to work travel is not always direct (for example, an employee may stop to do shopping, go to a restaurant or bar etc); and
  - (c) employees are already covered in most cases by compulsory third party insurance schemes.
- 5.141 Where an employee is "on call", I recommend that the employee should be covered by workers compensation. However, there should be a requirement that the journey must only include travel between home, or the place where the employee receives the message to attend work, and the place of work itself.

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45. Department of Families, Housing, Community Services and Indigenous Affairs, Submission to the Review, p 3.

46. Australian Council of Trade Unions, Submission to the Review, p 4.

47. Australian Industry Group, Submission to the Review, p 5.

5.142 Disputes about where a place of work begins and ends (for example, whether a car park comprises part of the workplace) will always exist as long as home to work travel is not covered. As with many potentially disputed aspects of workers compensation entitlements, it is not practicable to exclude those disputes without enacting arbitrary distinctions that will exclude almost as many deserving cases as they allow. In my opinion, the current wording in the legislation, combined with the guidance provided by AAT and Federal Court cases, provides the best means for addressing those issues.

#### **RECOMMENDATION 5.7**

I recommend that where an employee is “on call”, the employees journey to work should be covered by workers compensation. However, there should be a requirement that the journey must only include travel between home, or the place where the employee receives the message to attend work, and the place of work itself.

5.143 **Recommendation 5.7** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

# 6. REHABILITATION

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- 6.1 All workers compensation schemes in Australia emphasise a timely, safe and durable return to work for injured employees, who are encouraged to participate in rehabilitation as soon as they are able to do so.
- 6.2 Early recovery from injury brings with it a range of benefits, for both injured employees and their employers. For employees, there is the obvious benefit of recovering from injury more quickly, and returning to work and life. For employers, early rehabilitation means that the investment in existing employees is not lost, productivity and workplace morale are improved and compensation costs (in the form of premiums for premium payers, and compensation payments for licensees) are lowered.
- 6.3 Some of the principal factors identified as contributing to good rehabilitation and early recovery are:<sup>48</sup>
- (a) early intervention in treating the injury or disease;
  - (b) early workplace-based rehabilitation;
  - (c) effective claims management; and
  - (d) well-designed and properly targeted benefits and dispute-resolution structures.
- 6.4 In this chapter, I make recommendations about early intervention, provisional liability and the rehabilitation system in the SRC Act. The management of claims, including dispute resolution, is considered in Chapter 9.

## THE EARLY INTERVENTION PHILOSOPHY

- 6.5 The key elements of effective early intervention identified by Comcare include:<sup>49</sup>
- (a) clear policy or guidelines on supporting employees exhibiting early warning signs of not coping at work; the support need not be contingent on the employee submitting a claim, or a claim being accepted;
  - (b) early contact with the employee to offer assistance;
  - (c) early and expert assessment to identify employee needs;
  - (d) employee and supervisor involvement in developing an agreed plan to enable the employee to remain at work or return to work;
  - (e) if there is a psychological condition, access to effective medical treatment and evidence-based therapeutic interventions; and
  - (f) flexible workplace solutions to support the employee at work.
- 6.6 Those factors are particularly important in the case of the injuries and diseases that are involved in mental stress claims. People harmed at work in premium payers' workplaces are not recovering as quickly as they could, evidenced by increases in the average duration of lost time for recent claims and poor return to work for long-term incapacity claims. This dynamic is having a substantial impact on Comcare's overall premium liabilities.<sup>50</sup>
- 6.7 Interpersonal conflict in the workplace that might lead to a mental stress claim could benefit from early intervention in the form of counselling for those involved and mediation between the parties. Although that would require an up-front investment by the employer, successful intervention could prevent the lodging of a formal claim, and facilitate an early return to work.
- 6.8 Early intervention in treating the injury or disease and early workplace-based rehabilitation are not specifically addressed under the SRC Act. The recent changes to the Rehabilitation Guidelines, issued by Comcare on 22 May 2012,<sup>51</sup> (the **Rehabilitation Guidelines**) have, to some extent, addressed those issues.

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48. Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Inquiry Report No 27, 6 March 2004, p 191. Available at: [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0006/18546/workerscomp.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0006/18546/workerscomp.pdf)

49. See: [http://www.comcare.gov.au/injury\\_management/early\\_intervention/benefits\\_of\\_early\\_intervention](http://www.comcare.gov.au/injury_management/early_intervention/benefits_of_early_intervention)

50. *Comcare–SRCC Annual Report 2011–12*, p 83. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0019/115822/Comcare-SRCC\\_Annual\\_report\\_2011-2012.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0019/115822/Comcare-SRCC_Annual_report_2011-2012.pdf)

51. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0014/110822/Guidelines\\_for\\_Rehabilitation\\_Authorities\\_2012.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0014/110822/Guidelines_for_Rehabilitation_Authorities_2012.pdf)

- 6.9 However, despite those recent developments, the structure of the SRC Act provides two key challenges for early intervention:
- (a) a lack of timeframes for claims lodgement: by the time a claim is lodged, and any interventions are considered, the opportunity for an early response has often passed; and
  - (b) the inability to take any action, intervene or pay any compensation without a determination of liability.
- 6.10 The provision of medical treatment and occupational rehabilitation under the SRC Act is dependent on a finding or acceptance of liability.
- (a) Rehabilitation programs may only be provided to employees who have suffered an injury resulting in an incapacity to work: s 37(1) of the SRC Act.
  - (b) A determining authority is only liable to compensate an employee for medical expenses that relate to a compensable injury: s 16(1) of the SRC Act.
- 6.11 In paragraphs 6.47–6.62 below, I recommend a system of provisional liability so that actions can be taken, and compensation paid, without a determination of liability. And in Chapter 9 below, I recommend statutory timeframes for the early reporting of injuries, and determination of claims: see **Recommendations 9.2** and **9.3** respectively.
- 6.12 Early intervention is designed to initiate a proactive and coordinated response at the earliest and most critical point at which quality care, costs and outcomes can be influenced. However, that intervention is necessarily dependent on knowledge of the injury. The first requirement for providing early intervention is therefore timely reporting of injuries. Although it is well understood that immediate injury reporting leads to improved outcomes and reduced costs of any claim, there are barriers to achieving that best practice.
- 6.13 In the majority of Australian workers compensation schemes, there are obligations on employers to report to their insurers injuries suffered by their employees. The timeframes for reporting range from 48 hours to 10 days.<sup>52</sup> In some jurisdictions, for example Victoria and South Australia, there are parallel obligations on an employee to notify an employer and/or insurer of a workplace injury.
- 6.14 Early reporting of injuries leads to a number of desirable outcomes, such as earlier provision of rehabilitation support to the injured employee, the opportunity for provisional liability to commence (where that is part of the relevant scheme), and the earlier determination of claims.
- 6.15 In paragraph 6.48 below, I recommend that the SRC Act be amended to facilitate the reporting of incidents and injuries.

## SUBMISSIONS RECEIVED

- 6.16 The majority of submissions received provided overwhelming support for early intervention.
- 6.17 The Department of Defence submits that:<sup>53</sup>
- ... early intervention is seen as the most effective tool in minimising time off work as diagnosis and access to treatment is early in the process. This is a benefit not only to the employer in reducing cost of claims, but more critically for injured employees as they are able to resume 'normal' aspects of life quicker, including returning to work.
- 6.18 The Royal Australian College of Physicians submits:<sup>54</sup>
- Early intervention for vocational rehabilitation with a coordinated approach from the onset of the claim is especially important, as the evidence shows a relationship between the length of time spent off work and the likelihood of a return to work. Managing return to work within the first few weeks is vital. A model that deals with cases within the first one to 3 days is strongly recommended. Obstacles to return to normal duties need to be addressed early including workplace disharmony, low morale and family issues.
- 6.19 The Australian Psychological Society submits:<sup>55</sup>
- The APS agrees that the SRC Act should be amended to include access to early interventions, as this would not only facilitate early recovery and rehabilitation; it also has the potential to allow for reduction in (inappropriate) claims. However, access to early intervention should not be contingent on the acceptance of liability.

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52. Section 108(1) of the Victorian Act requires employers to submit claim forms within 10 days.

53. Department of Defence, Submission to the Review, p 9.

54. Royal Australian College of Physicians, Submission to the Review, covering letter, p 2.

55. Australian Psychological Society, Submission to the Review, pp 6–7.

6.20 However, Maurice Blackburn sounds a word of caution:<sup>56</sup>

Amendment of the SRC Act to accommodate access to early intervention should be approached cautiously. There is a real risk that early intervention schemes may be used in a manner that undermines a worker's access to meaningful medical treatment and the appropriate assessment of a claim for compensation. An excessive focus on early intervention prior to a claim being assessed can result in a situation where early intervention is used as a "back door" method of assessing and treating injuries outside the protections provided by the Act for accepted claims.

6.21 That caution is echoed by Mr John Ross:<sup>57</sup>

... a clear definition of "early intervention" would be beneficial to all parties including injured workers and employers. I think the concern that needs to be addressed here is that "early intervention" not simply be synonymous with forcing an injured worker back to work before they are ready in order to save costs. On the other hand, many employers make no attempt at early and safe return to work and have no rehabilitation plans in place.

## RECOMMENDATIONS

6.22 The SRC Act should explicitly provide for early intervention as the primary form of rehabilitation. The proposed injury management and rehabilitation code of practice (see paragraphs 6.103–6.109 below) should include a requirement for employers to:

- (a) have a clear policy or guidelines about early intervention;
- (b) support employees exhibiting early warning signs of not coping at work, whether or not a claim has been submitted (effectively, a link between WHS and workers compensation);
- (c) establish early contact with the employee to offer assistance; and
- (d) make an early and expert assessment to identify employee needs.

### RECOMMENDATION 6.1

I recommend that the SRC Act explicitly provide for early intervention as the primary form of rehabilitation, recognised in the injury management and rehabilitation code of practice proposed in **Recommendation 6.9**.

## PROVISIONAL LIABILITY

### CURRENT SYSTEMS OF PROVISIONAL LIABILITY

6.23 Many Australian workers compensation schemes have introduced mechanisms that facilitate early intervention through early access to compensation and encourage timely decision making. Those mechanisms include commencement of provisional compensation payments if the decision-making time period is exceeded, or general provisional payment of income replacement and medical expenses.

6.24 Systems of provisional liability make compensation claimed for income maintenance, and in some jurisdictions for medical expenses, available to an injured employee before a claim is determined (or even lodged). The Australian Capital Territory,<sup>58</sup> New South Wales,<sup>59</sup> South Australia<sup>60</sup> and Tasmania<sup>61</sup> all now have systems of provisional liability.

### COMMENCING COMPENSATION PURSUANT TO PROVISIONAL LIABILITY

6.25 In provisional liability systems, payments for claimed income maintenance and medical expenses generally commence on notification of the injury, provided that a certain amount of information is provided to, or obtained by, the scheme administrator or insurer. In New South Wales, the WorkCover Guidelines for Claiming Compensation Benefits<sup>62</sup> outline the requirements for commencement of provisional liability payments. One important feature of the New South Wales system is that, after the initial notification of the injury, the onus is on the insurer to collect sufficient information to enable it to make a sound decision to commence weekly payments for compensation.

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56. Maurice Blackburn, Submission to the Review, p 18.

57. Mr John Ross, Submission to the Review, p 3.

58. Section 38 of the ACT Act.

59. Section 267 of the 1998 NSW Act.

60. Sections 32A and 50B of the SA Act.

61. Section 77AB of the Tasmanian Act.

62. New South Wales Government, "WorkCover Guidelines for Claiming Compensation Benefits", *New South Wales Government Gazette* No 30, Special Supplement, 23 March 2012. Available at: [http://www.nsw.gov.au/sites/default/files/Government\\_Gazette\\_30\\_March.pdf](http://www.nsw.gov.au/sites/default/files/Government_Gazette_30_March.pdf)

- 6.26 In New South Wales, insurers are bound to commence provisional liability payments within seven days of notification of an injury,<sup>63</sup> except in circumstances where a reasonable excuse, as provided under the Guidelines, applies. Such excuses include:<sup>64</sup>
- (a) there is insufficient medical information to establish that there is an injury or a work-related injury;
  - (b) the injured person is unlikely to be a worker;
  - (c) the insurer is unable to contact the worker;
  - (d) the worker refuses access to information;
  - (e) the injury is not work related;
  - (f) the injury is notified after two months; and
  - (g) the injury is not a significant injury (the worker is likely to be incapacitated for work for less than seven continuous days), in which case the seven-day assessment period for provisional liability payments can be extended to 21 days after initial notification.
- 6.27 Similarly, in South Australia provisional payments for income maintenance must commence within seven days after initial notification,<sup>65</sup> unless there is a reasonable excuse as defined in the "Provisional Payment Guidelines".<sup>66</sup> In both New South Wales and South Australia, provisional payments commence within 7 days of an injury being notified, rather than on receipt of a formal claim. If a determining authority receives certain "mandatory" information (as required under the guidelines), provisional payments can commence.
- 6.28 One consequence of that system is the potential for abuse that accompanies limited assessment of liability. However, as at 17 January 2013, 83 % of all claims lodged in the 2011–12 financial year were (ultimately) accepted.<sup>67</sup>
- 6.29 In the Northern Territory and Western Australia, early access to compensation is determined in a different way.
- 6.30 In the Northern Territory, employers can accept liability, defer their decision for 56 days<sup>68</sup> or dispute liability. If an employer fails to notify an injured employee of the decision either to accept, to defer a decision or to dispute the claim within 10 working days,<sup>69</sup> or if an employer fails to make a deferred decision after 56 days, the employer is deemed to have accepted liability for compensation. That deemed acceptance continues until 14 days after the day on which the employer notifies the claimant of the employer's decision.<sup>70</sup> It follows that, where a time limit is exceeded, an employer must pay compensation for income maintenance until 14 days after the employer makes a decision to accept or dispute liability.
- 6.31 The second situation giving rise to early access to compensation in the Northern Territory is where a deferred decision concerns a claim for weekly income maintenance payment. For such claims an employer must, within three working days of giving notice of the decision to defer determination, commence the payments claimed.<sup>71</sup> In effect this system, while complex, aims not to disadvantage those injured employees whose claims may be too involved to determine within the statutory decision-making timeframe.
- 6.32 In Western Australia, similar arrangements exist when an insurer (the determining authority) fails to comply with the 14-day statutory decision-making timeframe. Under s 57A(5) of the WA Act, an injured employee is entitled to receive weekly income payments where the employee has not been notified of a decision within the statutory timeframe. In such situations the insurer covers the costs that employers incur in paying the employee those weekly payments. If an employer who has received funds from an insurer fails to make weekly provisional payments, the employer may be liable for a \$2,000 penalty.<sup>72</sup> Similar requirements apply to uninsured and self-insured employers; however, they need only commence weekly payments to an injured employee if they have not made a decision to accept, reject or dispute liability within 17 days.<sup>73</sup>

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63. Section 267(1) of the 1998 NSW Act.

64. New South Wales Government, "WorkCover Guidelines for Claiming Compensation Benefits", *New South Wales Government Gazette* No 30, Special Supplement, 23 March 2012, pp 809–810 (8–9 of 31), paragraph 7. Available at: [http://www.nsw.gov.au/sites/default/files/Government\\_Gazette\\_30\\_March.pdf](http://www.nsw.gov.au/sites/default/files/Government_Gazette_30_March.pdf)

65. Section 50B(1) of the SA Act.

66. WorkCoverSA, *Workers Rehabilitation and Compensation Act 1986 Provisional Payment Guidelines*, July 2009, pp 4–5, paragraph 2.1. Available at: <http://www.workcover.com/documents.ashx?id=1729>

67. As supplied by Comcare.

68. Section 85(4)(a) of the NT Act.

69. Section 85(1) of the NT Act.

70. Section 87(1) of the NT Act.

71. Section 85(4)(b) of the NT Act.

72. Section 57A(8) of the NT Act.

73. Section 57B(4) of the NT Act.

- 6.33 The New South Wales model, where provisional liability payments commence within seven days of notification of an injury unless there is a reasonable excuse, appears to ensure that access to provisional liability is quick and does not contain unintended barriers.

#### **THE DURATION OF COMPENSATION PURSUANT TO PROVISIONAL LIABILITY**

- 6.34 In the Australian Capital Territory, an employee is entitled to receive provisional payments of compensation upon notification from the date of injury. However, under s 38(2) of the ACT Act, if the worker does not make a claim for compensation within seven days of the insurer receiving the notice of injury, provisional access to compensation will cease. Any subsequent claim is then subject to the standard statutory timeframes that apply to the determination of a formal claim.<sup>74</sup>
- 6.35 In New South Wales, payments pursuant to provisional liability will continue for up to 12 weeks,<sup>75</sup> and in South Australia they will continue for up to 13 weeks;<sup>76</sup> however, in both those schemes the determining authority has a discretion to continue provisional payments beyond those periods.
- 6.36 In the Australian Capital Territory, payments continue until a determination has been made,<sup>77</sup> or until the injured employee makes a full return to work, or until the statutory time period outlining the duration of provisional liability payments expires. The concept of provisional liability is coupled with a statutory timeframe for decision-making—if, at the end of 28 days after the day the insurer receives an employee's claim for compensation, the insurer has not rejected the claim, the insurer is taken to have accepted the claim.<sup>78</sup>
- 6.37 I prefer a system where compensation payments continue for a designated period, for example 12 weeks. That provides certainty for both the employee and the determining authority.

#### **THE NATURE OF COMPENSATION PAID PURSUANT TO PROVISIONAL LIABILITY**

- 6.38 In South Australia and New South Wales, provisional liability also extends to the payment of medical, hospital and rehabilitation costs. The relevant statutory provisions allow an injured employee to receive up to \$5,000 in South Australia<sup>79</sup> and \$7,500 in New South Wales.<sup>80</sup> However, unlike provisional payments for income maintenance, provisional acceptance of liability for medical (and other) costs is at the discretion of the determining authority. There is no statutory obligation to make provisional payments for medical costs.
- 6.39 In my view, in order to properly support all aspects of early intervention, a provisional liability model should provide access to compensation for medical expenses as well as compensation for income maintenance. Again, I prefer a system with a defined limit, for example \$3,000, so that both employees and determining authorities are aware of the extent of the liability and benefit.

#### **RECOVERY OF COMPENSATION PAID PURSUANT TO PROVISIONAL LIABILITY**

- 6.40 Provisional payments for both income maintenance and medical expenses do not constitute an admission of liability. However, regardless of the ultimate acceptance or rejection of liability, there is a limited right to recover the payments when:
- (a) an injured employee has acted dishonestly;
  - (b) the claim is fraudulent; or
  - (c) an injured employee has obstructed or delayed the determination of the claim, and liability is subsequently determined not to exist.
- 6.41 However, where the claim is approved, any provisional liability payments are offset against the total amount claimed.<sup>81</sup>

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74. Section 128 of the ACT Act.

75. Section 267(3) of the 1998 NSW Act.

76. Section 50C(1) of the SA Act.

77. Section 38 of the ACT Act.

78. Section 128 of the ACT Act.

79. Section 32A of the SA Act.

80. Section 280(1) of the 1998 NSW Act; and New South Wales Government, "WorkCover Guidelines for Claiming Compensation Benefits", *New South Wales Government Gazette* No 30, Special Supplement, 23 March 2012, p 802 (8 of 31), paragraph 6.6. Available at: [http://www.nsw.gov.au/sites/default/files/Government\\_Gazette\\_30\\_March.pdf](http://www.nsw.gov.au/sites/default/files/Government_Gazette_30_March.pdf).

81. See, for example, s 50H(1) of the SA Act.

## SUBMISSIONS RECEIVED

- 6.42 The majority of submissions received provided overwhelming support for early intervention and some form of provisional liability payments.
- 6.43 The Department of Defence submits:<sup>82</sup>  
Access to early intervention should not be linked to the outcome of a compensation claim. This would negate delays for injured employees accessing appropriate treatment.
- 6.44 The Australian Psychological Society submits that:<sup>83</sup>  
... access to early intervention should not be contingent on the acceptance of liability. This could mean that claimants can have access to 5 sessions of psychological services prior to the determination of liability, which may prevent the onset of chronicity and may in fact assist with determination of liability.
- 6.45 Comcare submits:<sup>84</sup>  
The benefits of provisional liability in encouraging earlier engagement with the injured employee are supported in principle by Comcare. Comcare would welcome the Review giving this matter consideration ...
- 6.46 Suncorp submits:<sup>85</sup>  
The concept of provisional liability is used in the South Australian and New South Wales schemes to support early intervention initiatives. Likewise, the concept of provisional liability should be explored for the Comcare scheme.

## RECOMMENDATIONS

- 6.47 In order to support early intervention, the SRC Act should be amended to include a system of provisional liability that allows an injured employee access to a maximum of 12 weeks of incapacity payments, and medical costs of up to \$3,000. Provisional liability is to be determined on the following basis:
- (a) upon receipt of an injury notification the determining authority has seven days either to commence provisional liability payments or to provide a reasonable excuse (as prescribed) not to commence provisional liability payments; and
  - (b) if no reasonable excuse is provided, provisional liability payments must commence within seven days of the determining authority receiving the injury notification.

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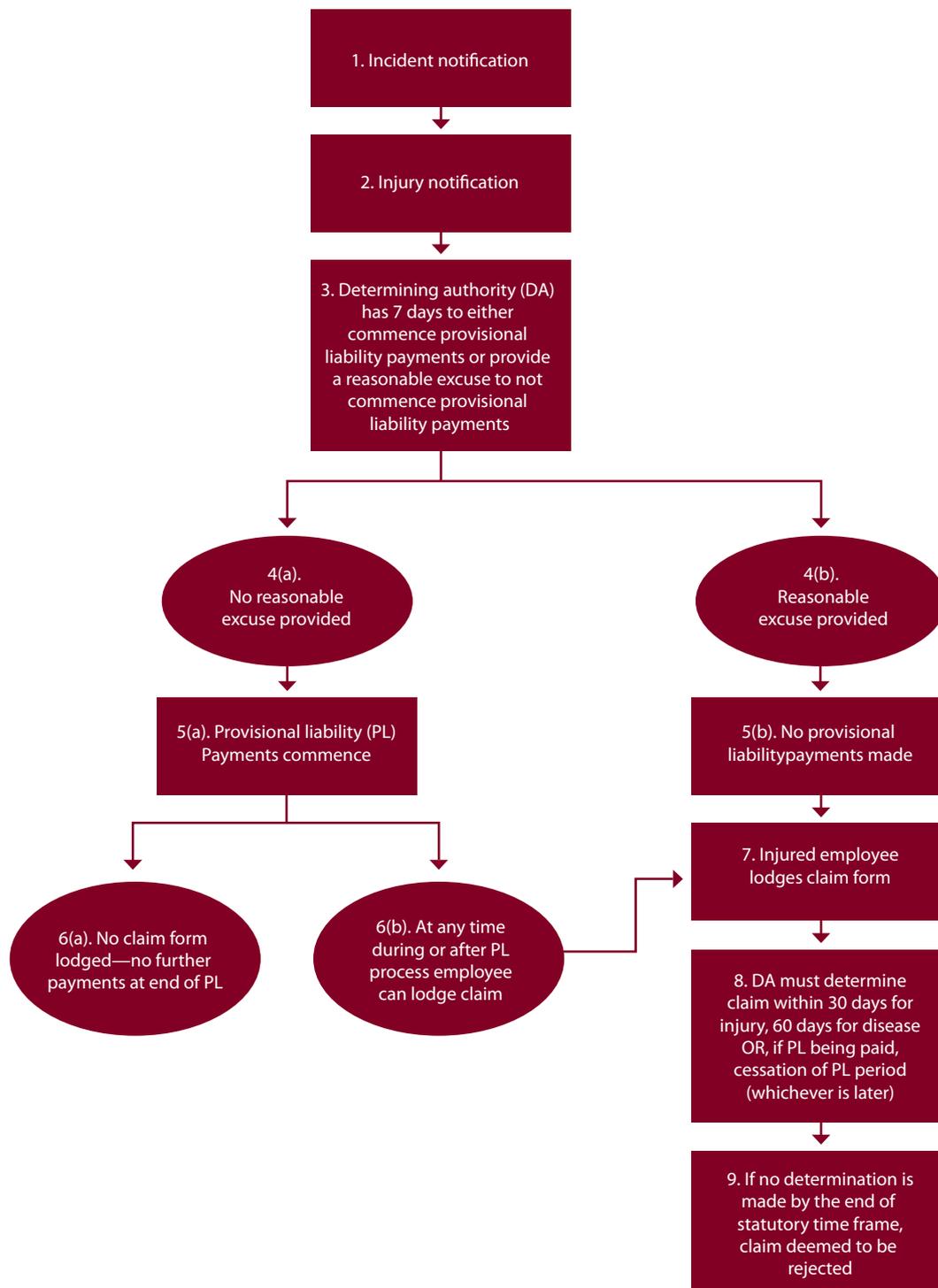
82. Department of Defence, Submission to the Review, p 9.

83. Australian Psychological Society, Submission to the Review, pp 6–7.

84. Comcare, Submission to the Review, p 33.

85. Suncorp, Submission to the Review, p 11.

Figure 1: The proposed provisional liability model



6.48 More specifically, the SRC Act should be amended to include the following.

- (a) a requirement for employees to notify their employer of any incident; **incident notification** does not trigger any liability or require further action, but it ensures communication of an incident;
- (b) the ability for an employee to notify the determining authority of an injury; **injury notification** may be made by the employee, the employer or a representative (for example, a medical practitioner) to the determining authority; however, where the employee notifies the employer of the injury, the employer must provide the notification to the determining authority within 48 hours.

- 6.49 The injury notification must be on an approved form, or must include prescribed information.<sup>86</sup> The injury notification may be in the form of a claim for compensation (see paragraph 6.52(b) below), and should include:
- (a) personal information about the employee (name, residential address, date of birth);
  - (b) information about the employer (name and current business address);
  - (c) information about the treating doctor (medical certificate; if an employee is hospitalised, the name of the hospital is sufficient);
  - (d) details about the injury or illness and the incident (date of injury, description of injury and how it occurred); and
  - (e) information about the person making the notification (name of person notifying, relationship to employee or employer, contact details).
- 6.50 Within seven days of the date of the injury notification, the determining authority must commence provisional liability payments or provide a reasonable excuse as to why provisional liability payments will not commence. Reasonable excuses include that:
- (a) the injury was notified after two months;
  - (b) the injured employee is probably not a employee;
  - (c) the injury is probably not work related;
  - (d) there is insufficient medical information (that is, the determining authority has a reasonable excuse if it does not have enough medical information to establish that there is an injury or to establish that the injury may be related to the employee's employment; this reasonable excuse can only be used in circumstances where there has been a failure to provide a medical certificate or information to the determining authority despite requests from the determining authority); and
  - (e) the injury is not a significant injury; an injury is not significant if the employee is likely to be incapacitated for work, whether partially or totally or a combination of both, for less than seven continuous days; in that case, the determining authority may extend the time to assess provisional liability entitlements to 21 days after the initial notification is made; if the determining authority does that, then within seven days of the initial notification, the insurer is to notify the employee in writing that a decision will be made within 21 days of the initial notification.
- 6.51 If no reasonable excuse is made, provisional liability payments must commence within seven days of the determining authority receiving the injury notification: see step 4(a) in **Figure 1**. Similarly, if no decision is made, provisional liability is deemed to be accepted. Where a reasonable excuse is provided, no payments are made: see steps 4(b) and 5(b) in **Figure 1**.
- 6.52 The following additional details should be included in the provisional liability model.
- (a) If a reasonable excuse is provided in the provisional liability process, then no provisional liability payments are made and the injured employee must lodge a claim for compensation with the determining authority in order for liability to be considered: see steps 4(b), 5(b) and 7 in **Figure 1**. A claim may be lodged by an employee at any time throughout the process.
  - (b) If an employee does not notify an injury separately from a claim for compensation, the determining authority is required to determine, within seven days, whether there are any reasonable excuses why provisional liability payments should not be made: see step 3 in **Figure 1**. The same reasonable excuses apply as outlined in paragraph 6.50 above.
- 6.53 Upon receipt of a claim for compensation, having considered whether there are any reasonable excuses why provisional liability should not be paid, the determining authority must determine the claim, in accordance with the statutory timeframes I recommend at Recommendation 9.3 below, namely:
- (a) within 30 days for injury;
  - (b) within 60 days for disease; or
  - (c) if provisional liability is accepted, by the end of the provisional liability period;
- whichever is the longest: see step 8 in **Figure 1**.

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86. I envisage that this level of detail would be contained in the regulations rather than the Act.

- 6.54 If no determination is made by the end of the relevant timeframe (outlined immediately above), the claim is deemed to be rejected.<sup>87</sup>
- 6.55 There are a number of circumstances that may affect the payment of provisional liability. They include:
- (a) If an employee returns to pre-injury duties and is then off work again: provisional liability can be paid for a cumulative total of 12 weeks, even if the employee returns to work for intermittent periods and compensation is not paid during those periods.
  - (b) After a reasonable excuse no longer exists: if the reasonable excuse on which the determining authority relied for not commencing provisional weekly payments ceases to exist, the insurer must commence payment within seven days (unless information identifying a further reasonable excuse exists and is relied on by the insurer).
- If the initial notification of injury is a claim: an insurer must commence payments of compensation benefits under provisional liability within seven days of the claim being received, unless the insurer has a reasonable excuse, as discussed in paragraph 6.52(b) above. The requirement to commence provisional payments is waived if liability for the claim is determined, and notice of that determination given to the employee, within seven days of receipt of the claim. In that case, the employee will either be receiving compensation pursuant to s 19 of the SRC Act or not.
- 6.56 Provisional liability payments may cease for one of the following reasons:
- (a) the employee returns to work before the end of the provisional liability period and is not incurring any economic loss; or
  - (b) the employee makes a claim and that claim is accepted.
- 6.57 In either of those cases, the determining authority need not notify the employee in advance that the provisional liability for weekly payments of compensation is to cease.
- 6.58 Provisional liability may be discontinued in one of the following circumstances:
- (a) the employee fails to comply with her or his rehabilitation obligations, as discussed at paragraphs 6.155–6.158 below;
  - (b) the employee does not provide a medical certificate that certifies the employee’s incapacity within seven days after the determining authority requests the certificate;
  - (c) the employee does not authorise a provider of medical or hospital treatment or occupational rehabilitation services to give a determining authority the information requested within seven days after the determining authority makes the request; or
  - (d) the insurer receives new credible evidence that was not available at the time when the provisional payments began (for example, that the employee is not an employee as defined, or employment is not a substantial contributing factor to the injury, or the injury notification contains false information in a material particular).
- 6.59 If provisional liability is discontinued (in the circumstances described in paragraph 6.58 above), the determining authority must send the employee written notice that provisional liability and payments have been discontinued, informing the employee of the reason for discontinuation. The notice must also detail any action that the employee can take, if any, to enable the determining authority to recommence payments.
- 6.60 The determining authority may recommence provisional liability:
- (a) for administrative purposes to make further payments;
  - (b) if provisional liability for payment of compensation benefits has ceased or been discontinued (for the reasons outlined in paragraphs 6.56 and 6.58 above) and the employee becomes eligible again for compensation benefits, the payments can start again if the provisional liability period has not expired and \$3,000 of expenses have not been paid; any period for which weekly payments of compensation are not made because they have been stopped is not included in the provisional liability period;
  - (c) on recurrence of the original injury—that is, a spontaneous re-emergence of symptoms needing treatment or causing incapacity as opposed to a new injury which is an aggravation or further incident affecting the same area of the body as the originally notified injury; or
  - (d) if the claim is litigated.
- 6.61 The determining authority must notify the employer within seven days that payments based on provisional liability have been recommenced, unless the payments have only been recommenced for administrative purposes.

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87. As noted in paragraph 9.35 below, the benefit of deemed rejection is that it provides certainty and then immediate access to the next decision-making layer (that is, reconsideration). Deemed acceptance provides less certainty, because that decision can still be overturned if a decision is ultimately made to reject the claim, so there is little gain for the employee except perhaps a few weeks extra incapacity payment.

- 6.62 Once provisional liability payments have been made for eight weeks, the determining authority should notify the employee that the employee will need to make a claim because of ongoing partial or total incapacity if the employee requires payments of compensation to be paid beyond the 12-week provisional liability period.

### **RECOMMENDATION 6.2**

I recommend that the SRC Act be amended to include a system of provisional liability that allows an injured employee access to a maximum of 12 weeks of incapacity payments and medical costs of up to \$3,000.

## **THE REHABILITATION FRAMEWORK**

- 6.63 An effective rehabilitation framework is an integral part of any workers compensation scheme. It is an important aspect of early intervention, which I address in paragraphs 6.5–6.22 above. An effective framework also provides support for longer term incapacity.
- 6.64 The current rehabilitation framework in the Comcare scheme is over 20 years old. It was modern when it was enacted; vocational rehabilitation was the key focus of rehabilitation in the mid to late 1980s. However, the vocational rehabilitation model has been refined and developed over the last 25 years, and the legislative framework has not kept up to date with those developments.

### **THE CURRENT FRAMEWORK**

- 6.65 Part III of the SRC Act contains the rehabilitation provisions and sets out the rehabilitation process. As noted in paragraph 6.10 above, the provision of a rehabilitation program is dependent on liability being accepted.
- 6.66 Employees may be assessed to determine their capacity to undertake a rehabilitation program: s 36 of the SRC Act; and a rehabilitation authority may determine that an employee should undertake such a program: s 37 of the SRC Act.<sup>88</sup> Decisions made pursuant to ss 36 and 37 may be reviewed: s 38 of the SRC Act.
- 6.67 When an employee is undertaking a rehabilitation program, compensation by way of income replacement is paid under s 37(5) of the SRC Act; and compensation for costs incurred in the rehabilitation process is paid under s 39 of the SRC Act.
- 6.68 The term “rehabilitation program” is defined in s 4(1) of the SRC Act and includes medical, dental, psychiatric and hospital services, physical training and exercise, physiotherapy, occupational therapy and vocational therapy. That definition is very broad, particularly by comparison to the definition used in other workers compensation legislation.<sup>89</sup>
- 6.69 Employers have a duty to provide suitable employment to employees who have undertaken or are undertaking a rehabilitation program: s 40 of the SRC Act.<sup>90</sup>
- 6.70 Division 2 of Part III of the SRC Act provides for the approval of rehabilitation program providers. Pursuant to the application and approval process set out in ss 34B–34H, if Comcare is satisfied that an applicant meets the criteria for approval and is likely to be able to comply with the operational standards, Comcare must approve the applicant to be a rehabilitation program provider: s 34F. A rehabilitation program provider is also referred to as an “authorised program provider”: s 4(1). Rehabilitation program providers are responsible for providing rehabilitation programs pursuant to s 37(2)(b) of the SRC Act.
- 6.71 The SRC Act framework is largely focused on ensuring that the administrative decisions associated with the rehabilitation process are correct. The provisions are supported by the Rehabilitation Guidelines, with which rehabilitation authorities (that is, employers, including licensees) must comply. The Rehabilitation Guidelines focus on process and legislative compliance. In my view, rehabilitation should be more focused on desirable outcomes, rather than on processes that must be followed.

### **DEVELOPMENTS IN REHABILITATION**

- 6.72 A recent major development in public policy is the message that, for most people, work is good for their health and their wellbeing and loss of work, whether because of impaired health or for other reasons, is generally harmful.

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88. See also the discussion at paragraphs 6.134–6.146, below.

89. Generally, occupational/vocational rehabilitation is defined as the managed process directed at assisting injured employees to stay in, or return to, suitable employment with appropriate and adequate services. Those services are based on assessed need.

90. See the discussion at paragraphs 6.160–6.166 below.

- 6.73 Comcare is a signatory to the Australian Consensus Statement on the Health Benefits of Work (the **Consensus Statement**).<sup>91</sup> At the heart of the Consensus Statement is a shared desire to improve the welfare of individuals, families and communities. Some of the key elements of the Consensus Statement are that:
- (a) work is generally good for health and wellbeing;
  - (b) long-term work absence, work disability<sup>92</sup> and unemployment have a negative impact on health and wellbeing;
  - (c) individuals seeking to enter the workforce for the first time, seeking re-employment or attempting to return to work after a period of injury or illness face a complex situation with many variables; good outcomes are more likely when individuals understand the health benefits of work, and are empowered to take responsibility for their own situation; and
  - (d) health professionals exert a significant influence on work absence and work disability; Government, employers, unions, insurance companies, legal practitioners, advocacy groups and the medical, nursing and allied health professions all have a role to play in promoting the health benefits of work.
- 6.74 The bio-psycho-social model helps to explain how, in general, work is good for health and wellbeing. In addition to the benefits identified in the Consensus Statement, work may provide benefits such as:
- (a) ensuring that some physical activity is undertaken on work days;
  - (b) providing a sense of community and social inclusion;
  - (c) allowing workers to feel that they are making a contribution to society and their family;
  - (d) giving structure to days and weeks;
  - (e) financial security; and
  - (f) a decreased likelihood that individuals will engage in risky behaviours, such as excessive drinking.<sup>93</sup>
- 6.75 Current research indicates that good work also assists with the recovery of common health conditions.<sup>94</sup>
- 6.76 A significant development is the endorsement, by all 191 World Health Organization member States in the 54th World Health Assembly on 22 May 2001, of the International Classification of Functioning, Disability and Health (the **International Classification**).<sup>95</sup> The International Classification is the World Health Organization's framework for measuring health and disability at both individual and population levels. It is now the international standard to describe and measure health and disability. Of particular relevance to the occupational rehabilitation context, the International Classification takes into account the social aspects of disability and does not see disability only as a "medical" or "biological" dysfunction: it formally recognises the "bio-psycho-social model" of injury treatment. The "bio" is recognised through the impairment, body structure and function elements; the "psycho" is recognised through the activity and support and relationship elements; and the "social" is recognised through the participation elements.
- 6.77 In recognition of the importance and relevance of the bio-psycho-social model, the HWCA and Heads of Compulsory Third Party (the **HCTP**) prepared and published a *Biopsychosocial Injury Management* position paper.<sup>96</sup> In summary, the HWCA and HCTP recognise the World Health Organization's generic bio-psycho-social model of health, illness and disability as relevant to workers compensation regulation, policy, and scheme administration, and accept this approach as critical to improving outcomes when managing injured workers.

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91. Australasian Faculty of Occupational and Environmental Medicine, *Australian Consensus Statement on the Health Benefits of Work*, 2011. Available at: <http://www.racp.edu.au/index.cfm?objectid=CE85B63E-D955-3B0A-A1D95E75E72F6A21>

92. The term used in the Consensus Statement.

93. Australasian Faculty of Occupational and Environmental Medicine and Royal Australasian College of Physicians, *Position Statement: Realising the Health Benefits of Work*, 2011 (the Position Statement), p 8. Available at: <http://www.racp.edu.au/index.cfm?objectid=5E3445A1-E478-2539-1D7058D6481AAB3A>

94. Position Statement, p 15.

95. World Health Organization, *International classification of functioning disability and health*, Resolution WHA54.21, 22 May 2001. Available at: <http://www.who.int/classifications/icf/wha-en.pdf>.

The International Classification is accessible at: <http://apps.who.int/classifications/icfbrowser/>

96. Available at: <http://www.hwca.org.au/documents/HWCA%20HCTP%20-%20Biopsychosocial%20Injury%20Management%20Paper.pdf>

- 6.78 In another significant development, in June 2008 the HWCA endorsed the introduction of a Nationally Consistent Approval Framework for Workplace Rehabilitation Providers (the **National Approval Framework**),<sup>97</sup> which has been in operation since 1 July 2010. Comcare is a signatory to the National Approval Framework. The National Approval Framework specifically limits the work of the Approved Rehabilitation Program Providers to vocational tasks, so as to minimise the perceived conflict of interest for the delivery of treatment services together with vocational programs. The definition of “rehabilitation program” in the SRC Act appears to be inconsistent with contemporary thinking in relation to vocational rehabilitation.

## THE DEFINITION OF REHABILITATION PROGRAM

- 6.79 The definition of “rehabilitation program”, as noted in paragraph 6.68 above, appears to be an attempt to define a holistic, whole-person approach to rehabilitation, specifying some of the relevant professional groups involved in injury management and vocational rehabilitation leading to a return to work.
- 6.80 The occupational rehabilitation services currently used in the Comcare scheme are mostly provided by approved rehabilitation providers and include:
- (a) vocational assessments;
  - (b) guidance or vocational counselling;
  - (c) functional capacity assessments;
  - (d) assessment of work requirements and potential suitable duties for return to work;
  - (e) work experience and training; and
  - (f) job-seeking assistance.

## RECOMMENDATIONS

- 6.81 The term “rehabilitation program” in the SRC Act should be changed to “workplace rehabilitation plan”. That title would confirm that rehabilitation is vocationally directed and is aimed at the return to work of the employee. Additionally, the definition of the term in s 4(1) of the SRC Act should be amended to remove references to medical and like treatments, retaining functional training forms of treatment. The new definition of “workplace rehabilitation plan” could be as follows:

**workplace rehabilitation plan** includes provision of appropriate services which are aimed at maintaining the employee in, or returning them to, suitable employment. Those services include:

- (a) initial rehabilitation assessment;
  - (b) functional assessment;
  - (c) workplace assessment;
  - (d) job analysis;
  - (e) advice concerning job modification;
  - (f) occupational rehabilitation counselling;
  - (g) vocational assessment;
  - (h) advice or assistance concerning job seeking;
  - (i) vocational re-education;
  - (j) advice or assistance in arranging vocational re-education;
  - (k) advice or assistance in return to work planning;
  - (l) the provision of aids, appliances, apparatus or other material likely to facilitate the return to work of a worker after an injury;
  - (m) modification to a work station or equipment used by a worker that is likely to facilitate the return to work of the worker after the injury; and
  - (n) any other service authorised by Comcare.
- 6.82 The language in Part III of the SRC Act should be amended to reflect the focus on workplace rehabilitation plans.

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97. Available at: <http://www.hwca.org.au/documents/Guide%20-%20Nationally%20Consistent%20Approval%20Framework%20for%20Workplace%20Rehabilitation%20Providers.pdf>

- 6.83 Although it might be said that restricting the definition of “workplace rehabilitation” to focus exclusively on vocationally directed activities is inconsistent with the bio-psycho-social approach, in order to fully integrate the various participants in the system (employee, employer, medical treatment and functional or vocational treatments) it is necessary to be clear about the roles and responsibilities of each participant.

### **RECOMMENDATION 6.3**

I recommend that the term “rehabilitation program” in the SRC Act be amended to “workplace rehabilitation plan”, and that the definition of the term should be amended to emphasise the vocational nature of the services and remove reference to other treatment forms.

### **RECOMMENDATION 6.4**

I recommend that the language in Part III of the SRC Act should be amended to reflect the focus on occupational or vocational rehabilitation program providers.

## **THE PARTICIPANTS IN REHABILITATION**

- 6.84 The SRC Act contemplates seven main participants in the rehabilitation process:
- (a) the injured employee;
  - (b) the employer;
  - (c) the rehabilitation authority;
  - (d) the relevant authority;
  - (e) the determining authority;
  - (f) rehabilitation program providers (approved program providers); and
  - (g) a legally qualified medical practitioner.

### **THE “RELEVANT AUTHORITY” AND “REHABILITATION AUTHORITY”**

- 6.85 Section 4(1) of the SRC Act defines the “relevant authority” as Comcare in the case of employees of a Commonwealth (premium paying) agency, and the relevant licensee for employees of licensees; and the “rehabilitation authority” as, variously, the principal officer of the employer or, in the case of authorities exempted by the Minister pursuant to s 35 of the SRC Act,<sup>98</sup> Comcare.
- 6.86 In practice, rehabilitation authorities delegate their powers to others within their organisations (pursuant to s 41A of the SRC Act); and those delegates are generally referred to as “case managers”.
- 6.87 There is no requirement in the SRC Act for the rehabilitation authority, or a delegate of the rehabilitation authority, to undertake any formal training for that important role. That is in direct contrast to the requirements in other Australian workers compensation schemes,<sup>99</sup> and can be contrasted with training requirements for health and safety representatives under the WHS Act. Section 85(6) of the WHS Act provides that a health and safety representative cannot issue a direction under the WHS Act until training has been completed. The required training is prescribed as:
- (a) an initial five-day course of training; and
  - (b) one day’s refresher training each year, with the entitlement to the first refresher training commencing one year after the initial training.
- 6.88 For employees of premium payers, there can be six participants in the rehabilitation process (with some duplication in the roles undertaken by, for example, the employing agency and Comcare); however, for employees of licensees there are only two or three participants (the employee, the employer and any rehabilitation provider that is not the employer).
- 6.89 There is also some uncertainty about who is the rehabilitation authority for some employees—in particular, former employees who have been affected by machinery of government changes.

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98. Apart from a reference in s 4(1) of the *United States Naval Communication Station (Civilian Employees) Act 1988* (providing that civilian employees under that Act are taken to be employed by an exempt authority), there are no such exempt authorities.

99. Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand*, April 2012, Table 5.6, pp 128–130.

- 6.90 In addition, there are difficulties when an injured employee moves on to work in another workplace (either with another Comcare scheme employer or with an employer outside the Comcare scheme). Where an employee moves from one Comcare scheme employer to another, the new employer becomes the rehabilitation authority, whereas the former employer remains liable for the claim costs.<sup>100</sup> Therefore, there may be no relationship between the rehabilitation authority and the employer who is liable for claim costs (the **liable employer**). The liable employer may wish to continue rehabilitating the employee due to the ongoing claim costs; however, the power to approve rehabilitation rests with the rehabilitation authority (the new employer), who does not necessarily have the same motivation to exercise that power.
- 6.91 That situation is exacerbated when an employee moves to another employer outside the Comcare scheme. Some employees are at risk of “falling through the cracks” and not being able to access rehabilitation because it is difficult or impossible to identify their rehabilitation authority.
- 6.92 Additionally, Comcare has no capacity to intervene in rehabilitation even in those extreme circumstances. As the Federal Court concluded in *Hardin v Comcare Australia*,<sup>101</sup> although the conclusion produced a “most unjust result”,<sup>102</sup> Mr Hardin could not be compensated for further education which Comcare had approved. Comcare had done so without a determination by the Department of Defence (the rehabilitation authority), because Mr Hardin was no longer employed by the Department and Comcare was managing his claim.
- 6.93 In other cases, the liable employer may not have the power to arrange for rehabilitation.

### SUBMISSIONS RECEIVED

- 6.94 Stakeholders were generally supportive of rehabilitation responsibilities remaining with the liable agency, and of Comcare having the power to intervene and provide rehabilitation for an employee who has separated from their employer.
- 6.95 The Royal Australian College of Physicians submits:<sup>103</sup>
- The rehabilitation authority for injured employees should always remain the liable agency. In situations where employees with compensable injuries move to another agency, the two authorities need to work closely together to achieve a successful outcome, however the liable agency should remain the rehabilitation authority.
- The liable agency should remain the rehabilitation authority as they are motivated to manage their premium and source employment opportunities in conjunction with appropriately skilled WRP’s.
- 6.96 The Australian Psychological Society submits:<sup>104</sup>
- Comcare should be the rehabilitation authority for employees who are no longer employed by the liable employer. As stated previously, many mental health claims are due to workplace conflicts, where claimants did not have adequate avenues to identify and resolve such conflicts and therefore lodged claims as a last resort option. Until such a time when the SRC Act provides explicit guidelines, procedures and services (through fully trained and qualified clinicians) to provide early intervention around such issues, Comcare should remain the rehabilitation authority even for employees who are no longer employed with their original employer.
- 6.97 Maurice Blackburn submits:<sup>105</sup>
- Comcare should have the power to initiate rehabilitation for injured employees who have separated from their employers. Such employees are presently disadvantaged as disinterested former employers have little present incentive to return ex-employees to the general workforce. Unless such incentives can be provided we consider it appropriate that, in the absence of any other party, Comcare be responsible for the rehabilitation of such injured employees consistent with its statutory function to arrange quickly for the rehabilitation of employees injured under the SRC Act.
- 6.98 The Australian Broadcasting Corporation agrees that Comcare should be able to arrange rehabilitation for employees who have separated from their employer:<sup>106</sup>
- ... because although the pre-injury Agency may be the Rehabilitation delegate, once an injured worker has separated from the pre-injury employer, ongoing contact with the injured worker is minimal (or non-existent) and can be harmful to the longer term recovery process.

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100. Section 97A of the SRC Act sets out the matters Comcare must consider in determining the premiums payable by the premium payers by reference to several amounts, including an “estimated liability component”. That component includes an estimation of Comcare’s liability arising out of injuries suffered by employees of the premium payer: s 97A(3). There is no provision to account for an employee moving to another workplace either within or outside the Comcare scheme.

101. [1995] FCA 1246; (1995) 21 AAR 392.

102. [1995] FCA 1246; (1995) 21 AAR 392 at 396.

103. Royal Australian College of Physicians, Submission to the Review, p 11–12.

104. Australian Psychological Society, Submission to the Review, Part 1, p 8.

105. Maurice Blackburn, Submission to the Review, p 20.

106. Australian Broadcasting Corporation, Submission to the Review, p 4.

## RECOMMENDATIONS

- 6.99 The SRC Act should be amended to remove the role of the rehabilitation authority and replace it with the concept of the liable employer, which will always have a right, and the responsibility, to arrange rehabilitation. The liable employer may vest another person within their organisation (or outside) with the authority to assist the employer in the discharge of the employer's rehabilitation responsibilities (similar to the concept of the rehabilitation coordinator in other jurisdictions).
- 6.100 The SRC Act should be amended to include a requirement that the person vested with authority to assist the employer in the discharge of the employer's rehabilitation responsibilities undertake appropriate training, to be prescribed by regulations.
- 6.101 Where an employee moves between employers (both of whom are covered by the SRC Act), dual rehabilitation responsibilities should be established for both the liable employer and the current employer. Where an employee moves to an employer outside the SRC Act, sole rehabilitation responsibility should revert to the liable employer.
- 6.102 As is currently the case, the obligation to arrange a rehabilitation assessment and develop a return to work plan should remain with the liable employer. The SRC Act should also provide Comcare with an ultimate power to commence and/or take over rehabilitation where an employer fails to meet the employer's obligations.

### RECOMMENDATION 6.5

I recommend that the SRC Act be amended to remove the role of the rehabilitation authority and replace it with the concept of the liable employer, which will always have a right, and the responsibility, to arrange rehabilitation.

### RECOMMENDATION 6.6

I recommend that the SRC Act be amended to include the requirement that the person vested with authority to assist the employer in the discharge of the employer's rehabilitation responsibilities undertake appropriate training, to be prescribed by regulations.

### RECOMMENDATION 6.7

I recommend that, where an employee moves between employers (both of whom are covered by the SRC Act), dual rehabilitation responsibilities should be established for both the liable employer and the current employer. Where an employee moves to an employer outside the SRC Act, sole rehabilitation responsibility should revert to the liable employer.

### RECOMMENDATION 6.8

I recommend that the SRC Act be amended to provide Comcare with an ultimate power to commence and/or take over rehabilitation when the liable employer fails to meet its obligations or ceases to exist.

## A CODE OF PRACTICE

- 6.103 The rehabilitation provisions should also be supported by an "injury management and rehabilitation code of practice" (the **IMR code of practice**) which sets the expected standards for vocational rehabilitation and injury management under the SRC Act. The code of practice should always be followed, unless there is another solution that achieves the same or a better standard. (Codes of practice are used in the WHS Act in the same way.)
- 6.104 A current element of the Rehabilitation Guidelines is the requirement for employers to resource and oversee the delivery of effective rehabilitation to their employees, through a management system. That is also a licence condition<sup>107</sup> and therefore already practised by licensees. Due to its effectiveness in improving rehabilitation outcomes by the licensees, the requirement has been extended to the whole jurisdiction via the Rehabilitation Guidelines. It is an integral element of rehabilitation under the SRC Act, and should be part of the SRC Act itself.

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107. Available at: [http://www.srcc.gov.au/self\\_insurance/licence\\_conditions\\_and\\_performance\\_standards\\_outcomes/licence\\_conditions\\_and\\_performance\\_standards](http://www.srcc.gov.au/self_insurance/licence_conditions_and_performance_standards_outcomes/licence_conditions_and_performance_standards)

## RECOMMENDATIONS

- 6.105 As discussed at paragraph 6.103 above, the SRC Act rehabilitation provisions should be supported by an IMR code of practice. The IMR code of practice will provide practical guidance to employers in meeting their rehabilitation obligations under the SRC Act. While the precise details of what is contained in the IMR code of practice should be determined following appropriate consultation, I recommend that at a minimum it should include guidance to employers about:
- (a) suitable employment and the obligation to take “all reasonable steps” to provide suitable employment;
  - (b) the requirement to consider any suitable duties developed by the injured employee, and to provide clear reasons if those duties are not agreed to. If the injured employee cannot or will not use the opportunity to propose suitable duties, the responsibility would immediately revert back to the employer;
  - (c) injury management plan obligations; and
  - (d) the establishment, content and implementation of their rehabilitation management system.
- 6.106 I further recommend that the IMR code of practice also include guidance to determining authorities about their injury management obligations.
- 6.107 Section 41 of the SRC Act should be amended to require that employers comply with the IMR code of practice issued by Comcare. In preparing the code of practice, consideration should be given to aligning vocational rehabilitation and injury management plans to reflect:
- (a) that work is generally good for health and wellbeing;<sup>108</sup>
  - (b) a bio-psycho-social approach to injury management;<sup>109</sup> and
  - (c) activities and participation requirements similar to those used in the Centrelink activity test.
- 6.108 The SRC Act should also be amended to include an obligation for employers to ensure that:
- (a) a rehabilitation management system is established for the employer’s employees; and
  - (b) the establishment, content and implementation of the rehabilitation management system is in accordance with the IMR code of practice.
- 6.109 If an employer does not comply with the IMR code of practice, penalty units may apply.

### RECOMMENDATION 6.9

I recommend that s 41 of the SRC Act be amended to provide for Comcare to issue an “injury management and rehabilitation code of practice”, including obligations for employers to ensure that:

- (a) a rehabilitation management system is established for the employer’s workers; and
- (b) the establishment, content and implementation of the rehabilitation management system is in accordance with the code of practice.

## AN INJURY MANAGEMENT PLAN

- 6.110 Occupational rehabilitation is a necessary part of injury management; however, it does not constitute the whole. Overreliance on occupational rehabilitation may contribute to “needless disability”,<sup>110</sup> which is commonly defined as disability caused by non-medical factors. Those factors include administrative delays in medical treatment and specialty referral, a lack of transitional work, ineffective communication, and the barriers created by compensation and return to work systems, such as the number of participants involved in the rehabilitation process: see paragraph 6.84 above.
- 6.111 A number of Australian workers compensation jurisdictions, specifically those in New South Wales, Tasmania and the Australian Capital Territory, have recognised that traditional rehabilitation, such as that available under the Comcare scheme, needs to be supported by a broader injury management plan if an employee is “seriously injured”.<sup>111</sup>

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108. Consensus Statement. Available at: <http://www.racp.edu.au/index.cfm?objectid=CE85B63E-D955-3B0A-A1D95E75E72F6A21>

109. Consistent with HWCA and HCTP, *Biopsychosocial Injury Management* position paper. Available at: <http://www.hwca.org.au/documents/HWCA%20HCTP%20-%20Biopsychosocial%20Injury%20Management%20Paper.pdf>

110. American College of Occupational and Environmental Medicine, *Preventing Needless Work Disability by Helping People Stay Employed*, 2006. Available at: <http://www.acoem.org/PreventingNeedlessWorkDisability.aspx>

111. Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand*, April 2012, Table 5.2b, at pp 109–112. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

- 6.112 Each seriously injured employee should have an injury management plan that runs parallel to the traditional rehabilitation model. The goal of the injury management plan is to outline all the services required to return the injured employee to the workplace. The plan includes details about the employer and employee; information about the injury; the rehabilitation goal; and the actions required by the employee, employer, treating doctor, rehabilitation provider and determining authority.
- 6.113 The injury management plan should be focused on avoiding needless disability. Those factors include administrative delays in treatment and specialty referral, a lack of transitional work, ineffective communication, and the barriers created by compensation and return to work systems.
- 6.114 The injury management plan should run for the entire period during which the seriously injured employee is incapacitated for work. In the short to medium term, the program would include the types of components outlined in paragraph 6.81 above; for longer term incapacitated employees, additional components would be required.
- 6.115 In order to support the effectiveness of the injury management plan, and to ensure that it reflects the current situation of each employee as that evolves, the plan should be supported by claim review points.
- 6.116 Effective claims administration lessens the risk of needless disability, by ensuring that claims are dealt with in a timely way, which contributes to the rehabilitation of injured employees.
- 6.117 A framework for the better management of claims is set out in Figure 2.<sup>112</sup>

**Figure 2: Framework for the better management of claims**



- 6.118 I have made recommendations to remove the barriers to achieving the first two steps by recommending an obligation on employers to forward claims at **Recommendation 9.2** and early intervention at **Recommendation 6.1**.
- 6.119 There are no specific legislative barriers to a determining authority reviewing a claim at any point during the life of a claim, and I understand that determining authorities undertake reviews on an ad hoc basis. However, there is no incentive to conduct those reviews; nor is there any specific legislative requirement.

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112. IUA/ABI Rehabilitation Working Party, *Psychology, Personal Injury and Rehabilitation*, 2004, p 32. Available at: [http://www.iua.co.uk/IUA\\_Test/Communities/Claims/Rehabilitation/Psychology\\_\\_Personal\\_Injury\\_and\\_Rehabilitation/IUA\\_Test/Communities\\_folder/rehabilitation/Psychology\\_\\_Personal\\_Injury\\_and\\_Rehabilitation.aspx?hkey=46143fd6-15e3-4e55-b42f-e704b3eae80f](http://www.iua.co.uk/IUA_Test/Communities/Claims/Rehabilitation/Psychology__Personal_Injury_and_Rehabilitation/IUA_Test/Communities_folder/rehabilitation/Psychology__Personal_Injury_and_Rehabilitation.aspx?hkey=46143fd6-15e3-4e55-b42f-e704b3eae80f)

- 6.120 The literature is clear. The majority of injured employees make full physical, mental and social recoveries, but there is much individual variation. Around 20 % to 30 % suffer significantly greater distress and disability than might be expected from physical factors alone. After one year, approximately 5 % of employees encounter serious difficulties which appear out of proportion to the physical pathology of their injuries.<sup>113</sup>
- 6.121 There is no legislative impediment to a determining authority conducting a review at any point during the life of a claim. One of the functions of determining authorities is to minimise the duration and severity of injuries to employees. One of the ways that can be achieved is by arranging for rehabilitation. Rehabilitation could be further supported by reviewing each claim at predetermined times.
- 6.122 Effective claim review is an important tool in identifying employees who require additional support and assistance in returning to work. Although there is no impediment to a determining authority reviewing a claim at any time, reviews at 12 weeks and again at 52 weeks should be the minimum.
- 6.123 The first review should occur 12 weeks after the date of injury or the date when the claim itself is accepted (regardless of whether provisional liability has been paid), whichever is the later. The first review should be tailored to the individual circumstances of a claim. It is a review that examines all elements of the claim, for example:
- (a) the clinical pathway;<sup>114</sup>
  - (b) the functional capacity of the injured employee; and
  - (c) the provision by the employer of suitable duties.
- 6.124 The information gathered by the determining authority in conducting the first review will ultimately form part of the injury management plan.
- 6.125 At paragraphs 9.45–9.47 below, I recommend that, in order for compensation to be payable for psychological injuries for more than 12 weeks after the date of a claim, the initial diagnosis must have been made, or must be confirmed, by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare. A review of psychological injury claims at 12 weeks would include consideration of whether compensation is still payable pursuant to s 14 (if **Recommendation 9.4** is accepted).
- 6.126 The second review should be conducted 52 weeks after the date of injury or the date when the claim itself is accepted (regardless of whether provisional liability has been paid). However, for claims where claim lodgement has been delayed for over 45 weeks after the date of injury, there should be no need for a determining authority to undertake the 12-week review; only the 52-week review would be required. There should be flexibility in the review date so that a review can occur earlier than the prescribed review points where appropriate. For example, where a determining authority accepts a claim 10 weeks post injury, it may be appropriate to conduct the claim review at the 10-week point.
- 6.127 It can be difficult to maintain rehabilitation momentum for an injured employee who has received incapacity payments for a significant period. In order to maintain momentum for long-term incapacitated employees, examination of the model used by Centrelink, in particular the activity test, may be useful.
- (a) The activity test is designed to ensure that unemployed people receiving income support payments are “actively looking for work and/or doing everything that they can to become ready for work in the future”.
  - (b) Similarly, participation requirements “aim to ensure that a person looks for, and undertakes, paid work in line with the person’s work capacity” in order “to increase work force participation ... and reduce welfare dependency”.<sup>115</sup>
  - (c) Generally, job seekers must be “actively seeking and willing to undertake any paid work that is not unsuitable”. That usually requires job search, paid or voluntary work, study or other activities. Different requirements may apply for job seekers who have a partial capacity to work, early school leavers, those who are principal carers, and those aged 55 or over.
  - (d) A person who does not meet the activity test or participation requirements may have a “failure” imposed, which may affect the person’s social security payments.
- 6.128 Similar activities and participation requirements to those used in the Centrelink activity test could be included in any injury management plan for employees who are incapacitated for the longer term. All activities should be focused on improving the injured employee’s skills and experience (and, therefore, prospects of obtaining suitable paid work) and on assisting the person in seeking suitable work.

113. IUA/ABI Rehabilitation Working Party, *Psychology, Personal Injury and Rehabilitation*, 2004, p 13. Available at: [http://www.iaa.co.uk/IUA\\_Test/Communities/Claims/Rehabilitation/Psychology\\_\\_Personal\\_Injury\\_and\\_Rehabilitation/IUA\\_Test/Communities\\_folder/rehabilitation/Psychology\\_\\_Personal\\_Injury\\_and\\_Rehabilitation.aspx?hkey=46143fd6-15e3-4e55-b42f-e704b3eae80f](http://www.iaa.co.uk/IUA_Test/Communities/Claims/Rehabilitation/Psychology__Personal_Injury_and_Rehabilitation/IUA_Test/Communities_folder/rehabilitation/Psychology__Personal_Injury_and_Rehabilitation.aspx?hkey=46143fd6-15e3-4e55-b42f-e704b3eae80f)

114. Clinical pathways are tools used to guide evidence-based healthcare.

115. FaHCSIA, Guide to Social Security Law, section 3.2.8.10. Available at: [www.fahcsia.gov.au/guides\\_acts/](http://www.fahcsia.gov.au/guides_acts/)

- 6.129 The continued adherence to an injury management plan could be used as a tool to maintain and improve the employability of an injured employee whose incapacity has exceeded, for example, 52 weeks. Ongoing incapacity benefits could be linked to continued participation in the work connection program.
- 6.130 An injured employee who has received incapacity benefits for 52 weeks and who has some capacity to work could have an injury management plan that requires activities to be undertaken such as:
- (a) a number of job contacts to be made each week;
  - (b) a work experience activity; and
  - (c) regular meetings with the rehabilitation provider.

## RECOMMENDATIONS

- 6.131 The SRC Act should be amended to provide for the development of an “injury management plan” by a determining authority for each injured employee who is incapacitated for 28 days or more (either total or partial incapacity). That plan would be in addition to any workplace rehabilitation plan (see paragraph 6.81 above) provided pursuant to s 37 of the Act.
- 6.132 The SRC Act should be also amended to provide that:
- (a) the injury management plan must be prepared by the determining authority in consultation with the injured employee, employer and nominated treating practitioner;
  - (b) employees and employers must cooperate in the preparation and implementation of an injury management plan;
  - (c) if an employee does not cooperate in the preparation or implementation of the injury management plan, the employee’s rights to compensation may be suspended (consistent with the obligation currently implicit in s 37(7) of the SRC Act); and
  - (d) if an employer does not cooperate in the preparation or implementation of the injury management plan, penalty units may apply.
- 6.133 The SRC Act should be amended to require a determining authority to conduct a review of each active claim at 12 and 52 weeks.

### RECOMMENDATION 6.10

I recommend that the SRC Act be amended to provide for the development of an “injury management plan” that is developed by a determining authority for each injured employee who is incapacitated for 28 days or more (either total or partial incapacity).

### RECOMMENDATION 6.11

I recommend that the SRC Act be amended to provide that:

- (a) the injury management plan must be prepared by the determining authority in consultation with the injured employee, employer and treating practitioner;
- (b) employees and employers must cooperate in the preparation and implementation of an injury management plan;
- (c) if an employee does not cooperate in the preparation or implementation of the injury management plan, the employee’s rights to compensation are suspended (consistent with the obligation currently implicit in s 37(7) of the SRC Act); and
- (d) if an employer does not cooperate in the preparation or implementation of the injury management plan, penalty units may apply.

### RECOMMENDATION 6.12

I recommend that the SRC Act be amended to require a determining authority to conduct a review of each active claim at 12 and 52 weeks.

## REHABILITATION ASSESSMENTS AND PROGRAMS

- 6.134 It is difficult to see the benefit of prescribing separate processes for the rehabilitation assessment (s 36) and rehabilitation program (s 37). Workplace rehabilitation should be delivered on a service continuum of assessment of need, planning, active implementation, review and evaluation.<sup>116</sup>
- 6.135 A rehabilitation assessment is a review of the injured employee's situation to determine if there is a demonstrated need for the provision of rehabilitation services. Most other Australian workers compensation schemes use an "initial needs assessment" in order to generate a rehabilitation program. Generally, "initial needs assessments" will include:<sup>117</sup>
- (a) a review of medical, educational, employment, social, psychological, home environment and other factors;
  - (b) contact with the injured employee, employer, treating medical practitioner and other parties (as necessary); and
  - (c) development of an initial assessment report—specifying the proposed rehabilitation goal.
- 6.136 For administrative purposes (for example, costing and outcome measurement), it may be necessary for determining authorities to separate an "initial rehabilitation assessment" from the rehabilitation plan itself. However, I consider that differentiation is administrative in nature and should not be required in the SRC Act.
- 6.137 Section 36 of the SRC Act currently requires that a formal assessment of rehabilitation need be undertaken by a "legally qualified medical practitioner" or "suitably qualified person"; the assessment is a medical one.
- 6.138 In my view, the type of assessment contemplated by s 36 could more properly be conducted under s 57 of the SRC Act. That would reduce the fragmentation of medical information received by the rehabilitation authority and the determining authority. It will also allow the rehabilitation authority to focus on delivery of the workplace rehabilitation plan, rather than collection of medical information.
- 6.139 However, there are some concepts in s 36 that should be incorporated into s 57 of the SRC Act.
- 6.140 Section 36(2)(c) provides that a panel may assess an employee. The benefit of a panel assessment is that, when an employee is suffering from a complex condition, two or more relevant medical practitioners or "suitably qualified persons" (for example, an orthopaedic surgeon and a clinical neuropsychologist) can examine the injured employee during the same consultation. Section 57(1) currently precludes more than one legally qualified medical practitioner examining the injured employee during a consultation. Section 57 of the SRC Act should be amended to provide the ability for more than one legally qualified medical practitioner to examine the injured employee during a consultation.
- 6.141 Section 36 of the SRC Act currently provides that an assessment may be undertaken by a suitably qualified person. Under s 57, only a legally qualified medical practitioner may undertake a medical examination. From time to time, a person other than a legally qualified medical practitioner may be better placed to conduct an examination. For example, clinical neuropsychologists do not meet the definition of legally qualified medical practitioner but are highly skilled in assessing traumatic brain injury. Section 57 of the SRC Act should be amended to provide that a suitably qualified person may undertake a medical examination.
- 6.142 Section 37 then becomes the primary section that provides for the detail of a workplace rehabilitation plan.
- 6.143 The principal focus is on the initial determination made under s 37(1) that an employee should undertake rehabilitation. At that point, whether rehabilitation is provided by an approved rehabilitation provider or otherwise, all of the services defined under the workplace rehabilitation plan can be provided.
- 6.144 In many cases, due to the information gathered during the initial assessment, a return to work plan will not be required<sup>118</sup> and rehabilitation will cease at that point.
- 6.145 In other cases, further services as defined under the "workplace rehabilitation plan" will be provided. I consider that s 37 should not provide any further prescription in relation to the workplace rehabilitation plan itself. The focus should be on establishing performance-based duties more aligned with the WHS Act. The core requirements should be that an employer:
- (a) take all reasonable steps to return an injured employee to work as soon as possible; and
  - (b) consult as far as practicable with the injured employee and treating practitioner about the injured employee's return to work.

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116. HWCA, *Nationally Consistent Approval Framework for Workplace Rehabilitation Providers*, November 2011, p 6. Available at: <http://hwca.org.au/documents/Guide%20-%20Nationally%20Consistent%20Approval%20Framework%20for%20Workplace%20Rehabilitation%20Providers.pdf>

117. Safe Work Australia, *Guidance Note for Best Practice Rehabilitation Management of Occupational Injuries and Disease* [NOHSC:3021 1995], April 1995, p 24. Available at: [http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/280/GuidanceNoteForBestPracticeRehabilitationManagementOfOccupationalInjuriesAndDiseases\\_NOHSC3021-1995\\_PDF.pdf](http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/280/GuidanceNoteForBestPracticeRehabilitationManagementOfOccupationalInjuriesAndDiseases_NOHSC3021-1995_PDF.pdf)

118. For example, the approved rehabilitation provider may establish that the employee has returned to work and no support is required.

- 6.146 A determination under s 37(1) should only be required to advise an employee:
- (a) that they are required to participate in a workplace rehabilitation plan;
  - (b) of the vocational goal of any workplace rehabilitation plan; and
  - (c) of any modification to the vocational goal.

## RECOMMENDATIONS

- 6.147 I recommend that s 36 of the SRC Act be repealed. All rehabilitation needs previously assessed under s 36 of the SRC Act could simply be assessed pursuant to s 37; or, where necessary, the determining authority could obtain further information—in the form of an assessment—pursuant to s 57 of the SRC Act, as amended.
- 6.148 I recommend that s 57 of the SRC Act be amended to provide for examinations to be conducted by either a legally qualified medical practitioner or a suitably qualified person, and that those examinations can be conducted by a panel.
- 6.149 That could be achieved by amending s 57(1), and inserting a new subsection (1A), as follows:
- (1) Where:
    - (a) a notice has been given to a relevant authority under section 53 in relation to an employee; or
    - (b) an employee has made a claim for compensation under section 54;the relevant authority may require the employee to undergo an examination by one legally qualified medical practitioner nominated by the relevant authority.
  - (1A) Any examination in subsection (1) shall be undertaken by:
    - (a) a legally qualified medical practitioner nominated by the relevant authority;
    - (b) a suitably qualified person (other than a medical practitioner) nominated by the relevant authority; or
    - (c) a panel comprising such legally qualified medical practitioners or other suitably qualified persons (or both) as are nominated by the relevant authority.
- 6.150 Further, s 37(3) of the SRC Act should be removed and replaced with the core requirements that an employer:
- (a) take all reasonable steps to return an injured employee to work as soon as possible; and
  - (b) consult as far as practicable with the injured employee and nominated treating practitioner in relation to the injured employee's return to work.
- 6.151 As part of taking those steps and consulting, "assessments" will be made on an ongoing basis throughout the rehabilitation process. That is the continuum of rehabilitation.
- 6.152 Any further guidance that may be required could more appropriately be contained in subordinate legislation.

### RECOMMENDATION 6.13

I recommend that s 36 of the SRC Act be repealed.

### RECOMMENDATION 6.14

I recommend that the current s 37(3) of the SRC Act be removed and replaced with the core requirements that an employer:

- (a) take all reasonable steps to return an injured employee to work as soon as possible; and
- (b) consult as far as practicable with the injured employee and nominated treating practitioner about the injured employee's return to work.

### RECOMMENDATION 6.15

I recommend that s 57 of the SRC Act be amended to provide that a suitably qualified person may undertake a medical examination and that a medical examination may be undertaken by a panel.

## THE OBLIGATION ON EMPLOYEES TO PARTICIPATE IN REHABILITATION

- 6.153 Effective rehabilitation requires active participation. It is detrimental to the health outcomes of an injured employee for that employee to remain the passive recipient of compensation. Requiring continued and ongoing engagement should lead to better rehabilitation outcomes. Currently, the only enforceable obligations on employees are found in ss 36(4) and 37(7).
- 6.154 The SRC Act makes separate provision for the assessment of injured employees for rehabilitation programs: s 36; and for the provision of rehabilitation programs: s 37. I have recommended that workplace rehabilitation be provided for in the one section: see **Recommendation 6.13**.
- 6.155 Currently, an assessment may be carried out at the instigation of the employer or on the request of the injured employee: s 36(1) of the SRC Act. The SRC Act indicates who can make such an assessment: s 36(2); and employees are required to attend an examination for the purpose of making the assessment, at the cost of the rehabilitation authority: ss 36(3) and (5). Employees who refuse or fail to undergo an examination may have their compensation payments suspended: ss 36(4) and (7) of the SRC Act.
- 6.156 A rehabilitation authority may require an employee to undertake a rehabilitation program: s 37(1) of the SRC Act; but only after having regard to a number of factors set out in s 37(3), which are mandatory.<sup>119</sup> The cost of the program is paid for by the relevant authority: s 37(4); and may be provided by the rehabilitation authority or another service provider: s 37(2).
- 6.157 If an employee fails or refuses, without reasonable excuse, to undertake a rehabilitation program, that employee's compensation is suspended by operation of ss 37(7) and (8) of the SRC Act. Employees who undertake rehabilitation programs are paid compensation in accordance with s 37(5) (as opposed to ss 19 and 31 of the SRC Act); however, I have recommended that s 37(5) be repealed—see paragraph 7.163 below.
- 6.158 An employee's return to work will clearly be impeded if that employee chooses not to engage in the process. Some participants in the Comcare scheme have argued that it is difficult to enforce the obligations of injured employees in the rehabilitation process through suspension of payments, primarily because any decision to suspend payments may be, and frequently is, set aside by Comcare at the reconsideration stage. That can be because when the decision to suspend compensation is made, the "reasonable excuse" has not been provided or articulated. That excuse often arises after the suspension decision has been made, in the context of the reconsideration.
- 6.159 I am not persuaded that any change is required to ss 37(7) or (8) of the SRC Act.

## SUITABLE EMPLOYMENT

- 6.160 Ensuring that suitable employment is accessible to injured employees is a cornerstone requirement for any framework to ensure employees are engaged to their full capacity, and to achieve an equitable and cost-effective compensation system.
- 6.161 As noted in paragraph 6.73 above, Comcare is a signatory to the Consensus Statement. The principal message of the Consensus Statement is that, for most people, work is good for their wellbeing and loss of work, whether because of impaired health or for other reasons, is generally harmful.<sup>120</sup>
- 6.162 Under the SRC Act, employers have a duty<sup>121</sup> to take all reasonable steps to provide suitable employment to employees who are eligible for compensation and who are undertaking, or have completed, a rehabilitation program, or to assist the employee to find such employment: s 40(1). What constitutes "suitable employment" is defined in s 4(1), and depends on whether or not the employee was a permanent employee of the relevant employer at the date of the injury and continues to be employed by that employer.
- 6.163 For employees who were permanent employees and remain so, suitable employment is employment by that same employer: paragraph (a) of the s 4(1) definition. For all other employees, suitable employment may be any employment (including self-employment): paragraph (b) of the s 4(1) definition.
- 6.164 In both situations, suitable employment is employment to which the particular employee is suited, having regard to a number of factors, including the personal circumstances of the employee (her or his age, experience, training, language and other skills), the employee's suitability for rehabilitation or vocational retraining, whether it is reasonable to require the employee to change her or his place of residence, and "any other relevant matter": paragraphs (a)(i)–(iv) of the s 4(1) definition.

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119. See *McGuinness v Comcare* [2007] FMCA 1486; (2007) 214 FLR 56.

120. Consensus Statement, p 3.

121. The duty rests with the "relevant employer", which is defined in s 40(2) of the SRC Act to mean (a) in relation to an employee who is employed by a Commonwealth authority, the authority; (b) in relation to an employee who is employed by a licensee, the licensee; and (c) in relation to any other employee, the Commonwealth.

- 6.165 The amount an injured employee earns (or is able to earn) in suitable employment is also taken into account in calculating the compensation payable for the employee's incapacity for work: ss 19(2) and (3) of the SRC Act.<sup>122</sup>
- 6.166 If an employer fails to provide suitable employment, the SRC Act does not currently specify any consequences for that employer.

## THE PROVISION OF "SUITABLE EMPLOYMENT"

- 6.167 Apart from return to work plans, many employers do not provide "suitable employment" to their injured employees, as required by s 40 of the SRC Act.<sup>123</sup> As a result, employees with a capacity to work remain on incapacity benefits for longer than necessary.
- 6.168 There is no penalty for any failure on the part of an employer to provide suitable employment. If a penalty were to be prescribed, two related issues should also be considered:
- Should the duty to provide suitable employment continue throughout an employee's incapacity?
  - Are there any exemptions that should apply to that duty?
- 6.169 As currently drafted, s 40 of the SRC Act provides that an employer shall take "all reasonable steps". That requirement may be a sufficient requirement, while providing sufficient flexibility. The IMR code of practice I have recommended (see paragraphs 6.105–6.109 above) could provide further guidance to employers about the definition of "all reasonable steps".
- 6.170 The s 4(1) definition of "suitable employment" considers the employment status of an employee at the time when the new employment is being considered as a critical factor in identifying what is "suitable" employment. So, for an injured employee who continues to be employed by the Commonwealth or a Licensee, suitable employment must be employment within the Commonwealth or the relevant licensee.
- 6.171 Some participants in the Review's consultations argue that the definition of suitable employment should not be limited in that manner, because return to work in the same workplace can be difficult and is not optimal in all cases.<sup>124</sup> There is no support provided in the Comcare scheme for a return to work with a different employer.
- 6.172 Job placement schemes, such as the WISE scheme in Victoria<sup>125</sup> and the RISE scheme in South Australia,<sup>126</sup> allow employers to register job vacancies with a network of rehabilitation providers, who then identify if they have a client who would be a good fit for a vacancy. A rehabilitation provider gives practical support to the employer who takes on an employee through the scheme; and the scheme provides financial support to the employer.
- 6.173 The financial support provided by job placement schemes such as WISE includes:
- an initial placement fee;
  - a contribution towards wages for the first 52 weeks of employment; and
  - some insurance protection in case the employee suffers another injury.
- 6.174 It should be recognised that the participants in the Comcare scheme differ from those in the South Australian and Victorian schemes, both in the number of employers and in the schemes' geographic spread. For that reason, it may be necessary to create a job placement scheme that provides job placement incentives for employers outside the Comcare scheme.
- 6.175 Another area that could be examined includes the injury management practices of employers. Employers can improve their injury management practices by encouraging workers to play an active role in their own rehabilitation and return to work.
- 6.176 One way of encouraging workers to play an active role could be to give an injured employee the initial opportunity to propose the duties that would make up "suitable employment". From a practical perspective, an injured employee is likely to have a better understanding of her or his ability and workplace than any other individual. An injured employee could be supported by a rehabilitation provider in developing a proposal, and ultimately the employer's agreement to the suitable duties would be needed.

122. See the discussion at paragraphs 7.67–7.76 below.

123. See Maurice Blackburn, Submission to the Review, p 21; and Community and Public Sector Union, Submission to the Review, p 9.

124. See, for example, Department of Defence, Submission to the Review, p 11; Australian Broadcasting Commission, Submission to the Review, p 4; and John Holland Group, Submission to the Review, p 9.

125. More information is available at: <http://www.worksafe.vic.gov.au/return-to-work/worksafe-incentive-scheme-for-employers-wise>

126. More information is available at: <http://www.workcover.com/health-provider/workplace-rehabilitation/rise-re-employment-incentive-scheme-for-employers>

- 6.177 If that model were to be implemented, there could be an obligation on an employer to consider any suitable duties developed by the injured employee, and to provide clear reasons if those duties are not agreed to. If the injured employee cannot or will not use the opportunity to propose suitable duties, the responsibility would immediately revert back to the employer.
- 6.178 Guidance to support employers through that process could be included in the IMR code of practice as discussed at paragraphs 6.103–6.104, above. A simple guided decision-making tool could be developed to support injured employees.

### SUBMISSIONS RECEIVED

- 6.179 Persons who were consulted during the Review generally considered that the employer obligation to provide suitable duties should be strengthened.

- 6.180 The Department of Defence submits:<sup>127</sup>

It is understood that when it was drafted, the SRC Act sought to avoid disadvantage to an injured worker by requiring them to seek employment outside of the Commonwealth, due to the particular employment conditions and superannuation contributions enjoyed by the APS. However, in practical application, the disadvantage of limiting suitable employment to, respectively, Commonwealth, ACT govt or licensee employment is far greater. Due to changes in the Commonwealth superannuation scheme from defined benefits, and the inclusion of licensees under the Act, who do not have access to defined benefits superannuation, this provision is much less relevant in the current environment ... The current definition of suitable employment also results in perhaps unforeseen circumstances which exploit the legislation ... In order for the definition of suitable employment to be changed, the Act should enable an injured worker's employment to be terminated by the liable employer on the basis that they cannot return to employment with the pre-injury agency due to the compensable injury.

And further:<sup>128</sup>

A scheme-wide employment incentive scheme is desirable. Such incentive schemes have proven effective in other jurisdictions in overcoming employer concerns with taking on a worker with an existing compensation injury. Such schemes in State jurisdictions sometimes involve coverage for workers compensation for a time limited period. The ability for the SRC Act to accommodate this if the definition of suitable employment is expanded is problematic. It may result in an individual in private sector employment acquiring a new injury covered under the public service workers compensation. It may also result in the individual having entitlements under both State and Federal compensation schemes. An alternative may be to consider a contribution by the liable employer to the new employer's premium cost for coverage of the injured individual.

- 6.181 The Australian Psychological Society submits:<sup>129</sup>

The APS agree that currently there is little incentive for employers to participate and to provide suitable duties for injured workers and that these provisions need to be strengthened under the new SRC Act.

- 6.182 Maurice Blackburn submits:<sup>130</sup>

The current obligations on employers to provide 'suitable employment' are not sufficient. Where an employment relationship ceases to exist, employers are often reluctant to acknowledge an ongoing obligation to assist the worker to train for, or identify, alternative employment opportunities. This results in circumstances where a worker is unable to engage in their pre-injury employment and is unable to find alternative employment due to a lack of training or real opportunities in the labour market. A worker can find themselves in a position of extreme financial difficulty. This is particularly an issue in cases of partial incapacity where a worker is found to have an 'ability to earn in suitable employment' yet no alternative employment relationship actually exists.

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127. Department of Defence, Submission to the Review, p 11.

128. Department of Defence, Submission to the Review, p 11.

129. Australian Psychological Society, Submission to the Review, Part 1 p 7.

130. Maurice Blackburn, Submission to the Review, p 21.

## RECOMMENDATIONS

- 6.183 I recommend that the definition of “suitable employment” in s 4(1) of the SRC Act be amended so that employment with any employer can be considered “suitable employment”. That could be achieved by changing the definition to:
- suitable employment**, means work for which the employee is suited having regard to:
- (a) the employee’s age, experience, training, language and other skills;
  - (b) the employee’s suitability for rehabilitation or vocational retraining;
  - (c) where employment is available in a place that would require the employee to change her or his place of residence—whether it is reasonable to expect the employee to change her or his place of residence; and
  - (d) any other relevant matter.
- 6.184 The SRC Act should be amended to provide for the establishment of a scheme-wide job placement program, appropriate to the unique attributes of the Comcare scheme, including a preference for placement with another scheme employer before looking outside the scheme. Once developed, the specific details of the job placement scheme should be prescribed in regulations.
- 6.185 The SRC Act should be amended so that, where the employer’s obligation to provide suitable duties under s 40 is not met, penalty units may apply.
- 6.186 The IMR code of practice (as recommended in paragraph 6.105 above) should provide the opportunity for employees to propose their suitable duties (where appropriate) as a first step.

### RECOMMENDATION 6.16

I recommend that the definition of “suitable employment” be amended so that employment with any employer can be considered “suitable employment”.

### RECOMMENDATION 6.17

I recommend that the SRC Act be amended so that, where the employer obligation to provide suitable duties under s 40 is not met, penalty units may apply.

- 6.187 **Recommendation 6.17** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, Table 2.

### RECOMMENDATION 6.18

I recommend that the SRC Act be amended to provide for the establishment of a scheme-wide job placement program appropriate to the unique attributes of the Comcare scheme, including a preference for placement with another scheme employer before looking outside the scheme.

### RECOMMENDATION 6.19

I recommend that the injury management and rehabilitation code of practice provide the opportunity for employees to propose their suitable duties (where appropriate) as a first step.

## REGULATION OF THE REHABILITATION PROCESS

- 6.188 It could be considered that 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.
- 6.189 As a result, the rehabilitation of employees is taking longer than necessary and employers are not sufficiently discharging their obligations to provide suitable employment to employees who are unable to return to their pre-injury positions. It could be argued that the rehabilitation provisions and relevant regulatory tools of the SRC Act should be strengthened.

- 6.190 Comcare is also responsible for the approval of rehabilitation providers wishing to operate within the Comcare scheme. Providers are required to apply to Comcare for approval and to meet Comcare’s criteria and operational standards—outcome and service delivery standards.
- 6.191 Comcare is an experienced regulator with respect to WHS issues. From a policy perspective, there is a strong alignment between WHS and rehabilitation.<sup>131</sup> WHS seeks to prevent harm, and rehabilitation seeks to reduce the effects of harm.
- 6.192 Comcare has recently published the *Comcare Regulation Policy* as a consultation draft<sup>132</sup> (the **draft regulation policy**), and this draft regulation policy advocates an integrated regulatory approach to WHS and rehabilitation issues.
- 6.193 The use of regulatory tools was discussed by the Productivity Commission in 2004. The Productivity Commission stated:<sup>133</sup>
- ... in the wider debate on OHS, there is considerable divergence of views on whether greater information, assistance and persuasion will be more productive than a greater emphasis on penalties and enforcement. The Commission notes that the balance between enforcement and education has gone through long cycles in the various jurisdictions. There have been, and should continue to be, differing emphases between the two approaches in response to the particular circumstances facing a jurisdiction, the differing behaviours and levels of risks between industries and the different capacities of firms, particularly small and medium enterprises, to effectively identify and manage those risks.
- 6.194 The response of regulatory theory (and increasingly regulatory practice) to the “punish/persuade” debate has been to adopt a mix of the two approaches in some form of a graduated enforcement response or enforcement pyramid. The challenge is to develop enforcement strategies that punish the worst offenders, while at the same time encouraging and helping employers to comply voluntarily.<sup>134</sup>
- 6.195 A number of regulatory tools are used in other Acts to improve rehabilitation outcomes.<sup>135</sup> They include a combination of better practice, compliance and enforcement—for example:
- (a) education;
  - (b) audits;
  - (c) inspections;
  - (d) statutory enforcement options, such as:
    - (i) improvement notices; and
    - (ii) on the spot fines; and
  - (e) civil remedies and sanctions, such as:
    - (i) declarations of contravention; and
    - (ii) pecuniary penalties.
- 6.196 Education and audits are the only regulatory tools currently available under the SRC Act for Comcare to use to encourage better practice amongst employers.<sup>136</sup>
- 6.197 The make-up of participants in the Comcare scheme is distinct from other schemes in Australia because it consists mostly of large employers who have relatively mature rehabilitation and return to work systems. As a result, some of the regulatory tools used in other schemes may not be appropriate in the Comcare scheme. A simple model that drives systemic change, coupled with an ability to intervene at an individual case level, when needed, may be most appropriate.
- 6.198 Improvement notices are used in Victoria to support the activities of their return to work inspectors (**RTW inspectors**).<sup>137</sup> An improvement notice is a written direction requiring a person to fix a rehabilitation or return to work problem in a workplace. The improvement notice will set a date by which the improvement must be completed. The legislation provides for penalties for failure to comply with an improvement notice. Improvement notices are a relatively quick and inexpensive enforcement option, and could be used when a regulator needs to intervene on an individual case level. Improvement notices have been used successfully in this manner in the WHS environment for many years.

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131. See the discussion in Chapter 3 of the principles that should guide the redesign of the SRC Act: paragraphs 3.18–3.19 above.

132. Available at: [http://www.comcare.gov.au/the\\_comcare\\_scheme/public\\_consultations/current\\_consultations/comcare\\_regulation\\_policy](http://www.comcare.gov.au/the_comcare_scheme/public_consultations/current_consultations/comcare_regulation_policy)

133. Productivity Commission, *National Workers’ Compensation and Occupational Health and Safety Frameworks*, Inquiry Report No 27, 16 March 2004, p 49. Available at: [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0006/18546/workerscomp.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0006/18546/workerscomp.pdf)

134. R Johnstone, *From Fiction to Fact – Rethinking OHS Enforcement*, National Centre for OHS Regulation, Working Paper 11, July 2003, p 15. Available at: [http://regnet.anu.edu.au/sites/default/files/u86/WorkingPaper\\_11.pdf](http://regnet.anu.edu.au/sites/default/files/u86/WorkingPaper_11.pdf)

135. See, for example, Division 6 of the Victorian Act and, in particular, ss 234–235. Also see s 28D of the SA Act.

136. Comcare, *Comcare Regulation Policy: Putting You First*, 28 March 2011, p 8. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0008/73187/Comcare\\_Regulation\\_Policy.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0008/73187/Comcare_Regulation_Policy.pdf)

137. See Part VII B of the Victorian Act and, in particular, s 224.

- 6.199 The WHS environment may provide other options for regulatory tools that can drive systemic change. A tool that has been used by Comcare as a regulator of WHS for many years, and has been adopted in the model WHS laws, is the undertaking (also known as an enforceable undertaking). Undertakings are not only used in the WHS environment; a number of Commonwealth regulators use undertakings as a regulatory tool—for example, the Clean Energy Regulator, the Australian Communications and Media Authority and the Australian Securities and Investments Commission.
- 6.200 An undertaking is a legally binding agreement under which a person or organisation agrees to carry out specific activities to rectify a contravention or alleged contravention of the relevant legislation or to improve performance in a particular area. Key characteristics of undertakings include that:
- they do not constitute an admission of guilt;
  - once agreed, they become enforceable; and
  - they generally address systemic issues and problems, and can be broad enough to benefit the community at large.
- 6.201 The value of enforceable undertakings was examined during the Australian Government’s review of occupational health and safety (**OHS**) laws, which concluded that experience supports including enforceable undertakings in the model OHS law and that the available evidence suggests their use has also been successful in other regulatory fields.<sup>138</sup>
- 6.202 Research suggests that enforceable undertakings can significantly improve compliance with OHS statutory standards. Enforceable undertakings can have a significant impact on:<sup>139</sup>
- the organisational culture of workplaces;
  - compliance with WHS laws;
  - the acquisition and implementation of skills in relation to systemic WHS management; and
  - the delivery of tangible benefits to workers, industry and the community.
- 6.203 Because of the very serious nature of some WHS investigations, inspectors under the WHS Act have significant powers, including a right of entry and the ability to request a search warrant.<sup>140</sup> The regulator also has a range of powers; however, those powers are much more focused on obtaining information.<sup>141</sup> It is unlikely that the range of powers of a WHS investigator would be required when investigating rehabilitation matters. However, some powers, perhaps aligned with those of a WHS regulator, may be appropriate.

## SUBMISSIONS RECEIVED

- 6.204 The concept of Comcare having a stronger regulatory role in relation to rehabilitation had support amongst those consulted during the Review.
- 6.205 Maurice Blackburn submits:<sup>142</sup>
- The implementation of an independent and adequately funded inspector, who can make investigations and record findings, as it is under the Victorian WorkSafe scheme, would be a highly practicable, and suitable way of ensuring that employers are complying with their rehabilitation obligations in a fair and equitable manner.
- 6.206 The firm goes on to say:<sup>143</sup>
- Comcare should have greater oversight of rehabilitation providers to ensure there is proper compliance with rehabilitation guidelines. Where the guidelines are not complied with, Comcare should be able to apply penalties.
- 6.207 The Department of Defence provides some qualification to its support for greater regulation:<sup>144</sup>
- Regulated obligations should be geared towards an incentive focus rather than a punitive focus. That is, rewarding positive behaviours as opposed to punishing poor behaviours. The latter is already achieved through premium calculations and has proven ineffective as a change mechanism.

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138. Australian Government, *National Review into Model OHS Laws: Second Report to WRMC*, January 2009, pp 202–210. Available at: <http://www.worksafe.nt.gov.au/Publications/Reports/NationalReviewintoModelOHSLawssecondreport.pdf>

139. R Johnstone and M King, “A Responsive Sanction to Promote Systematic Compliance?: Enforceable Undertakings in Occupational Health and Safety Regulation”, *Australian Journal of Labour Law*, vol 21, no 3 (2008), p 314.

140. See ss 160–190 of the WHS Act.

141. See s 155 of the WHS Act.

142. Maurice Blackburn, Submission to the Review, p 20.

143. Maurice Blackburn, Submission to the Review, p 21.

144. Department of Defence, Submission to the Review, p 9.

## RECOMMENDATIONS

- 6.208 The SRC Act should be amended to provide Comcare with a supervisory function and sanctioning powers in relation to the activities of employers with rehabilitation responsibilities—that is, the liable employer and, if one exists, the current employer. The SRC Act should also provide Comcare with an ultimate power to commence and/or take over rehabilitation where an employer fails to meet the employer’s obligations (and, in that case, imposing the cost of intervention or some other sanction on the employer).
- 6.209 An inspectorate should be developed within Comcare to ensure compliance with the rehabilitation obligations of employers, who are required to:
- (a) provide suitable employment;
  - (b) comply with the duties outlined in s 37 of the SRC Act; and
  - (c) comply with the IMR code of practice.
- 6.210 In addition, the inspectorate can also ensure compliance by approved rehabilitation providers with outcome and service delivery standards.
- 6.211 The SRC Act should be amended to provide Comcare with the power to issue improvement notices and to accept undertakings from employers in relation to contravention of employer rehabilitation obligations, including the duty to provide suitable employment. RTW inspectors should be provided with similar information-gathering powers to those provided to Comcare under s 155 of the WHS Act. Powers could be granted to Comcare in the following terms (modelled on s 155 of the WHS Act):
- (1) This section applies if Comcare has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of this Act or that will assist Comcare to monitor or enforce compliance with this Act.
  - (2) Comcare may, by written notice served on the person, require the person to do 1 or more of the following:
    - (a) to give Comcare, in writing signed by the person (or in the case of a body corporate, by a competent officer of the body corporate) and within the time and in the manner specified in the notice, that information of which the person has knowledge;
    - (b) to produce to Comcare, in accordance with the notice, those documents;
    - (c) to appear before a person appointed by Comcare on a day, and at a time and place, specified in the notice (being a day, time and place that are reasonable in the circumstances) and give either orally or in writing that evidence and produce those documents.
  - (3) The notice must:
    - (a) state that the requirement is made under this section; and
    - (b) contain a statement to the effect that a failure to comply with a requirement is an offence; and
    - (c) if the notice requires the person to provide information or documents or answer questions:
      - (i) contain a statement to the effect that nothing in this Act requires a person to produce a document that would disclose information, or otherwise provide information, that is the subject of legal professional privilege; and
      - (ii) state that the person may attend with a legal practitioner.
  - (4) Comcare must not make a requirement under paragraph (2)(c) unless Comcare has taken all reasonable steps to obtain the information under paragraphs (2)(a) and (b) and has been unable to do so.
  - (5) A person must not, without reasonable excuse, refuse or fail to comply with a requirement under this section.  
Penalty:
    - (a) In the case of an individual—\$10,000.
    - (b) In the case of a body corporate—\$50,000.
  - (6) Subsection (5) places an evidential burden on the accused to show a reasonable excuse.
  - (7) Section 172 (with any necessary changes) applies to a requirement under this section.

**RECOMMENDATION 6.20**

I recommend that an inspectorate be developed within Comcare with a supervisory function and information-gathering and sanctioning powers in relation to the activities of employers with rehabilitation obligations, to ensure compliance with those obligations, namely:

- (a) to provide suitable employment;
- (b) to comply with the duties outlined in s 37; and
- (c) to comply with the IMR code of practice.

In addition, the inspectorate can also ensure compliance of approved rehabilitation providers with outcome and service delivery standards.

**RECOMMENDATION 6.21**

I recommend that the SRC Act be amended to provide Comcare with the power to issue improvement notices and to accept undertakings from employers in relation to contravention of employer rehabilitation obligations, including the duty to provide suitable employment. RTW inspectors should be provided with similar information-gathering powers to those provided to the regulator under s 155 of the WHS Act.

# 7. COMPENSATION FOR INJURIES AND DISEASES

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- 7.1 The SRC Act provides for various heads of compensation for employees with an injury. In this chapter I consider compensation paid for lost income, known as income replacement, and compensation for medical expenses.
- 7.2 There are many aspects to income replacement.
- (a) I consider first how those benefits are initially calculated (Calculating income replacement): paragraphs 7.3–7.38 below; and then the subsequent actions or events that can reduce those benefits (Adjusting payments during incapacity): paragraphs 7.39–7.155 below.
  - (b) I then consider briefly income replacement while on a rehabilitation program: paragraphs 7.156–7.163 below.
  - (c) Next, I consider the level of benefits paid for the period of incapacity: paragraphs 7.165–7.201 below; and their duration: paragraphs 7.202–7.233 below.
  - (d) Finally, I consider the redemption of income replacement: paragraphs 7.234–7.262 below.

The other issues addressed in this chapter are compensation for medical expenses: paragraphs 7.263–7.378 below; compensation for medical expenses for defence-related claims managed by the MRCC under Part XI of the SRC Act: paragraphs 7.379–7.388 below; and compensation for services provided in the home (household and attendant care services): paragraphs 7.389–7.476 below.

## CALCULATING INCOME REPLACEMENT

- 7.3 The SRC Act provides income replacement for injured employees in two circumstances:
- (a) where an employee is incapacitated for employment as a result of injury; and
  - (b) where an employee is undertaking a rehabilitation program (and ss 19 or 31 of the SRC Act do not apply).
- 7.4 The basic liability to provide income replacement for an injured employee in the form of incapacity payments is expressed in ss 19(2) and (3) of the SRC Act. That liability is supplemented, in the case of an employee whose entitlements under s 19 have been redeemed under s 30 of the SRC Act, by s 31 of the SRC Act.
- 7.5 Where an employee is undertaking a rehabilitation program (as defined by s 37 of the SRC Act), compensation is not payable to the employee under s 19 or s 31 (incapacity payments following a redemption under s 30 of the SRC Act). Instead, compensation is payable under s 37(5)(a) or (b), with the level of compensation calculated under s 19 as modified by s 37(5).<sup>145</sup>
- 7.6 Incapacity payments are the single biggest driver of claim-related costs. However, the incapacity provisions of the SRC Act are widely regarded as difficult to understand and apply. The complexities and anomalies in their application have been, and continue to be, highlighted by the AAT and the Courts, and raised at Senate Estimates and in representations received by Comcare, the SRCC and DEEWR. Those issues arise from a combination of policy issues, questions of statutory interpretation and wide variations in the terms and conditions of employment covered by the SRC Act.
- 7.7 Since the SRC Act came into effect on 1 December 1988,<sup>146</sup> the employment conditions and industrial profile of employees covered by the SRC Act have changed significantly. However, the provisions for the calculation of weekly compensation remain, to a large extent, unchanged.
- 7.8 The approach taken by each of the Australian workers compensation schemes varies considerably and represents each jurisdiction's attempt to strike the most effective balance between:
- (a) adequate and fair compensation of injured employees for lost income;
  - (b) fair allocation of scarce scheme resources between the severely disabled and those who have sustained less serious injuries;

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145. As discussed in paragraphs 7.156–7.163 below.

146. Initially entitled the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*; renamed the *Safety, Rehabilitation and Compensation Act 1988* as a result of the *Commonwealth Employees' Rehabilitation and Compensation Amendment Act 1992*, s 4, and the *Industrial Relations and other Legislation Amendment Act 1993*, s 46.

- (c) reinforcing incentives for employers and employees, including incentives for employers and workers to create safer workplaces, employees to participate in rehabilitation and return to work and employers to facilitate return to work;
- (d) ensuring that the costs of workplace injury and illness are funded by employer contributions and not shifted elsewhere, and ensuring that other costs are not inappropriately shifted to the workers compensation scheme; and
- (e) scheme viability and affordability.

7.9 All Australian workers compensation schemes link compensation for lost income to an employee's pre-injury earnings and impose limits on the calculation, level and duration of, weekly benefits. I consider, first, the initial calculation of weekly benefits.

## NORMAL WEEKLY EARNINGS AND THE RELEVANT PERIOD

7.10 An injured employee who is incapacitated for work as a result of an injury (as defined in s 5A(1) of the SRC Act) receives incapacity payments for a specified period calculated weekly based on the employee's NWE: s 19.<sup>147</sup>

### NORMAL WEEKLY EARNINGS

- 7.11 An employee's NWE is calculated by multiplying the employee's average ordinary rate of pay by the average number of hours the employee worked (**NH**), plus any allowance paid to the employee (**A**) in the relevant period: s 8(1) of the SRC Act. The average hourly overtime pay paid to the employee in each week of the relevant period is added to that figure: s 8(2). (For the definition of the relevant period, see paragraphs 7.29 and 7.30 below.)
- 7.12 In *Comcare Australia v Pires*,<sup>148</sup> the Federal Court held that the phrase "average number of hours worked" in s 8(1) was restricted to ordinary non-overtime hours. The only way in which an employee may be compensated for overtime is through the application of the formula in s 8(2) of the SRC Act. This decision overturned the decision of the AAT in *Re Zarb and Comcare*,<sup>149</sup> in which the AAT found that overtime that is not regular and required should be included in the normal hours (NH) component in the calculation of NWE under s 8(1).
- 7.13 In *Telstra Corporation Limited v Peisley*,<sup>150</sup> the Full Federal Court considered the meaning of the words "required" and "regular" in the phrase "required to work overtime on a regular basis" in s 8(2) of the SRC Act.
- (a) Mr Peisley had undertaken work outside normal working hours, sometimes at the request of Telstra, sometimes with the approval of Telstra, and sometimes on a "recall" basis, whereby Mr Peisley received a call to attend an urgent task, not necessarily outside normal working hours.
  - (b) The Full Federal Court endorsed the AAT's interpretation of s 8(2) that "the notion of 'required to work' must necessarily take into account the nature and extent of the mutuality of an employment arrangement".<sup>151</sup>
  - (c) Further, the Court said that "the word 'required', in this context, includes situations where the employee is placed under obligation by the employer, even by a separate agreement that may not be legally enforceable but which constitutes an authority to work the additional hours".<sup>152</sup>
  - (d) As to the meaning of "on a regular basis", the Court held that it was the requirement to work overtime that must be regular, not the period of overtime worked.<sup>153</sup>
- 7.14 More recently, in *John Holland Group Pty Ltd v Robertson*,<sup>154</sup> the Full Federal Court considered the level of NWE of an employee, Mr Robertson, after the project on which he had been working (and during which he was injured) came to an end. The John Holland Group sought to apply s 8(10)(b) to reduce Mr Robertson's income because, if Mr Robertson had continued to work (assuming he had not been injured), his employment would have finished. Dowsett J (with whom Spender J agreed) said:<sup>155</sup>

Section 8(10) differentiates between employees who continue to be employed by the Commonwealth or a licensed corporation (to whom s 8(10)(a) applies) and employees who have ceased to be so employed (to whom s 8(10)(b) applies). However the section does not expressly identify the point in time at which a relevant employee's employment status is to be determined. The compensation payable pursuant to s 19 is weekly compensation ... s 8(10) is to operate according to the circumstances which obtain **in each week** in respect of which compensation is otherwise payable.

147. Normal weekly earnings are defined in s 4(1) of the SRC Act to mean normal weekly earnings as calculated in s 8.

148. [2005] FCA 747; (2005) 143 FCR 104.

149. [1997] AATA 254; (1997) 48 ALD 718.

150. [2006] FCAFC 79; (2006) 151 FCR 275.

151. [2006] FCAFC 79; (2006) 151 FCR 275 at [33].

152. [2006] FCAFC 79; (2006) 151 FCR 275 at [34].

153. [2006] FCAFC 79; (2006) 151 FCR 275 at [37].

154. [2010] FCAFC 88; (2010) 185 FCR 566.

155. [2010] FCAFC 88; (2010) 185 FCR 566 at [19], emphasis added.

- 7.15 Dowsett J went on to say:
- [74] Clearly, s 8(10) seeks to limit the compensation payable to an injured employee by reference to his or her notional earnings derived from employment with the same employer had he or she not been injured ...
- [75] Section 8(10)(b) involves different considerations. It assumes continuation of either the pre-injury employment or other actual employment undertaken subsequent to the injury with the same employer. The decision-maker is not directed to assume that the employee was not incapacitated. The enquiry pursuant to s 8(10)(b)(ii) involves only consideration of the employee's actual employment at the date at which he or she ceased to be employed by the employer and of the earnings which would have been derived had the employee been in such employment in the week for which he or she is to be compensated.
- [76] ... The decision-maker must simply take the terms of employment applicable to the employee at the date of injury and enquire as to likely earnings pursuant to those terms as at the date of calculation.
- 7.16 When an employee is employed on a part-time basis and has other employment outside the Commonwealth or a licensee, both the earnings from employment with the Commonwealth or the licensee and the earnings from that other employment are taken into account when determining the employee's NWE: s 8(3). However, the same is not true for a full-time employee who has outside employment. Only the employee's earnings from Commonwealth or licensee employment are taken into account when determining that employee's NWE: s 8(1) and (2).
- 7.17 Section 8(8) of the SRC Act deals with the situation where an employee has no earnings from other employment but:
- previously undertook a work contract with the Commonwealth or a licensee at a particular place and was injured when applying for a new work contract for work at the same place: s 5(4) of the SRC Act;
  - worked on a voluntary basis at the request or direction, or for the benefit, of the Commonwealth or a licensee and is listed in a notice made by the Minister and published in the Gazette: s 5(6) of the SRC Act; or
  - worked part time or in unpaid employment for the Commonwealth or a licensee: s 8(3) of the SRC Act.
- The determining authority is required to calculate the employee's NWE as the amount the employee would have been able to earn at date of injury if the employee had engaged in suitable paid employment.
- 7.18 Section 8(8) of the SRC Act is used in limited circumstances, including for calculating the NWE of census collectors employed by the Australian Bureau of Statistics or of an employee working on a volunteer basis with the Australian Electoral Commission. The provision was also previously used to calculate the NWE of Commonwealth Rehabilitation Service clients when they were deemed to be employees under s 5(6) of the SRC Act.
- 7.19 In all circumstances, employer and employee superannuation contributions are not taken into account when calculating NWE.
- 7.20 The formula for calculating NWE remains as it was enacted in 1988. However, many employees have terms and conditions that do not fall within the prescribed formula, which makes it difficult to calculate NWE in a way that fairly represents the employee's lost earnings.
- 7.21 In 1988, when the SRC Act commenced, the majority of employees covered by the scheme were Commonwealth public servants, whose conditions of employment were governed by the *Public Service Act 1922* (the **1922 Act**). Conditions of employment for most employees covered by the SRC Act were therefore markedly similar—that is, they were generally paid a consistent salary or wage on a fortnightly basis—and the formula used for calculating NWE was practicable.
- 7.22 Today, the APS comprises 20 departments and 103 agencies, with a multitude of employment agreements under the umbrella of the *Public Service Act 1999* (the **1999 Act**).<sup>156</sup>
- 7.23 In addition to APS agencies, there are now 30 self-insured licensees under the Comcare scheme,<sup>157</sup> the ACT Government and a number of individuals and agencies who receive coverage by virtue of Ministerial declaration. The licensees operate in a broad range of industries and employ a diverse range of occupations. Their employees are engaged under terms and conditions of employment that do not fall within the prescribed formula. Examples of those alternative terms and conditions of employment include, but are not limited to:
- remuneration based on the distance and/or hours an employee drives (for those employed in transport);
  - remuneration based on productivity; and
  - working to a fly-in-fly-out roster, on either a fortnightly or a monthly cycle.

156. Listed at: <http://www.apsc.gov.au/publications-and-media/current-publications/australian-public-service-agencies>

157. Listed at: [http://www.srcc.gov.au/self\\_insurance/current\\_licensees](http://www.srcc.gov.au/self_insurance/current_licensees)

- 7.24 In addition to those alternative terms and conditions of employment, systems of overtime and remuneration based on overtime are themselves complicated. Those variations make it difficult to calculate NWE in a way that fairly represents lost earnings.
- 7.25 As noted in paragraph 7.16 above, a part-time employee who has other employment outside the Commonwealth or a licensee is entitled to have both the earnings from employment with the Commonwealth or the licensee and the earnings from the other employment taken into account when determining the employee's NWE and normal weekly hours worked by an employee pre-injury (**NWH**): s 19(2C) of the SRC Act. However, a full-time Commonwealth or licensee employee with additional employment (part time or casual) will only have the employee's full-time Commonwealth or licensee employment taken into account when determining the employee's NWE and NWH.
- 7.26 When it comes to calculating and paying the employee's incapacity payments under the formulae in ss 19(2) and 19(3), the determining authority must take any earnings the employee receives from additional employment into account (represented by **AE** in the formulae), regardless of whether those earnings were taken into account in calculating the employee's NWE.
- 7.27 Because earnings from additional employment are not included in an employee's NWE figure, the employee's earning power is effectively reduced while on compensation; and, if the employee engages in additional employment and receives any earnings from that employment, her or his compensation is reduced by any earnings received from the additional employment. An incapacitated full-time employee is therefore financially better off relying solely on incapacity payments and giving up whatever additional part-time or casual work he or she might have been undertaking before the injury.
- 7.28 Contrasting with the specific formulae in ss 8(1) and (2), s 8(8) merely requires that determining authorities take a "best guess" approach to determining NWE. While this may result in a nil dollar figure, it may also result in an employee being credited with earnings the employee would not normally receive or may not normally receive consistently throughout the year. That situation has the potential to encourage adverse behaviour, because it is clearly beneficial for an employee in that situation to remain on compensation; however, an employee who was injured working in a voluntary or short-term capacity should also not be disadvantaged if that injury prevents the employee from obtaining subsequent paid employment.

## THE RELEVANT PERIOD

- 7.29 The relevant period is defined in s 9(1) as the latest two-week period, prior to the injury, during which the employee was continuously employed by the Commonwealth or a licensee. However, if the employee's earnings were reduced or the employee did not receive any earnings due to absence from employment for any reason during any part of the period calculated under s 9(1), that part of the period must be disregarded for the purposes of calculating the relevant period: ss 9(2)-(4) of the SRC Act.
- 7.30 If the length of the relevant period does not provide for a fair calculation of an employee's NWE, the NWE must be calculated in relation to *such other period* as Comcare (or the licensee) considers reasonable: s 8(5) of the SRC Act. Where an employee's NWE is calculated based on *such other period*, the SRC Act does not allow periods of reduced earnings to be disregarded because the determining authority is not using the *relevant period* to calculate NWE.
- 7.31 For as many employment agreements that exist, both within the Commonwealth and within licensees, there will be as many different periods over which remuneration will be calculated. Further, many employees receive seasonal bonuses, or are able to earn more during particular periods—for example, postal workers at Christmas time and other periods of high postal activity will earn more than at other times during the year.
- 7.32 The MRCC raises concerns with the current provisions and the calculation of NWE for self-employed Reservists who operate their own businesses.<sup>158</sup>
- 7.33 Telstra also raises concerns with the NWE model because the SRC Act does not contemplate "output" or "productivity" models of remuneration, which are now common remuneration models for employees of licensees. Other characteristics of the remuneration of Telstra employees that are inconsistent with the SRC Act NWE model include that:<sup>159</sup>
- (a) Telstra employees are paid on a fortnightly basis and many Telstra employees work a nine-day fortnight (with one rostered day off per fortnight), making it difficult to calculate NWE on a weekly basis; and
  - (b) a two-week "relevant period" is inadequate when dealing with fluctuating earnings—for example, for employees paid sales commissions.

158. MRCC, Submission to the Review, p 4.

159. Telstra, Submission to the Review, pp 6–7.

## RECOMMENDATIONS

7.34 In my view, the concept of NWE should be renamed “average remuneration”, which is the average amount paid to the employee in each week of the relevant period (see paragraph 7.38 below), and ss 8(1)–(5) and (8) should be repealed and replaced with the following:

### 8 Average remuneration

- (1) For the purposes of this Act, the average remuneration of an employee before an injury shall be the average amount paid to the employee in each week of the relevant period, where:
- (2) For the purposes of subsection (1), **remuneration** includes, but is not limited to, the following:
  - (a) wages and/or salary;
  - (b) any regular and required overtime;
  - (c) any allowances that relate to a skill the employee has or a service the employee provides; and
  - (d) any earnings from other employment the employee undertakes in addition to her or his work with the Commonwealth or a licensee, if:
    - (i) a full-time employee can demonstrate permission from their employer (if required) to engage in outside employment; and
    - (ii) an employee (either full time or part time) can demonstrate the additional employment was regular—that is, they were engaged in additional employment for at least six weeks in the 13 weeks before injury.
- (3) For the purposes of subsection (1), remuneration does not include allowances paid in relation to expenses incurred.
- (4) Where, because of the shortness of the relevant period, the employee’s average remuneration would not fairly represent the amount that the employee would have earned had the employee been employed for all or part of the relevant period, the employee’s average remuneration shall be taken to be the average remuneration of a comparable employee working for the same employer.
- (8) Where:
  - (a) an employee is not receiving any earnings from any other employment at the date of the injury; and
  - (b) the employment of the employee is of a kind referred to in subsections 5(4) or (6)the average remuneration of the employee shall be an amount determined by the determining authority to be the amount per week that the employee would have earned at the date of the injury if the employee had been engaged in suitable paid employment.

7.35 I also recommend that allowances that relate to the particular skills of the employee or the services the employee provides—for example as an occupational health and safety officer—should be included in the calculation of an employee’s remuneration because those allowances form part of the employee’s standard earnings. However, I recommend that allowances paid as recoupment of expenses not be included because, if an employee is not working, those expenses are not incurred and the allowance would not be paid. To be included in the calculation of average remuneration, allowances should have a genuine remunerative function. They should not reflect “under-the-table remuneration”; the compensation system should not reward evasion of income taxation.

7.36 Because of the proposed changes to the relevant period (see paragraph 7.38 below), ss 8(4) and 8(5) are no longer required; the relevant period will never be “too short” to calculate the average remuneration.

7.37 An employee’s remuneration should be a fair and reasonable representation of what the employee was being paid in respect of her or his employment before the injury. Providing flexibility in the definition of the relevant period will ensure that all of an injured employee’s remuneration can be more fairly calculated.

7.38 I recommend that s 9 be repealed and replaced with a provision that determines the relevant period at 13 weeks, with the flexibility to account for employment and remuneration arrangements where a 13-week period would not produce a fair and equitable outcome. Section 9 could read as follows:

### 9 Relevant period

- (1) For the purposes of calculating the ~~average remuneration, normal weekly earnings~~ of an employee before an injury, a reference in section 8 to the relevant period is, subject to this section, a reference to the latest period of 13 consecutive weeks before the date of the injury during which the employee was continuously employed by the Commonwealth or a licensed corporation.
- (2) If the average remuneration so calculated would not fairly represent the remuneration which the employee was being paid in respect of his or her employment, the determining authority may extend the relevant period for up to 52 consecutive weeks so as to provide a fair representation of the employee's average remuneration.
- (23) Subject to subsection (34), if, during the period referred to in subsection (1) or (2), the minimum amount per week payable to an employee in respect of her or his employment by the Commonwealth or a licensed corporation was varied as a result of:
  - (a) the operation of a law of the Commonwealth or of a State or Territory; or
  - (b) the making, alteration or operation of an award, order, determination or industrial agreement, or the doing of any other act or thing, under such a lawany part of that period that occurred before the variation, or last variation, took place shall be disregarded for the purposes of calculating the relevant period.
- (34) Where in any case the application of subsection (23) would require that a period be disregarded for the purposes of calculating the relevant period in relation to an employee, and as a result of disregarding that period:
  - (a) it would be impracticable to calculate under section 8 the normal weekly earnings of the employee before an injury; or
  - (b) the normal weekly earnings as so calculated would not fairly represent the weekly rate at which the employee was being paid in respect of his or her employment by the Commonwealth or a licensed corporation before the injurysubsection (23) shall not apply in that case, but the normal weekly earnings of the employee during that period shall be taken to be the amount that would have been his or her normal weekly earnings during that period if the variation had taken effect at the beginning of that period.
- (45) If, during any part of the period calculated under the preceding subsections, the employee's earnings were reduced, or the employee did not receive any earnings, because of absence from his or her employment for any reason, that part of that period shall be disregarded for the purposes of calculating the relevant period.

#### RECOMMENDATION 7.1

I recommend that the concept of NWE be renamed "average remuneration", which is the average amount paid to the employee in each week of the relevant period and that ss 8(1)–(5) and (8) be repealed and replaced with a definition of "average remuneration".

#### RECOMMENDATION 7.2

I recommend that s 9 of the SRC Act be repealed and replaced with a provision that fixes the relevant period at 13 weeks, with the flexibility to account for employment and remuneration arrangements where a 13-week period would not produce a fair and equitable outcome.

## ADJUSTING PAYMENTS DURING INCAPACITY

7.39 While an injured employee's NWE (or average remuneration, as recommended in paragraph 7.34 above) is based on pre-injury earnings, the SRC Act outlines a number of circumstances in which NWE should be increased or decreased. Changes in an employee's NWE mean a change in the level of the employee's incapacity payments. In addition to changes in NWE, other factors, such as the deemed ability to earn (paragraph 7.67 below), minimum and maximum

earning thresholds (paragraph 7.88 below) and receipt of superannuation (paragraph 7.94 below), all require determining authorities to adjust incapacity payments at various stages over the life of a claim.

- 7.40 As noted by Finn J in *Comcare v Thompson*,<sup>160</sup> “s 8(6)(c) of the SRC Act was not drafted with the [Australian Workplace Agreement] system in mind”. Further, s 8(6) “was crafted for, and reflected the characteristics of, a public sector that was structured in a particular fashion and which provided in known ways for the setting of the terms and conditions of employment including remuneration of public sector employees.”<sup>161</sup> Mr Thompson was injured in 1985 and, over the 15 years between then and the case being heard, there were a number of changes in the way Commonwealth employees at his level were remunerated.<sup>162</sup>
- 7.41 *Comcare v Thompson* highlights the inability of some of the subsections in s 8 to accommodate changes in the way employees are remunerated.

## ADJUSTMENTS BASED ON CHANGES TO THE UNDERLYING SALARY OR EARNINGS OF AN EMPLOYEE AND INDEXATION

- 7.42 Where an employee continues in employment, the employee’s NWE can only increase upon the:
- attainment of a particular age: s 8(6)(a) of the SRC Act;
  - completion of a particular period of service: s 8(6)(b) of the SRC Act;
  - receipt of an increase in salary, wages or pay due to an increment applicable to the employee, her or his office, position or appointment: s 8(6)(c) of the SRC Act; or
  - promotion of the employee: s 8(7) of the SRC Act.
- In those cases, the employee’s NWE is to be increased by the same amount or percentage as that employee’s normal earnings would have been increased.
- 7.43 For current employees, increases to NWE are most commonly made as a result of an increase in earnings based on an enterprise bargaining, or similar, agreement or as a result of a promotion: s 8(6) and (7) of the SRC Act.
- 7.44 Enterprise bargaining agreements are different for every employer: some agreements may provide for a set percentage increase for all employees no matter what their classification; other agreements may provide a baseline percentage increase for all employees and include a bonus percentage increase for individual employees based on performance.
- For example, Department X’s enterprise bargaining agreement provides that all employees will receive an increase of between 3 % and 5 % based on individual performance assessments.
  - Most employees are likely to receive a 3 % increase; however, a high-performing employee may expect to receive a 4 % or 5 % increase as a reward for exceeding expectations.
- 7.45 It is difficult for an injured employee, whose hours and duties may be restricted by injury, to demonstrate that he or she has exceeded expectations and is entitled to a higher percentage increase than the baseline. This situation is exacerbated where an employee, who may have received an additional increase for the past two years due to consistent high levels of performance, is unable to demonstrate her or his eligibility for that additional increase as a result of injury. The employee therefore will only receive a 3 % increase when, but for her or his injury, the employee could reasonably have expected to receive more.
- 7.46 Section 8(7) of the SRC Act provides for a percentage increase in an employee’s NWE if the employee’s earnings increase because of a promotion. For example:
- an employee is injured while employed as a substantive APS 2;
  - during the life of the claim, the employee is promoted to an APS 3 and finally to an APS 4;
  - under s 8(7), the employee’s NWE is increased following each promotion by the same percentage as the percentage by which the employee’s minimum amount per week is increased.
- 7.47 The SRC Act does not define what is meant by “promotion”. However, it is generally understood by *Comcare* to refer to a permanent advancement in position. Accordingly, if an employee is temporarily placed on higher duties and receives a wage increase, the employee’s NWE will not necessarily be increased to reflect the temporary wage increase. The result is that the employee would be worse off while on higher duties because the temporary increase in the employee’s wage constitutes actual earnings, which are then subtracted from the employee’s NWE figure under the formula in s 19(1) and (3) of the SRC Act, resulting in the employee receiving less money in hand despite an increase in the employee’s base wage.

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160. [2000] FCA 790; (2000) 100 FCR 375 at [34].

161. [2000] FCA 790; (2000) 100 FCR 375 at [37].

162. See [2000] FCA 790; (2000) 100 FCR 375 at [10]–[19].

- 7.48 Employees who are no longer employed by the Commonwealth or a licensee (**ex-employees**) receive an annual increase in the amount of their NWE by reference to the Wage Price Index (**WPI**):<sup>163</sup> s 8(9B) of the SRC Act. The annual increases in an ex-employee's NWE will start from the 1 July after the employee ceased employment, provided that the earliest date from which the increases can start is 1 July 2002.<sup>164</sup>
- 7.49 The SRC Act provides two circumstances in which an injured employee's NWE will be indexed by reference to the WPI,<sup>165</sup> depending on the employee's employment status: ss 8(9B) and 8(9F).
- 7.50 Employees who cease to be employed by the Commonwealth or a licensee will have their NWE indexed by reference to the WPI: s 8(9B) of the SRC Act.
- 7.51 Employees who continue to be employed by the Commonwealth or a licensee receive an increase to their NWE by reference to the WPI where there has been no other increase to their NWE in the last 12 months: s 8(9E) and (9F) of the SRC Act. The annual increases in a current employee's NWE can only be made for the 12-month periods that commence on 1 July 2007 and each subsequent 1 July.<sup>166</sup>
- 7.52 Where the calculated NWE of a current employee or an ex-employee exceeds the amount that the employee would have received if the current employee had not been incapacitated for work or the ex-employee had continued to be employed, the NWE is reduced by the amount of the excess: s 8(10) of the SRC Act.
- 7.53 Increasing an employee's NWE via indexation ensures that an employee's wage does not stagnate because the employee is on compensation. However, the application of the WPI to the NWE of ex-employees and applicable current employees (see paragraph 7.51 above) may result in an increase to the employee's weekly incapacity compensation, over and above what the employee might otherwise have received.
- 7.54 The current WPI indexation rate is 3.7 %.<sup>167</sup>
- 7.55 An ex-employee on incapacity payments will receive an annual increase of 3.7 %. In the current economic and industrial climate, annual enterprise bargaining agreement increases may be less than the WPI rate. Unless s 8(10)(b) of the SRC Act is applied to decrease the ex-employee's NWE after indexation has been applied under s 8(9B), an ex-employee might receive more income than if he or she had not been injured.
- 7.56 A current employee might also receive more compensation based on the WPI indexation, where that employee's salary has not otherwise increased. However, there may be reasons, not associated with the compensable injury, why a current employee has not received a pay increase in a 12-month period: for example the employee's applicable enterprise bargaining agreement might not have been finalised, so that no employee in the employee's agency has received a pay increase.
- 7.57 In relation to the operation of s 8(9B) of the SRC Act, one of the participants in the scheme, who wished to remain anonymous, submits:
- This section obliges review of normal weekly earnings amounts for employees no longer employed by the licensee from 01 July of each year. The percentage rate to be applied is that which is directed by Comcare. From 01 July 2012, former employees shall have earnings increased by 3.7% whilst existing employees are likely to have earnings constrained by a 3.0% increase.
- We submit that there is no requirement to distinguish the method for NWE review as is demonstrated by section 8(9) and 8(9B). It is enough, in our submission, to be able to demonstrate the average or probable earnings increase applied to the former employee's class of employment. To have a situation where a former employee has the benefit of higher earnings review than current employees leads to an unfair outcome, and vice versa.
- 7.58 Determining authorities are currently bound to increase a current employee's NWE every 12 months: s 8(9F) of the SRC Act; and, if that increase results in the employee receiving a higher NWE than the amount per week of earnings that employee would have received if still employed and not incapacitated for work, the NWE should be reduced: s 8(10) of the SRC Act.

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163. Regulation 5 of the *Safety, Rehabilitation and Compensation Amendment Regulations 2008 (No 2)* prescribes the Wage Price Increase (the WPI) for the purpose of indexing NWE figures.

164. Sections 8(9B), (9C) and (9D) were added to the SRC Act by clause 13 of Schedule 2 to the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001*, which came into effect on 1 October 2001.

165. The wage price index is published by the Australian Bureau of Statistics and is described as the "total hourly rates of pay – Australia/all industries/all occupations – excluding bonuses". Available at: [www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0)

166. Sections 8(9E), (9F) and (9G) were added to the SRC Act by cl 15 of Schedule 1 to the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007*, which commenced on 13 April 2007.

167. For the September quarter, 2012. See: [www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0)

- 7.59 However, the application of s 8(10) is necessarily dependent on the determining authority being aware of the pay increases (or decreases) applicable to the employee's colleagues. Licensees will be aware of the conditions of employment of their own employees and will have less difficulty here than Comcare, which may not be aware of the status and terms of each enterprise bargaining agreement within the APS.
- 7.60 Situations have also arisen where ex-employees are entitled to an increase in NWE by virtue of increases in their salary, wages or other pay: s 8(6) of the SRC Act; and via indexation: s 8(9B) of the SRC Act. Those situations will occasionally result in ex-employees being entitled to a higher NWE than the salary, wages or other pay they would have received if they had remained employed and not incapacitated for work. Again, s 8(10) of the SRC Act can only be applied to adjust NWE when the determining authority has the relevant information.
- 7.61 There is no obligation on an employee to advise the determining authority of the real situation, and indeed an employee may not know that he or she needs to advise the determining authority. I have addressed the issue of the lack of positive obligation on an employee to notify the determining authority of any changes in personal circumstance in Chapter 9 at paragraphs 9.239 to 9.241.
- 7.62 It is often difficult to locate documentation that indicates what an employee might have been paid if the employee had continued in employment and not been incapacitated. There have also been situations in which positions have been abolished from one enterprise agreement to the next, resulting in no further increases applying to an ex-employee—even though her or his counterparts may have continued to receive the same or similar remuneration under a different classification.
- 7.63 If **Recommendation 9.18**—namely that the SRC Act be amended to include an obligation that an employee must notify Comcare of any circumstances that may affect payment of her or his claim—is accepted, I believe it will adequately address this problem.

## RECOMMENDATIONS

- 7.64 The current adjustment and indexation provisions are well meaning; however, they are administratively burdensome to apply and may result in inequitable outcomes. A more arbitrary default position of indexation to the WPI would provide clarity to both employees and employers. Providing the opportunity for employees and employers, who have the relevant information, to apply for an adjustment other than by way of the WPI (for example if the enterprise bargaining agreement under which the employee would have been employed provided for an increase greater than the WPI) would address the arbitrary nature of the rule, and mean that the party with the information would bear the onus of providing it to the determining authority.
- 7.65 Those changes could be achieved by repealing s 8(6), (7), (9), (9A), (9B), (9C), (9D), (9E), (9F) and (9G) of the SRC Act and replacing them with the following:
- (6) The average remuneration of an employee before the date of the employee's injury, as calculated under the preceding subsections, must, while the employee continues to be receiving incapacity benefits, be indexed annually on 1 July by reference to the Wage Price Index number published by the Australian Statistician.
  - (7) If the determining authority is satisfied, based on information:
    - (a) received from the employee or the employer of that employee; or
    - (b) otherwise obtained by the determining authority;
 by 31 December of the calendar year in which the indexation took place, that the indexation applied by subsection (6) should be increased (or reduced) by a different amount, the determining authority may adjust that employee's average remuneration by that different amount.
- 7.66 As is currently the case with determinations made pursuant to s 8 of the SRC Act, determinations made pursuant to the proposed s 8(7) will be subject to reconsideration and review, by operation of ss 62 and 64 of the SRC Act.

### RECOMMENDATION 7.3

I recommend that the SRC Act be amended to provide for the annual indexation of an employee's average remuneration, subject to any changes that the determining authority makes on the basis of information provided by the employee or employer (or otherwise obtained by the determining authority).

## THE DEEMED ABILITY TO EARN

- 7.67 Deeming an employee “able to earn” in suitable employment is difficult and time consuming. Determining authorities have struggled to apply the relevant provisions in a consistent manner and disputes in such cases can be protracted and complicated.<sup>168</sup>
- 7.68 The basic formula used to calculate the level of incapacity payments, whether during the first 45 weeks of incapacity or after that period, requires an amount, AE, to be deducted from the NWE: ss 19(2) and (3) of the SRC Act. AE is defined as the greater of the amount that the employee is able to earn in suitable employment and the amount that the employee actually earns from any employment (including self-employment): s 19(2) of the SRC Act.
- 7.69 In determining the amount that an employee is able to earn in suitable employment (**AE**), s 19(4) of the SRC Act directs the determining authority (Comcare or the relevant licensee) to have regard to the amount per week that the employee:
- (a) is actually earning in employment: s 19(4)(a);
  - (b) would have been able to earn had the employee accepted an offer of suitable employment: s 19(4)(b);
  - (c) would have been able to earn had the employee engaged or continued to engage in suitable employment that the employee has been offered: s 19(4)(c);
  - (d) would have been able to earn had the employee completed a reasonable rehabilitation or vocational training program that was a condition of accepting an offer of suitable employment: s 19(4)(d); and
  - (e) could reasonably be expected to earn in suitable employment, having regard to the state of the labour market, had the employee not failed to seek suitable employment: s 19(4)(e).
- 7.70 In addition, the determining authority may have regard to whether the employee’s failure to accept an offer, to engage or continue in employment, to undertake or complete a rehabilitation or vocational training program or to seek employment was reasonable: s 19(4)(f); and any other matter the determining authority considers relevant: s 19(4)(g).
- 7.71 The wording of the paragraphs in s 19(4) is both specific and generic. Section 19(4)(b)–(e) of the SRC Act outline specific circumstances in which a determining authority, subject to considering whether the employee’s actions were reasonable, can deem an employee able to earn. However, where those circumstances are not applicable, a determining authority may still proceed to deem an employee able to earn using s 19(4)(g) of the SRC Act—that is, by considering “any other matter that Comcare [or the relevant licensee] considers relevant”. There is limited guidance available on what “any other matter” might be.
- 7.72 To deem an employee able to earn, a determining authority must gather sufficient information to demonstrate an employee’s capacity to earn and identify suitable employment options. This can be a very long and administratively burdensome process.
- (a) Some of the most relevant information for deeming ability to earn is contained in assessments made under s 36 of the SRC Act (discussed at paragraph 6.66), and other reports such as labour market assessments. Those reports are typically the responsibility of the rehabilitation authority.
  - (b) In situations where the determining authority and the rehabilitation authority are two separate entities, the determining authority may be unable to access the information most relevant to the deeming process.<sup>169</sup>
- 7.73 Further, the only active role envisaged for an employee is that of satisfying the determining authority that the employee has a reasonable excuse for her or his failure to seek, accept, engage in or continue to engage in suitable employment, or to undertake or complete a rehabilitation or vocational retraining program: see ss 36(4) and 37(7) of the SRC Act. The employee’s role in the deeming process, and (in some ways) in the corresponding return to work process, is seen as relatively passive.<sup>170</sup>
- 7.74 The deeming provisions are the closest legislative representation of an obligation on the part of an employee to seek suitable employment, or to participate in rehabilitation in order to obtain suitable employment. However, when deeming the employee’s ability to earn, the onus is on the determining authority to prove that the employee has some capacity for employment.

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168. See, for example, *Re Warnock and Comcare* [2008] AATA 567; *Martin v Australian Postal Corporation* [2000] FCA 1646; (2000) 32 AAR 199; *Slater v Telstra Corporation Ltd* [2001] FCA 1417; (2001) 115 FCR 34; *Re Graham and MRCC* [2006] AATA 286; (2006) 91 ALD 175; and *Re Sollazzo and Comcare* (2000) AATA 65.

169. See paragraphs 9.193–9.199 below in relation to the information-gathering powers of determining authorities. In Recommendation 9.17, I recommend determining authorities have the power to gather information in relation to the administration of a claim.

170. I recommend changes to the return to work process at paragraphs 6.208–6.211, above.

- 7.75 Because of the subjective nature of deeming the ability to earn, and the onus of proof borne by the determining authority, it is relatively easy for an injured employee to dispute a deemed amount.
- (a) For example, an incapacitated employee may start her or his own business. Because the employee is receiving incapacity payments as a result of her or his compensable condition, the employee does not have the same motivation to run a profitable business as might be the case were the employee not receiving incapacity payments.
  - (b) Where the business is not turning a profit and the employee can demonstrate he or she is not receiving an income, the onus is on the determining authority to calculate an amount the employee might reasonably be expected to earn working in that business.
  - (c) To dispute the deemed amount, the employee merely has to demonstrate that he or she is incapable of earning that amount of money or that the employment in which the employee is engaged, and which the determining authority has used to calculate the deemed amount, is not suitable employment.
- 7.76 The complexity of calculating the deemed ability to earn in cases of self-employed persons was evident in *Re Warnock and Comcare*.<sup>171</sup> Mr Warnock had declined employment because he wanted to work on his farm. Therefore, in order to calculate his ability to earn, the AAT referred to the cost of labour for farm workers in the relevant area at the relevant time.<sup>172</sup>

## SUBMISSIONS RECEIVED

- 7.77 Licensees and premium-paying employers have expressed some concerns with the deeming provisions.
- 7.78 John Holland submits that:<sup>173</sup>
- ... there should be greater clarity and simplification of the provisions relating to assessing the ability to earn for injured employees. Section 19(4) of the SRC Act has been difficult to apply in practice particularly in cases where an employee is self-employed.
- 7.79 The Australian Rail Track Corporation agrees that there should be greater clarity in relation to “ability to earn” for injured employees. It submits that:<sup>174</sup>
- Consideration of a comparison and/or analysis of an injured worker’s earning capacity according to factors such as the current labour market could be a more fair representation of ability to earn.
- 7.80 Telstra submits:<sup>175</sup>
- An amendment is required to expressly take into account the circumstances where an injured employee removes themselves from ‘the labour market’ e.g. relocating to a new place of residence where there is no labour market having regard to the employee’s capacity to undertake suitable duties ...
- Where the employee’s capacity enables the employee to return to his or her normal weekly hours then weekly payments of compensation should be nil.
- 7.81 One participant who provided feedback submits that the NWE formula should ensure that the “ability to earn” and “suitable employment” components have regard to contemporary industrial environments and are not restricted to employment within licensees or the Commonwealth.
- 7.82 The Department of Defence raises a number of concerns with the deeming provisions similar to those raised above, and urges the Review to consider the established provisions for “deeming ability to earn” within the State workers compensation schemes, because they have been tested in legal proceedings.<sup>176</sup>
- 7.83 Ryan Carlisle Thomas expresses the view that legislative change is not required, but that greater consistency in application of the deeming provisions should be the goal:<sup>177</sup>
- The difficulty with the “ability to earn” concept is that even if greater clarity was provided and the factors applied in a more consistent manner and even if there is a theoretical capacity to earn and theoretical jobs that injured workers can do, the likelihood is that these jobs are unlikely to be made available to an injured worker. The current provisions and case law (*Martin v Australian Postal Corporation* [2000] FCA 1646 and *Esam v ASP Ship Management* [1998] FCA 1129) adequately address this issue.

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171. [2008] AATA 567.

172. [2008] AATA 567 at [39].

173. John Holland Group, Submission to the Review, p 6.

174. The Australian Rail Track Corporation, Submission to the Review, p 4.

175. Telstra, Submission to the Review, pp 8–9.

176. Department of Defence, Submission to the Review, p 7.

177. Ryan Carlisle Thomas, Submission to the Review, p 9.

## RECOMMENDATIONS

- 7.84 Although the process of assessing an employee's ability to earn is administratively burdensome, it is appropriate and necessary to retain a system that takes into account an employee's ability to earn, in whatever way that may be determined.
- 7.85 I have received limited complaints from licensees about the provisions themselves. The main issue with the provisions' operation appears to be the administrative burden in obtaining the relevant information.
- 7.86 In Chapter 9 I propose wider information-gathering powers for determining authorities: see paragraphs 9.214–9.219. I recommend that determining authorities have the power to request information from employees, employers or third parties that relates to the ongoing administration of a claim: **Recommendation 9.17**. And, if **Recommendation 6.13** is adopted, the information currently obtained in reports issued under ss 36 or 37 of the SRC Act could be the subject of a request.
- 7.87 I am not persuaded that any other amendment to the deeming provisions in s 19(4) is required.

## THE SAFETY NET: s 19(6)

- 7.88 The minimum earnings provisions (s 19(6) and (7) of the SRC Act) were designed to minimise cost-shifting by putting a safety net in place to ensure that injured employees did not need to, and therefore would not want to, access social security payments. However, those provisions have an effect on the operation of s 19(4) of the SRC Act.
- 7.89 Section 19 specifies the minimum amount payable to injured employees following 45 weeks of incapacity. Where the compensation for an employee's incapacity, as calculated under s 19(3)(a), is less than the prescribed "minimum earnings", the injured employee's incapacity payment must be increased to the "minimum earnings" figure: s 19(6) of the SRC Act. The "minimum earnings" figure is the lower of:
- (a) the weekly statutory rate prescribed by s 19(7), currently: \$425.72;178 or
  - (b) 90 % of the employee's NWE.
- 7.90 For example:
- (a) Assume that an injured employee's NWE figure is \$1,000.
  - (b) After 45 weeks of incapacity, the determining authority determines that the injured employee has the ability to earn \$700 a week, and the employee is not employed during the relevant week.
  - (c) Because the employee is not employed, the adjustment percentage is 75 %. Using the formula in s 19(3)(a) of the SRC Act, the employee would therefore be entitled to receive weekly compensation of \$50.<sup>179</sup>
  - (d) However, because that amount of weekly compensation is less than the "minimum earnings" under s 19(7), the determining authority is required by s 19(6) to increase the injured employee's incapacity payments to the lower of the minimum earnings rates specified in s 19(7) of the SRC Act—in this case, \$425.72 per week (being the lower of the statutory amount and 90 % of the employee's NWE).
- 7.91 As a result, any incentive for the injured employee to return to work created by reducing incapacity benefits (because of deeming the employee able to earn) is significantly reduced. Even though a determining authority may have reduced an employee's incapacity compensation based on the employee's deemed ability to earn (or for any other reason), the application of the safety net means that the reduction may not affect the employee.
- 7.92 As long as the employee is incapacitated as a result of her or his compensable condition, the employee will be entitled to receive minimum earnings, regardless of her or his ability to earn. The current social security base rate pension for a single person with no children is \$489.70 per fortnight,<sup>180</sup> which is substantially lower than the current minimum earnings rate specified by the SRC Act.

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178. The base amount of \$202 has been indexed annually in accordance with s 13 of the SRC Act.

179. That is: (adjustment percentage x NWE – AE), in this example: (75 % x \$1,000) – \$700 = \$50.

180. See Allowance Test—Single Person, available at: [www.financialplanningmatters.com.au/centrelink-rate-charts.pdf](http://www.financialplanningmatters.com.au/centrelink-rate-charts.pdf)

## RECOMMENDATIONS

- 7.93 In order to ensure the incentive effect of the determining authority deeming an employee able to earn, s 19(6) of the SRC Act should be amended to provide:

Where an amount of compensation calculated under paragraph (3)(a) is less than the minimum earnings and that amount of compensation has not been calculated by taking into account the amount per week that the employee is able to earn in suitable employment, the amount so calculated shall be increased by an amount equal to the difference between that amount and the minimum earnings.

### RECOMMENDATION 7.4

I recommend that s 19(6) of the SRC Act be amended to exclude its operation where the employee has been deemed to have an ability to earn.

## OFFSETTING COMPENSATION AGAINST SUPERANNUATION

- 7.94 The SRC Act offsets the compensation payable to an employee who has retired and received a superannuation pension and/or a lump sum benefit in two ways—namely, by reducing the amount of compensation payable to the employee:

- (a) by reference to the amount of superannuation that is derived from the employer's contributions; and
- (b) in any event, by a further 5 % of the employee's NWE:

ss 20(3), 21(3) and 21A(3) of the SRC Act.

- 7.95 There appears to be no real justification for the 5 % reduction in compensation payable to an employee who has retired and received a superannuation benefit. Although the previous Commonwealth superannuation schemes (the PSS and CSS) provided for increased employer component contributions based on a percentage of the employee's contributions, most other superannuation schemes (including the contemporary Commonwealth scheme, the PSS-AP) only require employers to contribute the Superannuation Guarantee amount.<sup>181</sup> For that reason, for most employees covered by the SRC Act there is no link between the amount of personal contributions that they made to superannuation and the employer component of the superannuation benefit.

- 7.96 The 5 % reduction does make calculating benefits administratively easier; however, it is certainly not fair to employees who were not required to make superannuation contributions before their retirement. The unfairness of the deduction is compounded by the fact that the 5 % is not applied for the employee's benefit, for example by way of a contribution to the employee's superannuation fund, but is simply a saving in expenditure for Comcare and licensees.<sup>182</sup>

- 7.97 The Superannuated Commonwealth Officers Association submits:<sup>183</sup>

The 5% superannuation deduction should be removed to put those who are in receipt of superannuation on the same footing as those who are still in the contribution phase of a modern superannuation fund. The 5% deduction does not act to encourage severely injured and vulnerable people to return to the workforce, it merely adds to their financial and mental distress.

- 7.98 The compensation entitlements of employees who have retired and received superannuation are otherwise determined by ss 20, 21 and 21A. Each of those sections reduces the amount of incapacity payments that an employee (or ex-employee) may receive:
- (a) s 20 sets out the calculation of incapacity payments where an employee is in receipt of a superannuation pension as a result of retirement from employment;
  - (b) s 21 sets out the calculation of incapacity payments where an employee is in receipt of a superannuation lump sum benefit as a result of retirement from employment; and
  - (c) s 21A sets out the calculation of incapacity payments where an employee is in receipt of both a superannuation pension and lump sum benefit as a result of retirement from employment.

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181. The superannuation guarantee rate (charge percentage) for the period from 1 July 2003 to 30 June 2013 is 9 %. Available at: <http://www.ato.gov.au/super/content.aspx?menuid=0&doc=/content/60489.htm&page=22&H22>

182. This was confirmed by Comcare in the course of the Senate inquiry: Senate Standing Committees on Education, Employment and Workplace Relations, *Inquiry into the Safety, Rehabilitation and Compensation and Other legislation Amendment Bill 2006*, 8 February 2007 (page EWRE 13). Available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=eet\\_ctte/completed\\_inquiries/2004-07/src06/hearings/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/completed_inquiries/2004-07/src06/hearings/index.htm)

183. Superannuated Commonwealth Officers Association, Submission to the Review, p 4.

- 7.99 There is also provision for the recovery of an overpayment of compensation from an employee: s 114 of the SRC Act; and directly from the administrator of any superannuation fund (if funds are yet to be paid out of that fund): s 114B of the SRC Act.
- 7.100 The second reading speech for the Bill that became the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (later renamed the SRC Act<sup>184</sup>) stated in part:<sup>185</sup>
- ... this Bill will also seek to reduce the unreasonable costs associated with work-related injuries by introducing measures to prevent "double dipping" by employees using sick leave payments or superannuation entitlements while on compensation. For example, many employees who have been retired on invalidity grounds under the current legislation enjoy benefits under both compensation and superannuation schemes at a rate considerably in excess of their previous income. Special transitional provisions relating to the combined superannuation and compensation benefits payable to employees who have been invalidated out of employment are contained in the Bill.
- 7.101 The SRC Act treats superannuation as a form of income replacement to which injured employees will have access when they retire from employment. The formulae in the SRC Act calculate incapacity payments where an employee is in receipt of superannuation benefits based on the manner in which the employee chose to receive those benefits. However, the ways in which superannuation can be accessed and (re)invested have evolved dramatically since 1988: in particular, when changing employment, employees can now access any unpreserved funds held in a superannuation fund. Despite numerous legislative amendments, the SRC Act has not kept pace with those changes.
- 7.102 The Comcare scheme is the only workers compensation scheme in Australia that requires that superannuation payments received by employees be offset against compensation payments. The purpose of the provisions that require that offset is to prevent an employee from receiving more than one payment at the expense of the employer for the employee's incapacity.
- 7.103 In *Lonergan v Comcare*,<sup>186</sup> the Federal Court identified a loophole in the offset provisions as they were originally enacted.
- Mr Lonergan had been compensated for an injury that occurred during the course of his employment. He subsequently accepted a voluntary redundancy and received a lump sum payment from his superannuation fund. He then suffered an aggravation of his compensable injury.
  - Comcare accepted that it was liable to compensate Mr Lonergan for his incapacity for work, but argued that s 21 applied to the calculation of incapacity payments, not s 19.
  - In the Federal Court, Heerey J held that the words "incapacitated for work as a result of an injury" in s 21 constituted "an adjectival phrase which qualifies the employee who retires".<sup>187</sup> Because Mr Lonergan was not incapacitated when he retired, he was therefore entitled to have his compensation calculated on the basis of s 19.
- 7.104 The *Safety, Rehabilitation and Compensation and Other Legislation Amendments 2007 (SRCOLA 2007)* sought to address that legislative loophole. It repealed and substituted various subsections in ss 20, 21 and 21A and was intended to restore the original policy intent of the SRC Act, and the formulae introduced set the standard compensation payment at 70 % of NWE (being the adjustment percentage less the 5 % reduction in ss 20(3), 21(3) and 21A(3) of the SRC Act). The Explanatory Memorandum for the Bill for the SRCOLA 2007 stated:<sup>188</sup>
- The policy intention of the SRC Act is for retired employees on incapacity benefits who are in receipt of a superannuation amount to receive 70% of their normal weekly earnings. When the SRC Act commenced, employees contributed a minimum of 5% of their normal weekly earnings (NWE) to the Commonwealth Superannuation Scheme. The reduction in retirees' incapacity benefits from 75% to 70% of NWE was based on the rationale that had the recipient not retired, he or she would have been required to continue making the 5% superannuation contribution. The 5% contribution was taken as the benchmark so all retired employees weekly compensation payments were reduced by this amount, referred to as the "notional superannuation contribution".
- The level of the notional superannuation deduction depends on the minimum amount the employee is required to contribute to their superannuation fund. Since the introduction of this provision in 1988, Commonwealth public

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184. As a result of the *Safety, Rehabilitation and Compensation and Other Legislative Amendment Act 2001* and the *Safety, Rehabilitation and Compensation and Other Legislative Amendment Act 2007*.

185. Commonwealth Employees' Rehabilitation and Compensation Bill 1988, second reading speech by the Minister for Social Security, The Hon Brian Howe: House of Representatives, *Debates*, 27 April 1988, p 2191. Available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansardr%2F1988-04-27%2F0089;orderBy=\\_fragment\\_number;doc\\_date-rev;page=103;query=Dataset%3Ahansardr,hansardr80;rec=11;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansardr%2F1988-04-27%2F0089;orderBy=_fragment_number;doc_date-rev;page=103;query=Dataset%3Ahansardr,hansardr80;rec=11;resCount=Default)

186. [2005] FCA 377; (2005) 143 FCR 307.

187. [2005] FCA 377; (2005) 143 FCR 307 at [24].

188. SRCOLA 2007, Explanatory Memorandum, p 11.

servants and those covered by the SRC Act now belong to a range of superannuation schemes under which different minimum contributions may be made. The Public Sector Superannuation (PSS) scheme requires a minimum 2% employee contribution up to a maximum of 10%. Therefore, employee contributions under the PSS scheme may vary from 2% to 10% at the employee's discretion. Other employees covered by the Act may be members of funds which do not require a minimum contribution. Retired employees do not have any deduction made from their incapacity payments.

- 7.105 The formulae in ss 20, 21 and 21A of the SRC Act apply when an employee has retired from her or his employment and received a pension, a lump sum, or a pension and a lump sum as a result of that retirement. The correct application of the provisions hinges on an employee being "retired" and having "received" her or his superannuation; however, those terms are not defined in the SRC Act.

### **THE MEANING OF "RETIRED"**

- 7.106 Retirement is a modern concept, generally understood as referring to the time at which a person ceases to be employed on a permanent basis. In Australia, retirement is generally linked to age 65 and eligibility to receive the age pension or to access superannuation. In the context of the SRC Act, retirement is a different concept which encompasses any separation from Commonwealth or licensee employment, if that separation ultimately results in the employee receiving a superannuation benefit.
- 7.107 For superannuation benefits to become payable, retirement generally means that the retiree does not intend to become gainfully employed in the future. Gainful employment is considered to be more than 10 hours a week.<sup>189</sup> An employee can retire at any age; however, the employee cannot access superannuation benefits until the employee has reached her or his preservation age.
- 7.108 Different superannuation funds have different preservation ages. Generally, the preservation age is 55, but for some funds the preservation age is 60 years.
- 7.109 The presumption of the SRC Act is that an injured employee will remain an employee of the Commonwealth or a licensee until the employee reaches the preservation age as defined by her or his superannuation scheme (or until the employee is found to be totally and permanently incapacitated and retired on the ground of invalidity), and that superannuation scheme is presumed to be the relevant Commonwealth scheme for APS employees. However, today's workforce is far more mobile and it is uncommon for an employee to remain employed by a single employer for the duration of the employee's working life, or to have only one superannuation fund with consistent contribution and benefit structures. As a result, employees may be able to access parts of their superannuation (for example, the non-preserved portion) from different funds and at different times.

### **THE MEANING OF "RECEIVED"**

- 7.110 The relationship between superannuation benefits and incapacity payments is clear when an employee takes the employer-funded portion of a pension or a lump sum in hand, or directs that a lump sum benefit be paid to another fund.<sup>190</sup> The relationship is less clear when the employee is eligible for such a benefit but does not take the benefit in hand or (in the case of a lump sum benefit) directs that it be paid to another superannuation fund.
- 7.111 In *Re Mirkovic and Teslstra Corporation*,<sup>191</sup> the AAT found that, in "rolling over" his superannuation amount, Mr Mirkovic had exercised an unequivocal power of disposition over that amount because he had notionally received the lump sum and chosen to roll it over. Mr Mirkovic was therefore regarded as having received the amount for the purposes of s 21. As a result, his incapacity payments were reduced, even though he did not have access to the funds in the ordinary sense.
- 7.112 Incapacity payments for injured employees are payable up to age 65: s 23(1). Because superannuation benefits may become payable once an employee passes the applicable preservation age (which could be as early as 55), an injured employee who has reached preservation age and ceases Commonwealth or licensee employment before age 65 may be entitled to receive both incapacity payments and superannuation benefits.
- 7.113 The SRC Act does not provide for the situation in which a retired employee elects to preserve her or his superannuation benefits in the superannuation fund (rather than roll them over to another fund) or chooses not to access the benefits. In some ways, as discussed in paragraphs 7.119–7.122 below, the inability of determining authorities to account for the situation where an employee preserves her or his superannuation benefits in the relevant fund creates an administrative burden for determining authorities at the time when the employee finally accesses those benefits.

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189. For example, see Commonwealth Superannuation Scheme Age Retirement benefit fact sheet: [http://www.css.gov.au/storage/2-css\\_fs\\_CSF22\\_Age%20retirement%20benefit.pdf](http://www.css.gov.au/storage/2-css_fs_CSF22_Age%20retirement%20benefit.pdf)

190. In either situation, the lump sum benefit has been "received" by the employee for the purposes of ss 21 and 21A: *Archer v Comcare* [2000] FCA 1296; (2000) 101 FCR 30 at [13].

191. [1993] AATA 730; (1993) 18 AAR 492.

7.114 The SRC Act also fails to provide for situations where an employee remains employed and chooses to access her or his superannuation. For example, an employee who has reached preservation age but remains employed may start a transition-to-retirement pension, under which the employee can withdraw a maximum of 10 % of her or his account balance each year. Section 20 of the SRC Act cannot apply to that employee, because the employee is not retired from her or his employment.

### **THE MEANING OF “EACH WEEK AFTER THE DATE OF RETIREMENT”**

7.115 The language in each of ss 20(2), 21(2) and 21A(2) is identical. Each directs as follows:

Comcare is liable to pay compensation to the employee, in respect of the injury, in accordance with this section for each week after the date of the retirement during which the employee is incapacitated.

7.116 That direction applies where an employee is retired from her or his employment and receives:

- (a) a pension under a superannuation scheme as a result of that retirement: s 20(1);
- (b) a lump sum benefit under a superannuation scheme as a result of that retirement: s 21(1); or
- (c) a pension and a lump sum benefit under a superannuation scheme as a result of that retirement: s 21A(1).

7.117 In *Re Webley and Telstra Corporation Limited*,<sup>192</sup> the AAT reviewed Telstra's decision, following Ms Webley's receipt of a lump sum payment some two years after her retirement, to recalculate Ms Webley's incapacity payments as if she had received that lump sum on the date of her retirement, resulting in an overpayment of over \$15,500.<sup>193</sup> The AAT found that, regardless of when a superannuation lump sum is actually paid, the correct application of s 21 requires a determining authority to (re)calculate incapacity payments at the reduced rate from the date of retirement, including for the period prior to the date when the person receives the lump sum.<sup>194</sup>

7.118 Therefore, if an employee retires and does not receive her or his superannuation benefit, the employee continues to receive incapacity payments under s 19 of the SRC Act. If that same employee later receives her or his superannuation as a lump sum, ss 21(2) and 21A(2) require the determining authority to recalculate the employee's incapacity payments from the date when the employee retired, as if the lump sum had been accessed at the date of retirement. The inevitable result is that the employee will have been overpaid, normally by a significant amount.

7.119 Further, if an employee continues to receive payments under s 19 following cessation of employment and only accesses the employee's superannuation at age 65 (being ineligible to receive further incapacity payments by operation of s 23(1) of the SRC Act), the employee would have been overpaid from the date when the employee ceased Commonwealth or licensee employment, because that would be the date of “retirement”. However, because the employee's only source of income is likely to be her or his superannuation entitlements, s 114B permits the determining authority to recover overpayments directly from the superannuation fund.

### **THE RECOVERY PROVISIONS**

7.120 As noted above, the application of ss 20, 21 and 21A can lead to overpayments being made to injured employees. Sometimes those overpayments create a significant debt owed by the employee. While the employee can request that Comcare write off or waive the debt pursuant to ss 114C and 114D of the SRC Act, the fact that the debt exists, and the process that is required to be undertaken in order to achieve a write-off or waiver can be distressing for the employee. I understand from Comcare that overpayments generated as a result of recalculating employees' incapacity payments following receipt of superannuation can be in the region of \$350,000 and in some circumstances significantly more.

7.121 Despite the special recovery provision in s 114B, recovery of overpayments directly from superannuation funds is administratively difficult. Comcare or a licensee may issue a notice to a superannuation fund requiring notification as to whether the employee has received any payment of her or his superannuation benefits: s 114B(2). However, if there is delay between the employee ceasing employment and accessing superannuation, it is Comcare's experience that notification by the superannuation fund does not always occur. It is also Comcare's experience that the longer the employee does not access the employee's superannuation benefits, the more likely it is that Comcare will not be notified when those benefits are ultimately accessed.

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192. [2003] AATA 539.

193. [2003] AATA 539 at [6].

194. [2003] AATA 539 at [29].

- 7.122 Other Commonwealth Acts ensure that relevant agencies are notified of situations when compensation is paid.
- (a) For example, when a compensation payer (including Comcare) is paying someone compensation of more than \$5,000, the compensation payer is required under the *Health and Other Services Compensation Act 1995* (the **HOSC Act**) to notify Medicare.
  - (b) There are then certain requirements that must be met before the compensation payer can release the payment to the employee, for example paying Medicare any amount that Medicare may have paid to the recipient of the compensation.
  - (c) The notification is to ensure that the Department of Human Services can be repaid for any Medicare benefits, nursing home benefits and residential care subsidies that have been paid in relation to the disease or injury for which compensation is to be paid.
  - (d) If the compensation payer complies with the HOSC Act, then the compensation payer is obliged to deduct the HOSC debt from compensation paid to the employee and instead pay the amount of the debt to Medicare.
  - (e) If the compensation payer does not comply with its obligations under the HOSC Act, the compensation payer is liable to repay the HOSC debt, in addition to paying the compensation recipient the full amount of the compensation.<sup>195</sup>

## RECOMMENDATIONS

- 7.123 Although there are examples of legislation that requires notification of the payment of certain amounts (see paragraph 7.122 above), which would alleviate one of the issues in administering the offset provisions, I am not persuaded that the offset provisions should be retained.
- 7.124 The SRC Act is the only workers compensation scheme in Australia that contains superannuation offset provisions (ss 20, 21 and 21A). Removing those provisions would harmonise this aspect of workers compensation across the jurisdictions.
- 7.125 The offset provisions were designed to prevent double-dipping that would occur if employees on compensation payments received both compensation and superannuation amounts from the one source: their employer. However, superannuation is designed to fund an employee's retirement, and was not designed as an alternative form of workers compensation.
- 7.126 In my view, ss 20, 21 and 21A should be repealed in their entirety. Their policy justification is now outdated. They create an administrative burden on determining authorities and reduce the ability of determining authorities to focus on more important aspects of claims management, such as rehabilitation and return to work for injured employees. Comcare has calculated that it costs approximately \$2.6 million per year to administer the current incapacity provisions. More importantly, their application can create significant debts for older Australians who no longer have the earning capacity to repay those debts. If ss 20, 21 and 21A are repealed, ss 114A and 114B will no longer be required and should also be repealed.
- 7.127 If ss 20, 21 and 21A are to be retained, I would recommend that, at an absolute minimum, ss 20(3), 21(3) and 21A(3) be amended to eliminate the deduction of "5 % of the employee's normal weekly earnings" from the "amount of compensation". That deduction is intended to represent the contribution that the employee would have been making to her or his superannuation scheme if still employed. However, very few superannuation funds now require an employee to contribute to her or his own superannuation. Because most employees are not required to contribute to their superannuation funds, it is inequitable to reduce their incapacity payments in lieu of this assumed contribution; and that inequity is compounded by the fact that the 5 % reduction is not applied for the employee's benefit but is a saving in expenditure for Comcare and licensees.
- 7.128 In addition, if ss 20, 21 and 21A are to be retained, I would recommend the following amendments:
- (a) The term "retired" should be removed. The application of ss 20, 21 and 21A should be enlivened by the employee ceasing employment with her or his employer, reaching preservation age and being eligible to receive superannuation from her or his superannuation fund, OR when an employee ceases employment for invalidity reasons and becomes eligible to access superannuation, regardless of whether the employee has reached the preservation age. Retirement is an outdated concept. Frequently, persons who "retire" from the APS do not intend to cease work. In fact, they may continue working for the Commonwealth on a contract basis, or take up part-time or other employment. There is no agreed definition of the term.
  - (b) The powers in s 114B should be amended to include consequences for non-compliance similar to those contained in the HOSC Act.

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195. Section 32 of the HOSC Act.

### RECOMMENDATION 7.5

I recommend that ss 20, 21 and 21A be repealed in their entirety. If those sections are repealed, ss 114A and 114B will no longer be relevant and should also be repealed.

7.129 **Recommendation 7.5** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

7.130 Because the proposal would also affect Part XI claims, the Australian Government Actuary also considered the proposal. The cost estimated by the Australian Government Actuary is available at Chapter 2, **Table 3**.

### RECOMMENDATION 7.6

If **Recommendation 7.5** is not implemented, I recommend that, as an absolute minimum, the deduction of “5 % of the employee’s normal weekly earnings” should be removed from the formula in each of ss 20(3), 21(3) and 21A(3).

7.131 **Recommendation 7.6** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

7.132 Because the proposal would also affect Part XI claims, the Australian Government Actuary also considered the proposal. The cost estimated by the Australian Government Actuary is available at Chapter 2, **Table 3**.

### RECOMMENDATION 7.7

Further, if **Recommendation 7.5** is not implemented, in addition to **Recommendation 7.6**, I recommend that:

- (a) the term “retired” should be removed from ss 20, 21 and 21A; the application of ss 20, 21 and 21A should be enlivened by the employee ceasing employment with the employer, reaching preservation age and being eligible to receive superannuation from the employee’s superannuation fund, OR when an employee ceases employment for invalidity reasons and becomes eligible to access superannuation, regardless of whether the employee has reached the preservation age; and
- (b) the powers in s 114B should be amended to include consequences for non-compliance similar to those contained in the *Health and Other Services (Compensation) Act 1995*.

7.133 In addition, the mechanism for taking into account deemed income on a lump sum, in s 21(3) and 21A(3) of the SRC Act, should be based on the post-tax value of the lump sum (if any income tax has been paid on the lump sum benefit): an individual can only earn interest on money that he or she has available to invest.<sup>196</sup> That issue was raised by the Superannuated Commonwealth Officers Association,<sup>197</sup> which submits:

At present, an amount is deducted based on the whole pre-tax value of the lump sum, assuming that it can earn interest at the 10 year-bond rate. The deduction should be based on the after-tax value of the lump sum, and a lower, more realistic rate of interest assumed such as the RBA interest rate (since people with less than \$500,000 can’t buy Commonwealth bonds now), and, furthermore, the deduction should cease once total deductions for this reason have exceeded the after-tax value of the original lump sum.

7.134 The rate at which employees are deemed to earn income on any lump sum should reflect the interest that a retired employee can realistically expect to earn, such as deemed rate of return used for the purposes of the income test under the *Social Security Act 1991*.<sup>198</sup>

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196. In *Re Emery and Comcare* [2007] AATA 1695; (2007) 96 ALD 799 at [22]–[24], the AAT found that, applying ordinary principles of statutory construction, the amount on which interest is calculated in s 21 is the gross amount of the lump sum.

197. Commonwealth Superannuated Officers Association, Submission to the Review, p 9.

198. For the purposes of the *Social Security Act 1991*, the first \$45,400 of a person’s financial investments is deemed to earn income at 3 % per annum and any amount over that is deemed to earn income at 4.5 % per annum: see Department of Human Services, *Deeming*. Available at: <http://www.humanservices.gov.au/customer/enablers/deeming>

- 7.135 However, I do not consider it appropriate that deductions of deemed income on lump sum payments should cease once the total deductions have equalled the net value, or even the gross value, of the lump sum amount. That would result in employees who receive a lump sum receiving more compensation than their counterparts who choose to access their superannuation as a pension.

### RECOMMENDATION 7.8

Further, if **Recommendation 7.5** is not implemented, in addition to **Recommendation 7.6** and **Recommendation 7.7** I recommend that:

- (a) the mechanism for taking into account deemed income on a lump sum in ss 21(3) and 21A(3) of the SRC Act should be based on the post-tax value of the lump sum (if income tax was paid on the lump sum benefit); and
- (b) the rate at which employees are deemed to earn income on any lump sum should reflect the interest that an employee can realistically expect to earn.

## SUPERANNUATION CONTRIBUTIONS IN RELATION TO COMPENSATION PAYMENTS

- 7.136 On 29 July 2009 the Australian Taxation Office (the **ATO**) issued “Superannuation Guarantee Ruling 2009/2: Meaning of the terms ‘ordinary time earnings’ and ‘salary or wages’...” (the **Superannuation Guarantee Ruling**).<sup>199</sup>
- 7.137 The Superannuation Guarantee Ruling explains the meaning of “ordinary time earnings”, as defined in s 6(1) of the *Superannuation Guarantee (Administration) Act 1992* (the **SGA Act**). The definition of “ordinary time earnings” is relevant to calculating the minimum level of superannuation contribution that an employer is required to make for each employee under the SGA Act (equal to 9 % of each employee’s “ordinary time earnings”) in order to avoid the substantial tax liability that is imposed on an employer who does not make that contribution.
- 7.138 An employee’s “earnings”, for the purpose of the definition of “ordinary time earnings” in the SGA Act, consist of the remuneration paid to the employee as a reward for the employee’s services—essentially, the employee’s “salary or wages”. In explaining what types of remuneration provided to employees that are “salary or wages”, the Superannuation Guarantee Ruling states, at paragraph 68:
- Any workers’ compensation payments received by an injured employee for the hours the employee performs work or attends work as required form part of “salary or wages”. In contrast, if the employment has been terminated, or if the employee is paid workers’ compensation for hours not worked (or not attending work as required); the payment would not be “salary or wages” as in these situations it cannot be said that the payment is a reward for the services of the employee to the employer.
- 7.139 It follows that, for superannuation guarantee purposes, “ordinary time earnings” do not include workers compensation payments paid for any period when the employee is not undertaking work for the employer; and there is no obligation (on the employer, Comcare or any other person) to make any superannuation contribution for an employee based on those workers compensation payments.

### RECOMMENDATIONS

- 7.140 Successive governments have maintained a policy of compulsory superannuation provision by employers, in order to ensure that older Australians have access to retirement funds after they reach the preservation age.
- (a) The legislative expression of the policy is contained in the SGA Act and companion legislation, the effect of which is to give employers a very substantial tax incentive to contribute 9 % of each employee’s ordinary time earnings to the employee’s superannuation fund.
  - (b) However, that tax incentive does not apply to workers compensation payments. Therefore, for every week when an employee receives workers compensation that is not paid for performing or attending work, no contributions (or, at best, reduced contributions) are made to the employee’s superannuation fund.
  - (c) Employees on workers compensation therefore are likely to have lower retirement savings than employees who have not been injured at work and are more likely to need to access alternative forms of income support on retirement, such as the age pension.
- 7.141 I recommend that immediate consideration be given to amending the SGA Act so that compensation payments made pursuant to s 19 of the SRC Act are deemed to be “ordinary time earnings”.

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199. Available at: <http://law.ato.gov.au/atolaw/view.htm?docid=SGR/SGR20092/NAT/ATO/00001>

7.142 I note that a consequence of that change will be that the determining authority will be liable to pay the superannuation guarantee charge,<sup>200</sup> unless the prescribed minimum contribution (currently 9 % of “ordinary time earnings” and set to increase to 12 % by 1 July 2015) is made to the employee’s superannuation fund. (A similar amendment to s 31 of the SRC Act would be required if that section is retained, despite my recommendation that redemption should terminate an employee’s rights to incapacity payments in respect of the relevant injury: see paragraph 7.261 below.)

### RECOMMENDATION 7.9

I recommend that immediate consideration be given to amending the SGA Act so that compensation payments made pursuant to s 19 of the SRC Act are deemed to be “ordinary time earnings” for the purposes of the SGA Act.

### THE APPLICATION OF s 8(10)

- 7.143 Determining authorities can reduce an injured employee’s NWE where that NWE would exceed the amount that the employee would have received had the employee not been incapacitated for work, or would have received had the employee continued to be employed by the Commonwealth or licensee: s 8(10) of the SRC Act. As I read s 8(10), it was designed to apply after each and every adjustment to an employee’s NWE: that is, it is an ambulatory provision.
- 7.144 Several Federal Court and AAT decisions have examined the manner in which s 8(10) should be applied and the different factors that may or may not be taken into account when applying the provision.
- 7.145 In *Re Spurr and Comcare*,<sup>201</sup> the AAT found that an employee who was injured in Antarctica was entitled to NWE that included additional Antarctica allowances only during periods when he was likely to have been employed in Antarctica. The AAT said that s 8(10) requires:<sup>202</sup>
- ... a comparison between “the amount of the normal weekly earnings of an employee before an injury” and a hypothetical later figure. It refers to the pre-injury figure only for the purpose of requiring a comparison, and not to the intent that the pre-injury figure is to prevail.
- 7.146 In *Re Blade and Comcare*,<sup>203</sup> the AAT found that, where an employee’s NWE is reduced on the basis that higher duties are no longer available, the employee’s NWE may need to be restored if it is shown that higher duties remain available in the employee’s office, or more generally in the same organisation, or if they become available again after a period. However, in that case, Mr Blade’s NWE was not recalculated because, if he had not been injured, the opportunity to undertake higher duties would not have continued as the opportunities to undertake those higher duties were more limited than before his injury.<sup>204</sup>
- 7.147 In *Comcare v Burgess*,<sup>205</sup> the Federal Court (Greenwood J) held that s 8(10)(a) only applies in a situation where an employee continues to be employed by the Commonwealth and to receive earnings from the Commonwealth.
- (a) Ms Burgess had been suspended without pay during the period of her incapacity.
- (b) Comcare determined that, because Ms Burgess’s earnings were “zero”, her NWE should be reduced pursuant to s 8(10)(a) by the excess—that is, by the full amount that she was receiving. The AAT set aside Comcare’s decision.
- (c) The Court affirmed the AAT’s decision, holding that, if an employee is suspended without pay, s 8(10)(a) has no role to play because the provision does not contemplate a situation where an employee is still employed but receiving no remuneration from her or his employment for that period:<sup>206</sup> “The subsection assumes continuity of employment and the receipt of earnings and therefore a continuity of performance of the contract.”
- 7.148 In *John Holland Group Pty Ltd v Robertson*,<sup>207</sup> discussed in paragraphs 7.14–7.15 above, the Full Federal Court held that s 8(10)(b) should be applied to reduce an employee’s NWE in a situation where the employee’s contract of employment had come to an end as a result of the completion of the employment for which the employee had been engaged. In the course of his reasons, Dowsett J (with whose reasons Spender J agreed) said of the reasoning in *Comcare v Burgess* that there was:<sup>208</sup>

200. As required by the *Superannuation Guarantee Charge Act 1992*.

201. [1999] AATA 43; (1999) 28 AAR 424.

202. [1999] AATA 43; (1999) 28 AAR 424 at [13].

203. [2001] AATA 291; 64 ALD 471 at [28].

204. [2001] AATA 291; 64 ALD 471 at [49].

205. [2007] FCA 1663; (2007) 164 FCR 66.

206. [2007] FCA 1663; (2007) 164 FCR 66 at [24].

207. [2010] FCAFC 88; (2010) 185 FCR 566.

208. [2010] FCAFC 88; (2010) 185 FCR 566 at [42].

... difficulty in an approach to s 8(10) which contemplates the possibility that in certain circumstances, it may not be engaged. In my view an injured employee must either continue to be relevantly employed or not. Either s 8(10)(a) or s 8(10)(b) must apply.

7.149 In *The Australian Capital Territory v Comcare*,<sup>209</sup> the Federal Court considered the calculation of compensation payable to Mr Bowden (who had returned to work on reduced duties and was being paid compensation under s 19 for partial incapacity for work) while he was on long service leave. The particular question (to which the AAT had answered “yes”) was whether Mr Bowden’s compensation under s 19 should include an amount to reflect overtime while he was absent from work on approved long service leave. Bennett J noted:<sup>210</sup>

The correct test under s 8(10) of the SRC Act is whether an incapacitated employee’s NWE amount in any week after an injury exceeds the weekly earnings that he or she would receive in continuing employment, but for incapacity or cessation of the employment. It is not whether an incapacitated employee is “better off” because his or her NWE amount exceeds the amount of actual earnings in any week after an injury.

7.150 It was not in dispute that, under the terms of Mr Goodwin’s employment, he would not be entitled to be paid overtime while on long service leave. Accordingly, Mr Goodwin’s incapacity payments could not include an amount equivalent to the overtime he would have received if not on leave; and his NWE should be reduced by the amount by which it exceeded what he would have been paid during his long service leave if not incapacitated for work.<sup>211</sup>

7.151 Under s 8(10), any reduction in an employee’s NWE is based on what the employee would have earned but for her or his injury. The focus on the individual circumstances of the employee, as demonstrated by some of the cases outlined above, makes it difficult to apply s 8(10) easily or consistently.

7.152 In particular, the application of the principle in *Comcare v Burgess* (discussed in paragraph 7.147 above) produces a situation where an employee who would not have earned anything if free from incapacity (because he or she is suspended without pay), receives an income because of her or his incapacity.

7.153 Some determining authorities have applied s 8(10) on the basis that the subsection can only be used to reduce an employee’s NWE (where the hypothetical situation posited by s 8(10) is found to exist); but have assumed that, once NWE has been reduced, NWE cannot later be increased (when that hypothetical situation no longer exists). Although I doubt that s 8(10) has such an inflexible operation (indeed, I believe that it has an ambulatory operation), it is plainly preferable to remove uncertainty about the subsection’s effect.

## RECOMMENDATIONS

7.154 In order to remove uncertainty, s 8(10) should be amended by including the words “from time to time” so that the introduction to s 8(10) reads as follows:

(10) If the amount of the average remuneration ~~normal weekly earnings~~ of an employee before an injury, as calculated under the preceding subsections from time to time, would exceed:

7.155 Paragraph (a) of s 8(10) should be amended to confirm that, when an employee is suspended without pay or is not receiving earnings from employment for any other reason, that employee may still continue to be employed.<sup>212</sup> That could be achieved by expressing s 8(10)(a) in the following terms:

(a) where the employee continues to be employed by the Commonwealth or a licensed corporation (whether or not the employee is in receipt of earnings from that employment)—the amount per week of the earnings that the employee would receive if he or she were not incapacitated for work; or ...

### RECOMMENDATION 7.10

I recommend that the introduction to s 8(10) of the SRC Act be amended by including the words “from time to time”, to confirm its ambulatory operation.

209. [2012] FCA 67; (2012) 201 FCR 287.

210. [2012] FCA 67; (2012) 201 FCR 287 at [42].

211. [2012] FCA 67; (2012) 201 FCR 287 at [48]–[49].

212. Effectively avoiding the principle articulated in *Comcare v Burgess* [2007] FCA 1663; (2007) 164 FCR 66: see paragraphs 7.147 and 7.152 above.

### RECOMMENDATION 7.11

I recommend that s 8(10)(a) of the SRC Act be amended to confirm that an employee who is suspended without pay continues to be employed for the purposes of s 8(10).

## INCOME REPLACEMENT WHILE ON A REHABILITATION PROGRAM

- 7.156 An employee who is undertaking a full-time rehabilitation program is paid compensation pursuant to s 37(5) of the SRC Act, as opposed to ss 19 or 31. Where an employee is undertaking a full-time program, the compensation payable is equal to the amount of compensation that would have been payable pursuant to s 19 (or s 31): s 37(5)(a).
- 7.157 Where an employee is undertaking a part-time rehabilitation program, the compensation payable is an amount determined by the relevant authority, being an amount not less than the amount payable pursuant to s 19 (or s 31), but not more than the amount payable had the employee been undertaking a full-time program: s 37(5)(b).
- 7.158 Section 37(5) has not been materially amended since it was first enacted in 1988 as s 37(5) of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (the **CERC Act**). Both the Explanatory Memorandum and the second reading speech for the CERC Act<sup>213</sup> emphasised that the underlying object of ss 19(3), 37 and 40 of the SRC Act was to maintain injured employees in employment. However, there is no easily discernible reason as to how s 37(5) of the SRC Act does this in a better or more efficient manner than the s 19 incapacity payment provisions. Indeed, it has been argued that the s 19(3)<sup>214</sup> step-down provisions are designed to encourage return to work post-45 weeks.
- 7.159 While s 37(5) makes provisions for payments for employees undertaking "full-time programs" and "part-time programs", the SRC Act does not define what is meant by a "full-time program" or a "part-time program" in s 37(5).
- 7.160 Further, the inclusion of an additional incapacity payment provision in a section devoted to rehabilitation, and primarily concerned with the powers and functions of the rehabilitation authority, is illogical. There is no reason why a determining authority should refer to a section of the SRC Act devoted to rehabilitation in order to compensate an employee for what is essentially a payment by way of compensation for an incapacity for work.
- 7.161 In general, determining authorities, including Comcare, do not make payments under s 37(5). They continue to pay injured employees pursuant to ss 19 or 31, and count the time spent undertaking rehabilitation activities as time in employment.
- 7.162 The interaction between ss 37(5) and 19 remains untested.

### RECOMMENDATIONS

- 7.163 I recommend that s 37(5) be repealed. Compensation payments while an employee is undertaking a rehabilitation program should continue to be paid pursuant to ss 19 or 31.

### RECOMMENDATION 7.12

I recommend that s 37(5) of the SRC Act be repealed.

## THE LEVEL AND DURATION OF INCOME REPLACEMENT

- 7.164 As discussed in paragraph 7.9 above, all Australian workers compensation schemes link compensation for lost income to an employee's pre-injury earnings and impose limits on the calculation, level and duration of weekly benefits.

### THE LEVEL OF PAYMENTS ADJUSTED BY s 19

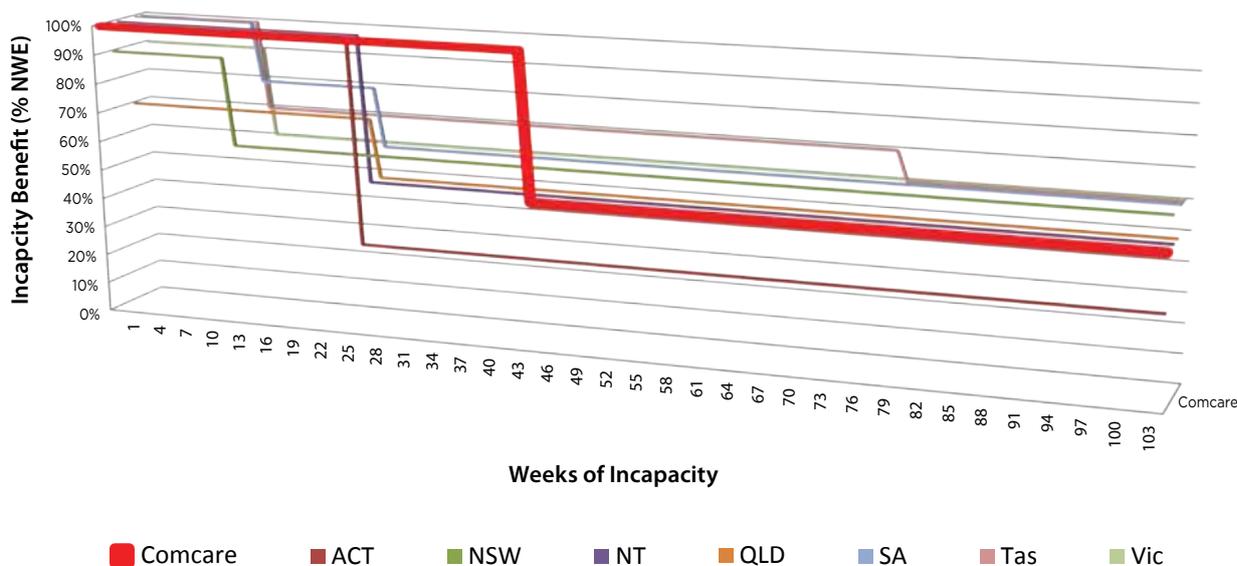
- 7.165 Structured reductions in weekly benefits, based on the period of incapacity, are commonly referred to as "step-downs". The step-down provisions in the SRC Act have been in place since it commenced on 1 December 1988.

213. Re-named the SRC Act as a result of amending legislation in 1992 and 1993.

214. See for example: Comcare, Submission to the Review, p 13.

- 7.166 Subject to various limitations and adjustments in s 19 of the SRC Act and other provisions, weekly compensation based on 100 % of the injured employee's NWE is paid for a maximum period of 45 weeks after injury: s 19(2) and (2A)(b).<sup>215</sup> After 45 weeks of incapacity, compensation is paid at an adjusted rate of between 75 % and 100 % of the injured employee's NWE: s 19(3).<sup>216</sup>
- 7.167 The formula for calculating weekly payments during the first 45 weeks is "NWE – AE", where AE is the greater of the amount (if any) that the employee is able to earn in suitable employment or the amount (if any) that the employee actually earns from any employment undertaken during that week: s 19(2) of the SRC Act.<sup>217</sup>
- 7.168 The formula for calculating weekly payments after the first 45 weeks is "(adjustment percentage x NWE) – AE", where the adjustment percentage is a percentage determined by reference to the amount of time that the injured employee worked during the week, but is never less than 75 %: s 19(3) of the SRC Act.
- 7.169 Section 19(5) provides an upper limit for compensation payments; they must not exceed 150 % of the average weekly ordinary time earnings for full-time adults (**AWOTEFA**).
- 7.170 The payment of compensation is also adjusted by reference to a safety net: s 19(6) (to which I have recommended changes; see paragraphs 7.88–7.93 above).
- 7.171 Typically, compensation for lost earnings in Australian workers compensation schemes will start at a level that approximates an injured employee's pre-injury earnings and then tapers down over time before reaching a "minimum" support level (or ceasing altogether). All schemes have some form of step-down arrangement (with a range of other limitations); however, the schemes are not consistent as to the timing or the amount of the step-down.
- 7.172 **Figure 3** shows the step-down arrangements in all Australian schemes.<sup>218</sup>

**Figure 3: Step-down arrangements in all Australian workers compensation schemes**



- 7.173 Step-downs are said to provide an incentive for employees to return to work as quickly as possible. Step-downs also take into account any "savings" that an injured employee makes by virtue of not attending work, such as not paying for travel costs or child care.<sup>219</sup>
- 7.174 It has been suggested that the utility of weekly incapacity compensation payments as a motivator for return to work depends, in part, on the ratio of compensation payments to pre-injury earnings. Where that ratio is low, a proportion of injured employees will choose to continue at work rather than claiming compensation, and injured employees who

215. Sick leave, recreation leave and long service entitlements also continue to accrue during that period: s 116(1)(a) and (b).

216. Only long service leave entitlements continue to accrue during that period: s 116(1)(b).

217. As to determining AE, see the discussions in paragraphs 7.67–7.87 above.

218. See also the Compensation Arrangements Comparison Report, Table 4.1: Income replacement, pp 73–78. Available at: <http://www.safe.workaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

219. *Accident Compensation Act Review: Final Report*, August 2008, p 193.

recover will try to return to work earlier rather than later. Where the ratio is high, injured employees have greater incentive not to invest as much effort in recovery; there is less incentive to return to work early.<sup>220</sup>

- 7.175 In most Australian schemes, there is more than one step-down of incapacity payments, with the first step-down occurring reasonably early in the life of a claim. Victoria and South Australia have their first step-downs after 13 weeks. The majority of States and Territories have at least one step-down by 26 weeks. In contrast, the first (and only) step-down in the Comcare scheme occurs much later, at 45 weeks. Such a late step-down might be creating a disincentive for early return to work by injured employees.
- 7.176 Data received from Comcare indicates that, during the 2011–12 financial year, the average scheme-wide duration of incapacity payments was 2.5 weeks, with more than 90 % of employees no longer receiving scheme compensation by four weeks. Of the 3,320 accepted claims, only 2,432 were still receiving compensation after two weeks; 326 were still receiving compensation after four weeks; and only 143 were still receiving compensation after 12 weeks. At the 45-week mark, only 39 claimants were still receiving compensation payments; at the 52-week mark, that number had reduced again to three.
- 7.177 After the first 45 weeks of incapacity, under the SRC Act, an injured employee's incapacity payments are based on the percentage of the employee's NWH. However, NWH can only be based on pre-injury circumstances, and the SRC Act does not provide any mechanism for calculating or adjusting NWH after the date of injury.
- 7.178 The step-down provisions and the NWH concept were considered in *Comcare v Heffernan*.<sup>221</sup> Following a spinal injury (which was later aggravated), Mr Heffernan was redeployed in a new position, the hours of which were less than the hours he had worked prior to his injury. The Court was asked to determine whether the NWH, by reference to which Mr Heffernan's compensation was to be paid, were the NWH of his pre-injury employment, or the NWH of his redeployment.<sup>222</sup> The relevance of that question was described by Marshall and Bromberg JJ as follows:<sup>223</sup>
- It seems logical that the work effort of a redeployed employee should be measured against the hours available for work in the redeployed position. In Mr Heffernan's case, he is working at full capacity in his redeployed position. The normal working hours of that position are 36.75 hours per week. Mr Heffernan is working all the available hours and thus at a 100% of the available capacity for work. But if the construction of s 19(3) for which Comcare contends is correct, Mr Heffernan will not be paid 100% of the compensation available under the formula in s 19(3), because Mr Heffernan is working less than 100% of his pre-injury normal working hours. In an Act which has the objective of encouraging incapacitated employees to return to work to the maximum extent possible, it seems appropriate that, having done exactly that, Mr Heffernan should be paid full compensation. Conversely, in an Act with that objective, it seems counterintuitive that employees who are redeployed into positions that require them to work more normal weekly hours than they worked in their pre-injury employment will have no incentive to work the additional hours of the redeployed position because those employees are able to receive maximum compensation for working the number of hours they worked in their pre-injury employment.
- 7.179 For some 20 years until November 2009, in its administration of claims under the SRC Act, Comcare had regarded NWH in s 19(3)(b)–(f) of the SRC Act as a reference to the NWH of the position into which an incapacitated employee had been redeployed, rather than as carrying the meaning given by the definition in s 4(1) of the SRC Act—the pre-injury hours worked by the employee before injury. In 2009, Comcare received legal advice that its previous approach was inconsistent with the SRC Act and changed its approach; and, in this appeal from an AAT decision, Comcare asked the Full Federal Court to endorse its new approach.
- 7.180 All three members of the Full Federal Court concluded that the definition of NWH in s 4(1) of the SRC Act controlled the meaning of NWH in s 19(3), where NWH should be understood as referring to the NWH worked in the employee's pre-injury employment.<sup>224</sup> There was no “contrary intention”<sup>225</sup> that would displace the s 4(1) definition.<sup>226</sup>
- 7.181 The Court acknowledged that the correct construction of the SRC Act would lead to a less generous result for many employees who had been receiving compensation for up to 20 years.<sup>227</sup> Comcare's previous approach had been to apply the NWH of the redeployed position, so that, if an employee worked to capacity in her or his redeployed position, that

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220. Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Inquiry Report, 2004. Available at: [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0006/18546/workerscomp.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0006/18546/workerscomp.pdf)

221. *Comcare v Heffernan* [2011] FCAFC 131; (2011) 196 FCR 494.

222. [2011] FCAFC 131; (2011) 196 FCR 494 at [2].

223. [2011] FCAFC 131; (2011) 196 FCR 494 at [16].

224. Downes J, in a separate judgment, also held that the definition of NWH in s 4(1) of the SRC Act controlled the meaning of the term in s 19(3)(b)–(f), but relied on slightly different reasoning. See, in particular, [2011] FCAFC 131; (2011) 196 FCR 494 at [41]–[43].

225. The definitions in s 4(1) of the SRC Act apply “[i]n this Act, unless the contrary intention appears”.

226. [2011] FCAFC 131; (2011) 196 FCR 494 at [22] (Marshall and Bromberg JJ) and [50]–[51] (Downes J).

227. [2011] FCAFC 131; (2011) 196 FCR 494 at [24] (Marshall and Bromberg JJ) and [53] (Downes J).

employee would receive 100 % of her or his NWE, pursuant to paragraph (f) of the definition of “adjustment percentage” in s 19(3). The Court also said that it was for the Parliament to resolve the issue. Marshall and Bromberg JJ said:<sup>228</sup>

But, as Downes J says in his reasons for judgment, it is for the government and Parliament to consider whether a regime which has operated for over 20 years with no apparent adverse effects should now be effectively changed to the detriment of most incapacitated employees.

- 7.182 The application of NWH therefore creates a financial disincentive for injured employees to return to a position that involves working fewer hours.
- 7.183 The need to adjust NWH because of changed employment circumstances is not limited to injured employees who may work fewer hours following redeployment. Consistent with the Government’s focus on social inclusion, modern enterprise bargaining agreements provide the opportunity and means for employees to change their working hours. In certain circumstances, such as returning to work after a period of maternity leave or returning to work following a non-compensable injury, it is sometimes the case that an employee’s hours will change. Unlike in non-compensable circumstances where flexibility is accommodated, the SRC Act does not appropriately deal with the situation in which an employee changes her or his hours. The provisions of the SRC Act are out of step and do not provide enough flexibility to deal with changing employment arrangements.
- 7.184 Managing and determining claims for incapacity payments, when an injured employee is working hours that differ from those worked at the date of injury, is complex and difficult. The difficulty and complexity are due, in large part, to the lack of flexibility in the SRC Act, which creates inequitable outcomes in the Comcare scheme.
- 7.185 The application of the adjustment percentage to incapacity payments after 45 weeks adds another level of complexity that is perhaps unnecessary. The employment arrangements of an injured employee may change from week to week, making the calculation of the compensation payable to that employee difficult and complicated. If the intention of the step-down and adjustment percentage is to encourage return to work, then it might be more appropriate to simply reduce the injured employee’s incapacity payments by deducting their AE amount for that week, consistent with the arrangements for incapacity payments before 45 weeks.

## SUBMISSIONS RECEIVED

- 7.186 Feedback during the Review’s consultations on the SRC Act’s step-down provisions was mixed. For example, Telstra submits that the current step-down provisions are too generous and that injured employees’ incapacity payments should be reduced before the 45-week mark or that the step-down provisions could be amended to provide greater incentive for rehabilitation and return to work.<sup>229</sup> A submission to the Review, states:
- It is widely acknowledged that the purpose of having a “step down” in weekly benefit entitlements is to create a financial incentive for a worker to return to paid employment. There is extensive evidence to show that the likelihood of returning to work reduces the longer a worker is away (see above references to the Australian and New Zealand Consensus Statement on the Health Benefits of Work). Comcare’s step down at 45 weeks is out of line with contemporary practice. Most jurisdictions have adopted earlier step downs which are aligned to the usual period of recovery for the majority of injury types. An earlier step down could reasonably be expected to provide a more effective incentive for an early and durable return to work.
- 7.187 The MRCC suggests that step-down provisions should:<sup>230</sup>
- ... take into account how significant a person’s injury or disease is and the extent to which this condition prevents them from returning to suitable employment (including whether that condition is permanent and stable) ...
- 7.188 However, employee groups opposed step-down provisions and submitted that injured employees should be compensated with a 100 % replacement of lost income. The Community and Public Sector Union, for example, submits that the provisions reducing incapacity payments “... should be deleted from the Act as this is a cost shifting mechanism that imposes economic hardship on injured workers ....”<sup>231</sup>
- 7.189 The Community and Public Sector Union’s view is also reflected in the submission received from Mr John Ross that:<sup>232</sup>
- ... post 45 week incapacity benefits should be reflective of pre-injury earnings and not penalise the worker unfairly. On the other hand, the incentive to return to work should be apparent, except in the case of permanent impairment.

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228. [2011] FCAFC 131; (2011) 196 FCR 494 at [24].

229. Telstra, Submission to the Review, p 7.

230. MRCC, Submission to the Review, p 5.

231. Commonwealth Public Sector Union, Submission to the Review, Part 2, p 5.

232. John Ross, Submission to the Review, p 2.

## RECOMMENDATIONS

7.190 I recommend that a three-level system of step-downs be introduced into the SRC Act.

7.191 A three-level system will provide a more sophisticated system of compensation, so that those employees who return to work relatively quickly are not disadvantaged; but, in order to fund a substantial increase in the level of compensation payable to long-term incapacitated employees, those employees who return to work between 13 and 26 weeks will receive a lower rate of weekly compensation. In order to ensure that the most significantly incapacitated employees, who remain on weekly compensation payments beyond 26 weeks, are not further disadvantaged, I recommend that the final step-down be to 80 % of NWE.

### MODEL 1: PREFERRED MODEL FOR STEP-DOWNS

Weeks incapacitated	Percentage of NWE
0–13	100 %
14–26	90 %
27+	80 %

7.192 I also considered two other models.

### MODEL 2

Weeks incapacitated	Percentage of NWE
0–13	100 %
14–26	90 %
27–52	80 %
53+	75 %

### MODEL 3

Weeks incapacitated	Percentage of NWE
0–13	100 %
14–26	90 %
27–52	80 %
53+	70 %

7.193 Models 2 and 3 would involve a reduction in payments between weeks 14 and 45, and an increase in payments between weeks 46 and 52—on the assumption that the reduction of 5 % of NWE currently prescribed by ss 20(3), 21(3) and 21A(3) is repealed. See paragraphs 7.123–7.130 above and **Recommendation 7.6**. Model 2 would involve maintaining the level of payments from week 53 and Model 3 would involve a reduction in payments from week 53.

7.194 I have recommended Model 1 (set out in paragraph 7.191) because:

- it shifts the balance of expenditure on compensation from short-term to long-term incapacitated employees;
- it recognises the needs of that second group; and
- it provides significant incentives for employees to pursue rehabilitation and return to work at an early stage—when rehabilitation has the best prospects of success.

7.195 I do not recommend Model 2 or Model 3 because, although each model would provide incentives for employees to pursue rehabilitation and return to work at an early stage, neither model would recognise the needs of long-term incapacitated employees and neither model would balance the significant reductions in compensation for short-term incapacitated employees with real increases for the long-term incapacitated.

- 7.196 In addition, for the reasons identified in paragraph 7.185 above, I recommend that the “adjustment percentage” be removed from the calculation of weekly compensation during any of the periods identified in Model 1. Injured employees will be automatically stepped down, based on the duration of their incapacity for work. Compensation payments should be reduced by reference to the AE (as is now the case during the first 45 weeks of incapacity). As a consequence of this recommendation, the NWH calculation now prescribed in s 19(3) of the SRC Act would be removed from the Act.
- 7.197 I also recommend that the periods of 13 weeks and 26 weeks leading to the first and second step-downs be calculated on the basis that time will run for any week during which the employee is participating in a return to work program or absent from work for any reason other than seeking medical treatment—that is, the whole week will count towards the 13-week and 26-week totals. Attendance at medical treatment, for which compensation is payable under s 16 of the SRC Act, will not count towards the calculation of a “week”.

### RECOMMENDATION 7.13

I recommend that weekly compensation be paid at 100 % of an employee’s NWE during the first 13 weeks of the employee’s incapacity for work, at 90 % of the employee’s NWE during weeks 14–26 of incapacity for work and thereafter at 80 % of the employee’s NWE while the employee remains incapacitated for work.

- 7.198 **Recommendation 7.13** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

### RECOMMENDATION 7.14

I recommend that compensation be calculated, at the levels recommended in **Recommendation 7.13**, by reference to the employee’s NWE less any earnings the employee receives from additional employment, deleting references to the “adjustment percentage”.

### RECOMMENDATION 7.15

I recommend that the step-down periods be calculated on the basis that time will run for each period during any week when the employee is participating in a return to work program or absent from work for any reason other than undergoing medical treatment, for which compensation is payable under s 16 of the SRC Act.

- 7.199 Recommendation 7.15 has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

## OTHER ADJUSTMENTS TO THE LEVEL OF PAYMENTS

- 7.200 As discussed in paragraphs 7.94–7.105 above, the SRC Act currently provides that, if an employee retires and receives a superannuation pension, the employee’s incapacity benefits are calculated using the adjustment percentage, whether the employee has been incapacitated for 45 weeks or not: s 20(2). And a component of the employee’s superannuation benefit will be offset against the employee’s incapacity benefits: s 20(3). Similar provision is made for calculating an employee’s incapacity benefits where the employee retires from her or his employment and receives a lump sum superannuation payment, with or without a pension: ss 21(3) and 21A(3). I have recommended that ss 20, 21 and 21A be repealed: see paragraph 7.126 and **Recommendation 7.5** above.
- 7.201 Further, if an employee is maintained in a hospital, nursing home or similar place for more than 12 months, and has no dependants, a determining authority is liable to pay compensation at an amount determined by the determining authority, having regard to the future needs of the employee and the period that the employee is likely to be in the hospital, nursing home or similar place: s 22 of the SRC Act. That limitation has not been the subject of any submissions to, or consideration by, the Review.

## THE DURATION OF PAYMENTS

- 7.202 No matter how they are funded, the one constant shared by all workers compensation schemes is that they must be financially viable and sustainable. There is a balance to be struck between, on the one hand, supporting injured employees who are recovering from injury and returning to work and, on the other hand, maintaining the affordability of a workers compensation scheme for employers. That balance is generally struck by denying access to compensation once particular thresholds are passed—in particular, the age of the employee. The SRC Act contains limitations by reference to the employee:
- (a) reaching the age of 65: discussed in paragraphs 7.204–7.224 below;
  - (b) refusing to take part in a rehabilitation program: see paragraph 7.226 below; and
  - (c) being imprisoned following conviction of an offence: see paragraph 7.227 below.
- 7.203 The SRC Act currently does not restrict payment of compensation to an employee who leaves Australia, although it does impose reporting obligations on such an employee: see paragraphs 7.228–7.233 below.

## THE AGE LIMIT ON THE PAYMENT OF COMPENSATION

- 7.204 Under the SRC Act, compensation is not payable to an employee who has reached 65 years of age: s 23(1). The one exception to this is an employee who has reached 63 years of age and then suffers an injury: that employee is entitled to a maximum of 104 weeks (consecutive or not) of incapacity payments: s 23(1A) of the SRC Act.
- 7.205 When the CERC Act was introduced, the then Minister for Social Security said that:<sup>233</sup>
- ... the Government does not consider it appropriate that employees should continue to receive workers' compensation benefits after the normal retirement age.
- 7.206 Accordingly, when the SRC Act (as the CERC Act is now known) came into effect, s 23(1) provided that compensation for incapacity was not payable to a person who had reached the age of 65, which was the normal retirement age at the time. Following the passage of the 1999 Act, the SRC Act was amended by Part 9 of Schedule 1 to the *Public Employment (Consequential and Transitional) Regulations Act 1999*,<sup>234</sup> so as to provide that s 23(1) would not apply to employees employed under the 1999 Act who suffered an injury after reaching 63. Instead, those employees would have access to a maximum of 104 weeks of incapacity payments.
- 7.207 On 1 October 2001, s 23 was amended by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001*, to add subsection (1A) in its current form, so as to provide that compensation is payable in respect of an injury sustained by an employee who has reached 63 years of age, for a maximum of 104 weeks, regardless of whether the employee is employed under the 1999 Act.
- 7.208 A majority of Australian workers compensation schemes remove the entitlement to weekly incapacity benefits for injured employees once they reach the age of 65. However, in New South Wales, Queensland and Western Australia restrictions apply by reference to the period during which benefits are payable, and to the maximum amount of weekly incapacity compensation an employee can receive during the life of a claim.
- 7.209 Age cut-offs in workers compensation schemes have historically reflected the fact that employees generally retire at age 65, and that employees at that age have access to other means of financial support, such as the age pension and superannuation.
- 7.210 In 2009, the Australian Government sponsored legislation to increase the eligibility age for the age pension progressively from 65 to 67, to be phased in between 2017 and 2023. The age pension age for women has increased from age 60 in 1995 to 64.5 in 2012. From 1 July 2013 the age pension age for women will align with the qualifying age for men, 65 years. From 1 July 2017, the qualifying age for the age pension will increase from 65 to 65.5 years and rise by six months every two years until it reaches 67 years on 1 July 2023.<sup>235</sup>

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233. Commonwealth Employees' Rehabilitation and Compensation Bill 1988: second reading speech by the Minister for Social Security, The Hon Brian Howe: House of Representatives, *Debates*, 27 April 1988, p 2191. Available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansardr%2F1988-04-27%2F0089;orderBy=\\_fragment\\_number,doc\\_date-rev;page=103;query=Dataset%3Ahansardr,hansardr80;rec=11;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansardr%2F1988-04-27%2F0089;orderBy=_fragment_number,doc_date-rev;page=103;query=Dataset%3Ahansardr,hansardr80;rec=11;resCount=Default)

234. As expressly authorised by s 14(5) of the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

235. See: <http://www.humanservices.gov.au/customer/enablers/centrelink/age-pension/eligibility-for-age-pension>

- 7.211 One key implication of that change is that an injured employee who is aged 65 will not only be unable to receive compensation but will also be unable to access the age pension until he or she turns 67. The Australian Law Reform Commission's discussion paper *Grey Areas—Age Barrier to Work in Commonwealth Laws* (the **Grey Areas Paper**) notes:<sup>236</sup>
- In such circumstances, a worker may be forced to access alternative forms of income support such as the Disability Support Pension, superannuation and other forms of private savings. Where this results in a depletion or exhaustion of superannuation or private savings, he or she may then need to access additional income support on a long-term basis, rather than self-funding retirement. This outcome is at odds with government policy objectives aimed at keeping people in work rather than in receipt of the Age Pension, and supporting people into self-funded retirement.
- 7.212 Other implications highlighted in the Grey Areas Paper include the potential disincentive to workforce participation for mature age employees if they are not covered for workers compensation, and the vulnerability of mature age employees where access to compensation is restricted.
- 7.213 The decision to increase the eligibility age for the age pension is likely to increase further the number of employees remaining in the workforce for longer. However, while the workforce is ageing, the Australian Bureau of Statistics *Survey of Employment Arrangements, Retirement and Superannuation 2007*<sup>237</sup> indicates that the average age at retirement is currently 52 years (58 years for men and 47 years for women), well below age 65. Indeed, it may be that the observed trend in employees extending their retirement age is skewed towards particular occupations, and that those occupations with a relatively high risk of work injury are not part of that trend.
- 7.214 The last point is consistent with observations made by Comcare in its *Productive And Safe Workplaces For An Ageing Workforce* booklet published in 2003:<sup>238</sup>
- Despite evidence that the age-related changes that affect older workers may make them more vulnerable to some types of occupational injuries, the ABS work related injuries survey does not suggest that injuries and disease increase with increasing age. Several reasons have been proposed to explain this finding:
- first, it may be that older workers are more likely to be aware of safety in the workplace and, therefore, less likely to have an accident
  - secondly, older workers tend to develop their own coping strategies (such as pacing, anticipation, planning and organisation) as they age, and these strategies may help them to reduce their injury risk
  - thirdly, selection factors may be important. That is, older employees may seek to move out of occupations or industries where their risk of injury or illness would otherwise tend to increase with age and into other forms of employment, phased retirement or early retirement. Older workers may also withdraw from the workforce prematurely and involuntarily due to ill health or disability.
- 7.215 The Grey Areas Paper suggests that there are three possible approaches for reform at the Commonwealth level to address issues relating to aged-based restrictions on workers compensation. They are:
- (a) the removal of all age-based restrictions;
  - (b) the removal of all age-based restrictions, but the imposition of benefit period or amount restrictions; or
  - (c) linking retirement provisions to the age pension age.
- 7.216 The Grey Areas Paper also states:<sup>239</sup>
- The ALRC supports the principle that there should be no age-based restrictions in Commonwealth workers' compensation legislation. However, there are a number of difficulties and cost implications of such an approach. As a result, it may be necessary to take a more nuanced approach to reform, involving three key components. First, retirement provisions should be legislatively tied to Age Pension age. Secondly, there may be a need to extend the incapacity payment period. Thirdly, workers over Age Pension age who can prove that, had they not been injured, they would have continued to work should potentially receive a supplementary payment.

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236. Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper, p 81. Available at: <http://www.alrc.gov.au/publications/grey-areas%E2%80%94age-barriers-work-commonwealth-laws-dp-78>

237. Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6361.0>

238. Comcare, *Productive And Safe Workplaces For An Ageing Workforce*, p 8. References omitted. Available at: <https://www.agedcommunity.asn.au/mature-workers-matter/downloads/resources/why-mature-workers-matter/ComCare.Productive%20and%20Safe%20Workplaces%20for%20an%20Ageing%20Workforce.pdf>

239. Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper, p 82.

7.217 The Grey Areas Paper contemplates removing all age-based restrictions in Commonwealth workers compensation legislation. In effect, that would result in an unlimited coverage for injured employees, regardless of age, for as long as they continue working and/or have a work-related injury. The ALRC notes that there are some practical difficulties with that approach. In particular, it might be difficult to determine when compensation benefits should stop on the basis that an injured employee, who is over the normal retiring age, would have decided to retire had the employee not been injured. There are also significant cost implications for the Comcare scheme in adopting such an approach.

### SUBMISSIONS RECEIVED

- 7.218 There was general consensus across the submissions received by the Review that the age cut-off provisions in the SRC Act need to reflect, as a minimum, the pension age.<sup>240</sup> However, the Australian Council of Trade Unions has gone further by submitting that injured employees aged 65 years or older “should be able to access weekly income payments on the same terms as all other injured workers”.<sup>241</sup>
- 7.219 Similarly, the Australian Human Rights Commission submits that the following amendments be made to s 23(1) of the SRC Act:<sup>242</sup>
- (a) the removal of all age limits on weekly incapacity payments for workers covered by the Comcare scheme; and
  - (b) the inclusion of non-discriminatory weekly incapacity payment provisions, similar to those adopted for Western Australia’s workers compensation scheme.

### RECOMMENDATIONS

- 7.220 I recommend that s 23(1) and (1A) of the SRC Act be amended so that:
- (a) the cut-off age beyond which incapacity payments cease will be tied to the qualifying age for the age pension; and
  - (b) employees who are injured at any time after five years prior to the age pension qualifying age will receive incapacity payments for a period of 260 weeks.
- 7.221 That could be achieved by amending ss 23(1) and (1A), and inserting a new s (1B), as follows:
- (1) Compensation is not payable under section 19, ~~20, 21, 21A~~ or 22 to an employee who has reached the pension age.
  - (1A) However, if an employee who is aged within ~~60~~<sup>24</sup> months of the pension age<sup>63</sup> suffers an injury (whether before or after the commencement of this subsection):
    - (a) subsection (1) does not apply; and
    - (b) compensation is payable under section 19, ~~20, 21, 21A~~ or 22 in respect of the injury:
      - (i) to the extent that this Act, other than subsection (1), allows; and
      - (ii) for a maximum of ~~260~~<sup>104</sup> weeks (whether consecutive or not) during which the employee is incapacitated.
  - (1B) For the purpose of subsections (1) and (1A2), **pension age** means the age at which a person qualifies for age pension under the *Social Security Act 1991*.
- 7.222 Given the complexities involved and the likely cost implications to the scheme, I am not persuaded that all age restrictions should be removed.

#### RECOMMENDATION 7.16

I recommend that s 23(1) and (1A) of the SRC Act be amended so that:

- (a) the cut-off age is tied to the qualifying age for the age pension; and
- (b) employees who are injured at any time after five years prior to the age pension qualifying age can receive incapacity payments for a period of 260 weeks.

7.223 **Recommendation 7.16** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

240. See, for example: Australian Industry Group, Submission to the Review, p 11; Comcare, Submission to the Review, p 20; Department of Defence, Submission to the Review, p 9; John Holland Group, Submission to the Review, p 8; Maurice Blackburn, Submission to the Review, p 18; Superannuated Commonwealth Officers’ Association, Submission to the Review, p 5; Slater and Gordon, Submission to the Review, p 6.

241. Australian Council of Trade Unions, Submission to the Review, p 9.

242. Australian Human Rights Commission, Submission to the Review, p 6.

7.224 Because the proposal would also impact on Part XI claims, the Australian Government Actuary also considered the proposal. The cost estimated by the Australian Government Actuary is available at Chapter 2, **Table 3**.

## OTHER LIMITS ON THE PAYMENT OF COMPENSATION

- 7.225 In addition to the age limit discussed in paragraphs 7.204-7.222 above, there are other events that affect the time during which compensation is paid.
- 7.226 If an employee unreasonably fails to undertake a rehabilitation program provided under s 37 of the SRC Act (which frequently will involve a return to work), her or his compensation payments may be suspended: s 37(7) of the SRC Act.
- 7.227 Compensation is also not payable in respect of any period during which an employee is imprisoned in connection with a conviction for her or his offence: s 23(2) of the SRC Act.
- 7.228 There is currently no limitation on payment of compensation to a person outside Australia.
- (a) An employee who has been receiving compensation for more than three months is required to inform the relevant authority (Comcare or a licensee<sup>243</sup>) of any overseas travel: s 120(3) of the SRC Act. However, the employee remains eligible to receive compensation while outside Australia.
  - (b) In addition, where an employee is absent from Australia for more than three months, the person is required to notify the relevant authority of her or his address: s 120(4) of the SRC Act. Failure to notify the relevant authority in accordance with s 120(4) of the SRC Act, is an offence: s 120(5). Again, the absence from Australia, even for more than three months, has no effect on the payment of compensation.
- 7.229 The *Social Security Act 1991* imposes quite stringent controls on payment of pensions (such as age pension and disability support pension) and allowances (such as Newstart allowance and sickness allowance) outside Australia.<sup>244</sup> One justification for those restrictions is that the agency that administers the Act is not in a position to monitor compliance with the conditions of eligibility while a recipient is outside Australia; another justification is that the administration of provisions designed to return recipients to the workforce (in the case of disability support pension and Newstart allowance) is impracticable when the recipient is outside Australia.
- 7.230 Similar considerations apply to incapacity payments under the SRC Act: the prospect of effective assessment of an employee's continuing incapacity for work, of the amount that the employee is able to earn in suitable employment and of the efficacy of medical treatment is very much diminished if the employee is outside Australia; and there can be no real participation in an effective rehabilitation program while the employee is outside Australia.
- 7.231 For those reasons, there are powerful arguments in favour of restricting payment of incapacity payments while an employee is outside Australia. Such a restriction will need to accommodate employees required to move overseas in connection with their employment with the Commonwealth or a licensee or in connection with "suitable employment" undertaken by the employee (essentially, as part of the employee's return to work program).

## RECOMMENDATIONS

- 7.232 To achieve the objectives outlined in paragraph 7.230 above, the SRC Act should be amended so that entitlement to weekly compensation is suspended during any period of more than 60 days when an employee is absent from Australia—subject to exceptions where the employee's employment with the Commonwealth or a licensee, or "suitable employment" undertaken by the employee, require the employee to leave Australia. Employees should be obliged to notify the relevant determining authority of any absence from Australia that exceeds 60 days.
- 7.233 That could be achieved by inserting a new subsection (4) in s 23; and amending s 120 by modifying subsection (1), adding a penalty to subsection (3) and repealing and replacing subsections (4) and (5):

### Section 23

- (4) Compensation is not payable under section 19 in respect of any period during which the employee is absent from Australia, unless that absence:
  - (a) is for a period that does not exceed 60 days; or
  - (b) is in connection with:
    - (i) the employee's employment by the Commonwealth or a licensed corporation or
    - (ii) employment undertaken by the employee as suitable employment for the purposes of this Act.

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243. See the definition of "relevant authority" in s 4(1) of the SRC Act.

244. See ss 1213–1221 of the *Social Security Act 1991*. For a relatively recent consideration of the effect of those provisions in the context of disability support pension, see *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mouratidis* [2012] FCAFC 29.

## Section 120

- (1) This section applies to a person to whom payments of compensation under section 19 are being made, ~~and have been made for a period of 3 months or longer~~, by a relevant authority.
- (2) Where the person proposes to leave Australia (whether or not the person proposes to return to Australia), the person may give the relevant authority a notice in writing:
  - (a) stating that the person proposes to leave Australia; and
  - (b) specifying the day on which the person proposes to leave.
- (3) Where the person has left Australia (whether or not the person proposes to return to Australia) without giving a notice of the kind referred to in subsection (2) to the relevant authority, the person shall, within 7 days after the day on which the person left Australia, send the relevant authority a notice in writing:
  - (a) stating that the person has left Australia; and
  - (b) specifying the day on which the person did so.

Penalty: 5 penalty units.

- (4) Subsection (3) is an offence of strict liability.
- (5) Where the person returns to Australia, the person shall, within 7 days after the day on which the person left Australia, give the relevant authority notice in writing:
  - (a) that the person has returned; and
  - (b) specifying the day on which the person did so.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

### RECOMMENDATION 7.17

I recommend that the SRC Act be amended so that:

- (a) entitlement to weekly compensation is suspended during any period of more than 60 days when an employee is absent from Australia—subject to exceptions where the employee’s employment with the Commonwealth or a licensee or “suitable employment” undertaken by the employee require the employee to leave Australia; and
- (b) employees are obliged to notify the relevant determining authority of any absence from Australia that exceeds 60 days.

## REDEMPTION OF COMPENSATION PAYMENTS

- 7.234 Redemption of compensation involves the payment of a lump sum amount to an employee in lieu of the employee’s ongoing weekly incapacity payments. The SRC Act limits redemption to compensation payments for incapacity for injured employees whose incapacity payments are equal to or less than the specified indexed amount (currently that amount stands at \$105.42<sup>245</sup>): s 30(1) of the SRC Act.
- 7.235 Where there is a liability to make weekly compensation payments, and:
  - (a) an employee’s weekly payments are equal to or less than the specified rate (currently \$105.42); and
  - (b) the employee’s degree of incapacity is unlikely to change;
    - a determining authority must redeem the ongoing liability to make further payments to the employee by the payment to the employee of a lump sum: s 30(1) of the SRC Act.
- 7.236 The quantum of that lump sum is calculated by a formula specified in s 30(2) of the SRC Act, and does not include compensation for the cost of medical expenses that is payable pursuant to s 16 of the SRC Act.
- 7.237 Redemption does not extinguish the liability of a determining authority to resume incapacity payments to the employee if the injury later incapacitates the employee to the extent that the employee cannot engage in suitable employment, and the incapacity is likely to last indefinitely: s 31(1) of the SRC Act.

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245. As at 1 July 2012, pursuant to s 30(4). See: [http://www.comcare.gov.au/claims/benefits\\_\\_and\\_\\_entitlements/statutory\\_rates](http://www.comcare.gov.au/claims/benefits__and__entitlements/statutory_rates)

- 7.238 Weekly payments can also be redeemed on the written request of a “former employee”: s 137. A former employee is a person who, immediately before 1 December 1988, was receiving weekly payments of compensation under the *Compensation (Commonwealth Government Employees) Act 1971* (the **1971 Act**) and who had ceased to be an employee within the meaning of that Act before 1 December 1988: s 123 of the SRC Act. Although s 137 remains a part of the SRC Act, it was clearly a transitional provision, the work of which has long finished.
- 7.239 The maximum weekly rate of incapacity payments that can be redeemed under s 31 of the SRC Act (\$105.42 per week, as at 1 July 2012) means that there are very few employees who qualify for redemption.
- 7.240 Other Australian workers compensation schemes provide greater flexibility for the redemption of incapacity benefits. The Australian Capital Territory, Queensland, South Australian and Western Australian schemes allow for medical and rehabilitation costs to be included in a redemption payment.
- 7.241 The redemption of compensation payments can benefit both employees and determining authorities, as the case may be. Rather than receiving small weekly payments over a number of years, an employee can receive one (larger) payment; and that payment (in many cases) severs the employee’s long-term dependence on the determining authority. For the determining authority, making one payment reduces the administrative costs associated with the continuing payment of benefits on a claim.
- 7.242 In some schemes, such as the Australian Capital Territory, New South Wales and Queensland schemes, redemption of compensation benefits, in whatever form the redemption takes, is linked to the closure of a claim. Currently, the Comcare scheme makes no provision for the closure of a claim: see, in particular, s 31 of the SRC Act, discussed in paragraph 7.237 above. It is not possible to end an employee’s relationship with the Comcare scheme; and, in light of the growing body of empirical literature that supports the existence of a link between compensation status and poor health outcomes, that is a notable gap in the SRC Act.<sup>246</sup>
- 7.243 Not only is redemption under the SRC Act currently not linked to the closure of a claim; the redemption provisions are difficult to apply. The difficulty of determining the likelihood of change in an employee’s level of incapacity, combined with the low specified rate (see paragraph 7.39 above), mean that s 30 is a little-used provision.
- 7.244 Where a redemption is made and an employee’s level of capacity subsequently worsens, the employee is entitled to claim ongoing compensation. Calculating ongoing incapacity payments in that situation is difficult for the determining authority, with the complexity of those calculations increasing as the period between redemption and the recurrence of incapacity lengthens.
- 7.245 The redemption of benefits should provide an opportunity to finalise a claim once and for all. However, redemption should only take place after an employee’s rehabilitation options have been fully exhausted and there is clear medical evidence that the employee’s medical condition has stabilised and is not likely to deteriorate.
- 7.246 All schemes that allow voluntary redemptions require certain pre-conditions to be met before redemption. The pre-conditions usually include the receipt of independent financial advice by the employee. It is important to ensure that the interests of the employee are the paramount consideration during any redemption process and that appropriate safeguards are in place.
- 7.247 An additional safeguard could be provided by making redemption only available to employees who have received incapacity payments for a substantial period and who have received a final payment of compensation for permanent impairment and non-economic loss—so that participation in redemption will be limited to employees whose injuries are likely to have stabilised and whose prognosis is unlikely to be clouded by uncertainty.
- 7.248 As a further safeguard, it would be appropriate to place a cap on the amount that can be paid to an employee by way of redemption—so that, with the benefit of independent advice about the implications of any redemption offer, employees with more serious injuries and incapacity would be less likely to accept a redemption and lose the protection that comes with ongoing entitlements under the SRC Act to weekly payments and compensation for the cost of medical treatment. (I had considered excluding employees with high levels of permanent impairment from any redemption program; but I have concluded that the best form of protection is to limit the amount that can be offered, while ensuring that employees have access to independent legal and financial advice.)
- 7.249 A cap on the amount that can be paid to an employee by way of redemption may also counter the possibility that a generous redemption might encourage the conscious or unconscious exaggeration by injured employees of the extent of their incapacity and need for medical treatment in order to qualify for a larger redemption payment.

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246. G Grant and DM Studdert, “Poisoned Chalice? A Critical Analysis of the Evidence Linking Personal Injury Compensation Processes with Adverse Health Outcomes” (2009) 33 *Melbourne University Law Review* 865. Available at: [http://mulr.law.unimelb.edu.au/go/33\\_3\\_7\\_GrantStuddert](http://mulr.law.unimelb.edu.au/go/33_3_7_GrantStuddert)

## SUBMISSIONS RECEIVED

- 7.250 Those consulted during the Review generally support the need for a review of the redemption provisions. The Department of Defence and Slater and Gordon, for example, both note that, for some employees, the ongoing link to employment (and, by association, the incident in which the employee was injured) was responsible for hindering the employee's recovery.<sup>247</sup>
- 7.251 Different views have been expressed on whether or not redemption of benefits should also include medical and like expenses. John Holland, for example, submits that a redemption should not include medical and like expenses and rehabilitation;<sup>248</sup> while the Department of Defence is of the view that a redemption of all benefits is important in order to enable a "total separation" from the employer, especially in circumstances where the evidence suggests this will assist the injured worker with her or his recovery.<sup>249</sup>
- 7.252 All those consulted who support redemption agree that safeguards are required in order to protect the injured employee. For example, Slater and Gordon submits that requirements such as ensuring sufficient medical information confirming the injured employee's medical condition is permanent and the provision of independent financial and legal advice are important.<sup>250</sup>

## RECOMMENDATIONS

### VOLUNTARY REDEMPTION—BASIC FEATURES

- 7.253 I recommend that the SRC Act be amended so that an employee may redeem her or his entitlement to compensation payments, but only on a voluntary basis. Those voluntary redemptions would not replace, but would supplement, the compulsory redemption of low-level incapacity payments pursuant to s 30 of the SRC Act: see paragraphs 7.234–7.237 above. There is some point in allowing determining authorities to redeem liability to make those low-level payments—where the cost of administering the payments will approach, if not exceed, the level of payments being made—provided that the interests of employees remain protected (as those interests are currently protected) by the system of reconsideration and external review under Part VI of the SRC Act.
- 7.254 Voluntary redemption, where chosen by an employee, would apply to:
- (a) incapacity payments under s 19 of the SRC Act (or ss 20, 21 or 21A if retained and applicable);
  - (b) compensation for the cost of medical treatment under s 16 of the SRC Act (including travel costs); and
  - (c) compensation for attendant care services and household services under s 29 of the SRC Act.
- 7.255 Redemption would not apply to, and therefore would not extinguish liability with respect to:
- (a) compensation for dependants of an employee whose injury results in death, and for funeral expenses, under ss 17 and 18 of the SRC Act;
  - (b) compensation for permanent impairment and non-economic loss under ss 24 and 27 of the SRC Act (but see paragraph 7.256(b) below); and
  - (c) the obligations of the relevant authority and the employer relating to rehabilitation and the provision of suitable employment under Part III Division 3 of the SRC Act.

### VOLUNTARY REDEMPTION—PRE-CONDITIONS

- 7.256 Redemption would only be possible if the following pre-conditions are met:
- (a) two years have elapsed since the employee's first claim for weekly incapacity payments was accepted;
  - (b) the employee's entitlement to compensation for permanent impairment and non-economic loss under ss 24 and 27 of the SRC Act has been determined;
  - (c) the employee has been assessed as:
    - (i) having exhausted all rehabilitation options—that is, the employee has demonstrated a sustained return to work (at whatever level) with limited capacity for improvement; or
    - (ii) unfit to return to suitable employment with limited capacity for improvement; and
  - (d) the employee has an existing and continuing entitlement to incapacity payments (whether the employee's incapacity is partial or total).

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247. Department of Defence, Submission to the Review, pp 7–8; Slater and Gordon, Submission to the Review, p 6.

248. John Holland Group, Submission to the Review, p 7.

249. Department of Defence, Submission to the Review, p 8.

250. Slater and Gordon, Submission to the Review, p 6.

## **VOLUNTARY REDEMPTION—THE PROCESS**

- 7.257 Redemption would only be payable if:
- (a) once the preconditions outlined in paragraph 7.256 above are met, the employee asks the determining authority to make a redemption offer;
  - (b) within 42 days of the offer, the employee accepts an offer of redemption from the determining authority made in response to that request;
  - (c) at the time of accepting the offer, the employee informs the determining authority in writing that the employee has received and understood independent legal and financial advice (see paragraph 7.258 below) about the redemption and its likely effect on the employee's legal and financial position; and
  - (d) the employee and the determining authority sign a redemption agreement.
- 7.258 If an employee meets the criteria for redemption outlined in paragraph 7.256 above, the determining authority will be liable to pay for any legal and financial advice sought and received by an employee, once in every two-year period (so that, where an employee elects not to accept a redemption offer, the employee cannot require the determining authority again to pay the cost of obtaining legal and financial advice until two years have elapsed).

## **VOLUNTARY REDEMPTION—THE AMOUNT PAYABLE**

- 7.259 The amount payable for a redemption would be calculated by the determining authority taking into account anticipated incapacity payments, compensation for the cost of medical treatment and compensation for attendant care and household services, with the redemption amount offered not to exceed the total of:
- (a) three years of incapacity payments (at the lower of 80 % of NWE indexed or the employee's current weekly incapacity entitlement);
  - (b) an estimate of the cost of medical treatment for the next three years (based on the cost of the employee's medical treatment over the year prior to redemption); and
  - (c) an estimate of attendant care and household services for the next three years (based on the employee's average service costs over the year prior to redemption).
- 7.260 I do not recommend that a formula be prescribed for calculating the amount to be offered. Instead:
- (a) the determining authority should decide the amount to be offered within the cap (see paragraph 7.259 above);
  - (b) the determining authority should make a transparent offer by disclosing the basis of the calculations; and
  - (c) the employee can then decide whether to accept the amount offered.

## **VOLUNTARY REDEMPTION—FINALITY**

- 7.261 It is important that any redemption, entered into by the determining authority and a fully informed and properly advised employee, be a final redemption of the employee's relevant entitlements under the SRC Act. If redemption is to allow employees to make a clean break with the compensation system and allow determining authorities to close their files, redemption needs to be final.
- (a) The determining authority will calculate the amount of the redemption and provide the offer in writing to the employee.
  - (b) The employee will have 28 days to consider the offer and seek legal and financial advice: see paragraph 7.257(c) above.
  - (c) If the employee accepts the offer, the employee's claim is redeemed and closed. The employee will not be entitled to any further compensation in respect of the injury.
  - (d) Any aggravation of the injury, and any consequential injury, would be treated as a new injury, independent of the redeemed claim and unaffected by the redemption.
  - (e) Similarly, if the employee dies as a result of the injury to which the redemption related, a claim by the employee's dependants for compensation under ss 17 and 18 of the SRC Act will not be affected by the redemption.
  - (f) Unlike redemptions under s 30 of the SRC Act, voluntary redemptions will not involve determinations for the purposes of Part VI of the SRC Act; they involve agreements between an employee and a determining authority. They will not be reviewable.

## COMPULSORY REDEMPTION

7.262 I recommend retention of s 30 of the SRC Act, the power of determining authorities to determine that low-level incapacity payments be redeemed, but that the threshold for its operation be increased to \$150 per week, indexed by reference to CPI (as is currently the case).

### RECOMMENDATION 7.18

I recommend that s 30 of the SRC Act be amended so that an employee may redeem her or his compensation payments on a voluntary basis.

### RECOMMENDATION 7.19

I recommend that s 30 be retained, but that the threshold for its operation be increased to \$150 per week, indexed by reference to the CPI.

## COMPENSATION FOR MEDICAL EXPENSES

- 7.263 A determining authority is liable to pay compensation of such amount as it determines is appropriate in respect of medical treatment that was reasonably obtained by an injured employee: s 16(1) of the SRC Act.
- 7.264 Further, a determining authority must pay the costs associated with travel to and from medical treatment, and in respect of any costs incurred by an employee if the employee remains at the place where she or he is receiving medical treatment: s 16(6) of the SRC Act. Before compensation is payable under s 16(6), the reasonable length of the journey must exceed 50 kilometres, unless the journey by the employee involved the use of public transport or ambulance services: s 16(7) of the SRC Act.
- 7.265 There are four questions involved in determining whether compensation for medical expenses is payable pursuant to s 16(1):
- Is the service that was provided “medical treatment”?
  - Was that treatment obtained in relation to an “injury” suffered by an employee?
  - Was that medical treatment reasonable for the employee to obtain in the circumstances?
  - What is the appropriate amount of compensation payable for that medical treatment?
- 7.266 Determining whether medical treatment was obtained in relation to an injury suffered by an employee is relatively straightforward. I have not been made aware of any issues with that concept and, as a result, it is not discussed.

## WHAT IS MEDICAL TREATMENT

- 7.267 Medical treatment is defined in s 4(1) of the SRC Act to include the provision of eight types of treatment and any other form of treatment that is prescribed. Medical treatment means (in part):
- medical or surgical treatment by, or under the supervision of, a legally qualified medical practitioner: paragraph (a) of the definition;
  - dental treatment by, or under the supervision of, a legally qualified dentist: paragraph (c) of the definition;
  - therapeutic treatment by, or under the supervision of, a physiotherapist, osteopath, masseur or chiropractor registered under the law of a State or Territory providing for the registration of physiotherapists, osteopaths, masseurs or chiropractors, as the case may be: paragraph (d) of the definition;
  - treatment and maintenance as a patient at a hospital: paragraph (g) of the definition; or
  - nursing care, and the provision of medicines, medical and surgical supplies and curative apparatus, whether in a hospital or otherwise: paragraph (h) of the definition.
- 7.268 Except for masseurs, the health practitioners that may provide therapeutic treatment without the direction or supervision of an LQMP (paragraph (d) of the definition) must be registered under the law of a State or Territory to practise.

## NATIONAL HEALTH PRACTITIONER REGULATION

- 7.269 In March 2008 the Council of Australian Governments decided to establish a single National Registration and Accreditation Scheme for 10 health professions, to be introduced on 1 July 2010, and to be administered by the AHPRA. Following additions that came into effect on 1 July 2012, the following 14 health professions are now regulated by the AHPRA:<sup>251</sup>
- (a) Aboriginal and Torres Strait Islander health practitioners;
  - (b) Chinese medicine practitioners;
  - (c) chiropractors;
  - (d) dental practitioners (including dentists, dental hygienists, dental prosthetists and dental therapists);
  - (e) medical practitioners;
  - (f) medical radiation practitioners;
  - (g) nurses and midwives;
  - (h) occupational therapists;
  - (i) optometrists;
  - (j) osteopaths;
  - (k) pharmacists;
  - (l) physiotherapists;
  - (m) podiatrists; and
  - (n) psychologists.
- 7.270 The introduction of the National Registration and Accreditation Scheme means that each of the 14 health professions that are regulated by a national board must meet the standards and policies set by the relevant National Board in order to be registered to practise in Australia.
- 7.271 Masseurs are not subject to the National Registration and Accreditation Scheme. That is, masseurs do not have to be registered in order to practise in Australia and do not have a National Board setting standards that must be met by a masseur.
- 7.272 In its submission to the Review, the Australian Psychological Society addresses the issue of medical treatment providers and, in particular, the difference between psychologists (who are subject to registration) and counsellors (who are not):<sup>252</sup>
- ... psychologists and psychological services in particular, need to be included in s.4 of SRC Act alongside medical treatment and therapeutic treatment. Doing so will also tighten up the SRC Act, as, in its current form, the Act exposes Comcare workers to treatment by poorly qualified providers who may exacerbate conditions or do further harm through inadequate treatment. Comcare currently has no legislative power to prevent such treatment as it is “under the referral of a medical practitioner”. Given the large increase in psychological claims, there is a risk of poor outcomes through treatment provision by unaccredited and unregulated “counsellors” ...
- 7.273 The introduction of the National Registration and Accreditation Scheme and the registration and regulation of 14 health professions under that Scheme mean that the SRC Act is out of step with current regulatory practice.
- 7.274 As discussed in paragraphs 7.228–7.231 above, even though there are arguments for restricting access to compensation for employees who are absent from Australia, there will be situations where medical treatment received outside Australia should be compensated; for example, where an employee is outside Australia because of her or his employment.

## RECOMMENDATIONS

- 7.275 Definitions of “legally qualified dentist” and “legally qualified medical practitioner” should be inserted in s 4(1) of the SRC Act, consistent with the registration scheme administered by AHPRA. Those definitions could be expressed as follows:
- Legally qualified dentist** means a practitioner registered with the Dental Board of Australia.
- Legally qualified medical practitioner** means a practitioner registered with the Medical Board of Australia.

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251. Embodied in the *Health Practitioner Regulation National Law Act 2009* (Qld) and complementary legislation in each State and Territory.

252. Australian Psychological Society, Submission to the Review, p 3.

- 7.276 The definition of “medical treatment” in s 4(1) of the SRC Act should also be amended, as follows:
- (a) by removing the words “, or under the supervision of,” in paragraph (a);
  - (b) by removing “masseur” from paragraph (d);
  - (c) by amending paragraph (d) to require that the listed health practitioners be registered under “the National Registration and Accreditation Scheme”;
  - (d) by adding a new paragraph (da) to include therapeutic treatment by a health practitioner recognised and accredited by Comcare; and
  - (e) by adding a new paragraph (db) to include medical, surgical, dental or other therapeutic treatment outside Australia, where Comcare is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare.
- 7.277 Comcare recognition and accreditation of health practitioners, as contemplated by the new paragraph (da), could include, for example, recognition and accreditation of masseurs and of medical treatment providers located outside Australia.
- 7.278 Giving Comcare the discretion to approve health practitioners outside Australia, as contemplated by the new paragraph (db), would ensure that employees who require medical treatment outside Australia because of the requirements of their employment, and employees who are travelling for personal reasons within the 60-day period that will be specified in s 120 of the SRC Act (see paragraph 7.233 above), are not denied compensation for the cost of their medical treatment.
- 7.279 Paragraphs (a) and (d), as amended, and new paragraphs (da) and (db) would read:
- medical treatment** means:
- (a) medical or surgical treatment by a legally qualified medical practitioner; or
  - ...
  - (d) therapeutic treatment by a physiotherapist, osteopath, or chiropractor registered under the National Registration and Accreditation Scheme or by a Comcare recognised and accredited health practitioner; or
  - (da) therapeutic treatment by a health practitioner recognised and accredited by Comcare; or
  - (db) medical, surgical, dental or other therapeutic treatment outside Australia, where the determining authority is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare; or
  - ...
- 7.280 New paragraphs should be inserted in s 69 of the SRC Act to include, as two of the functions of Comcare:
- (a) the recognition, accreditation and monitoring of medical treatment providers who are not subject to AHPRA regulation; and
  - (b) the approval of appropriate medical, surgical, dental or other therapeutic treatment for employees outside Australia.
- 7.281 Accreditation of medical treatment providers would be subject to the providers meeting standards defined in the Clinical Framework for the Delivery of Health Services (the **Clinical Framework**) (discussed in paragraphs 7.309–7.338 below); and the accreditation would be of the relevant professional body, or of a particular qualification, on a national basis rather than of individuals—for example, the national body for masseurs, rather than individual massage therapy providers, would need to negotiate with Comcare for accreditation.

#### RECOMMENDATION 7.20

I recommend that definitions of “legally qualified dentist” and “legally qualified medical practitioner” be inserted in s 4(1).

#### RECOMMENDATION 7.21

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to ensure that medical treatment is provided by legally qualified health practitioners with the relevant registration or by health practitioners who have been recognised and accredited by Comcare.

### RECOMMENDATION 7.22

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to include treatment provided outside Australia where the determining authority is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare.

- 7.282 **Recommendation 7.22** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

### RECOMMENDATION 7.23

I recommend that s 69 of the SRC Act be amended to insert new paragraphs to include, as the functions of Comcare:

- (a) the recognition, accreditation and monitoring of medical treatment providers who are not subject to AHPRA regulation; and
- (b) the approval of appropriate medical, surgical, dental or other therapeutic treatment for employees outside Australia.

## TREATMENT AND MAINTENANCE IN A NURSING HOME

- 7.283 I understand that the relationship between the SRC Act and the *Aged Care Act 1997* has been the subject of discussion within Comcare over several years, as has the distinction apparently drawn in the SRC Act between treatment and maintenance as a patient in a hospital and nursing care in a nursing home. The view has been taken that:
- (a) the cost of treatment and accommodation for an employee in a nursing home is not compensable under the SRC Act, whereas the cost of treatment and maintenance of an employee as a patient at a hospital is compensable; and
  - (b) residential care subsidy under the *Aged Care Act 1997* is not payable in respect of an employee for whom the cost of nursing care in a nursing home (but not the cost of accommodation in that nursing home) is paid under the SRC Act.
- 7.284 Although the SRC Act does not define the terms “hospital” or “nursing home”, the Act does make a distinction between the two in s 22(1)(a); and the explicit limitation in s 4(1) of “medical treatment” (for which compensation is payable under s 16) to “treatment and maintenance as a patient in a hospital” means that compensation payable under the SRC Act currently excludes compensation for the cost of treatment and maintenance in a nursing home. Further, because of the terms of s 9(2A) and (3) of the *Aged Care Act 1997*, residential care subsidy cannot be paid under that Act in respect of an employee accommodated in a nursing home where the cost of nursing care is being paid under the SRC Act, even though that compensation does not cover accommodation costs.
- 7.285 No justification for the discriminatory treatment of hospital patients and nursing home residents under the SRC Act (in a setting where many employees who are resident in a nursing home are likely to be denied residential care subsidy under the *Aged Care Act 1997*) has been suggested to the Review.

## RECOMMENDATIONS

- 7.286 In my view, the discriminatory treatment of hospital patients and nursing home residents under the SRC Act should be removed, by amending the definition of medical treatment to include treatment and maintenance in a nursing home. That can be achieved by inserting a new paragraph (ga) into the definition of medical treatment in s 4(1) as follows:
- (ga) treatment and maintenance as a resident in a nursing home; or

### RECOMMENDATION 7.24

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to include treatment and maintenance as a resident in a nursing home.

## THE PROVISION OF MEDICINES

- 7.287 Paragraph (h) of the definition of “medical treatment” in s 4(1) of the SRC Act includes “the provision of medicines ... whether in a hospital or otherwise”.

- 7.288 Some prescription medicines, particularly Schedule 8 medications,<sup>253</sup> are potentially addictive and therefore subject to misuse and abuse that may result in death or serious damage to health.
- 7.289 In addition, some injured employees visit multiple general practitioners (**GPs**) in order to obtain more prescription medicines than is clinically necessary for the treatment of their condition. That practice is often described as “doctor shopping”.<sup>254</sup>
- 7.290 Other workers compensation legislation in Australia (for example the Victorian Act) requires that prescription medicines must be dispensed by a registered pharmacist on the request of an LQMP or legally qualified dentist.

## RECOMMENDATIONS

- 7.291 In my view, paragraph (h) of the definition of “medical treatment” should be split into two paragraphs, so that “medicines” can be limited to those prescribed by a legally qualified medical practitioner or dentist and dispensed by a registered pharmacist, or provided to a patient at a hospital or nursing home.
- 7.292 Paragraph (h), as amended, would read:

**medical treatment** means:

- (h) nursing care, whether in a hospital or otherwise;
- (ha) the provision of medicines prescribed by a legally qualified medical practitioner or legally qualified medical dentist and dispensed by a registered pharmacist or provided to a patient at a hospital or resident in a nursing home, medical and surgical supplies and curative apparatus;

### RECOMMENDATION 7.25

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended so that “medicines” will be limited to those prescribed by a legally qualified medical practitioner or dentist and dispensed by a registered pharmacist, or provided to a patient at a hospital or resident in a nursing home.

## A NOMINATED LEGALLY QUALIFIED MEDICAL PRACTITIONER

- 7.293 There are currently no limits on the payment of compensation for the prescription of any kind of medication.
- 7.294 One of the medical experts consulted by the Review (who asked for anonymity) submits:
- Prescription medications, specifically drugs of addiction known as Schedule 8, pose a risk to injured workers and compensation schemes as the 3<sup>rd</sup> party payers. There should therefore be maximum controls and protections for both Comcare and the injured workers. As the direct funder to pharmacies of these medications Comcare is exposed to risks, such as doctor shopping, on-selling or abuse and potential fatalities of injured workers. Legislative boundaries around the funding of Schedule 8 drugs and Schedule 4 benzodiazepines would reduce risk to both the injured worker and Comcare.
- 7.295 The *Poisons Standard 2009*<sup>255</sup> prescribes national schedules that require similar regulatory controls over their availability. Schedule 4 medications are prescription-only medicines for which the use, or supply, should be by or on the order of persons permitted by State or Territory legislation to prescribe (that is, a doctor) and should only be available from a pharmacist on prescription. Schedule 8 medications are drugs of addiction. Schedule 8 includes substances that should be available for use but which require restriction on their manufacture, supply, distribution, possession and use in order to reduce abuse, misuse and physical or psychological dependence.
- 7.296 In order to protect against “doctor shopping” and the potential abuse of Schedule 8 medications, determining authorities’ ability to pay for those medications could be limited to medications that have been prescribed for use by the employee by a “nominated legally qualified medical practitioner”.
- 7.297 The “nominated legally qualified medical practitioner” would generally be the employee’s treating legally qualified medical practitioner. The employee would need to nominate a specific legally qualified medical practitioner at the outset of her or his claim using a form prescribed for that purpose by Comcare. The employee would be responsible for communicating the nomination to the doctor nominated.

253. Schedule 8 medications are drugs of addiction as listed in Schedule 8 of the “Standard for the Uniform Scheduling of Drugs and Poisons”, prepared by the Public Health Committee of the National Health and Medical Research Council.

254. For further information, see: <http://www.health.gov.au/internet/main/publishing.nsf/Content/health-archive-mediarel-1998-tw1398.htm>

255. Issued by the National Drugs and Poisons Schedule Committee pursuant to s 52D(2)(b) of the *Therapeutic Goods Act 1989*.

- 7.298 The employee would be able to change the nomination throughout the life of the claim. However, an employee would only be able to have one “nominated legally qualified medical practitioner” at any one time.
- 7.299 I do not envisage that this process will create additional work for the “nominated legally qualified medical practitioner”, because the practitioner is already required to monitor any prescription of Schedule 8 medications. As a result, I do not believe additional payments are required to be made to a “nominated legally qualified medical practitioner”.
- 7.300 In New South Wales, if an injury prevents an employee from undertaking her or his normal job for seven days or more, the employee is required to nominate a treating doctor.<sup>256</sup> The nominated treating doctor is responsible for:<sup>257</sup>
- (a) recommending and organising treatment;
  - (b) completing certificates of capacity;
  - (c) cooperating and communicating with the employee’s employer, insurer and rehabilitation provider about the employee’s health condition, progress and needs;
  - (d) cooperating and communicating with the insurer to develop the employee’s Injury Management Plan; and
  - (e) reviewing the employee’s condition and capacity for work on a regular basis.
- 7.301 I do not recommend the adoption of that broader role for the nominated legally qualified medical practitioner at present. However, I note that it would likely provide for better rehabilitation if the employee’s “nominated legally qualified medical practitioner” was the same practitioner who was involved in the development of the employee’s Injury Management Plan as discussed in paragraphs 6.110–6.130 above. If a broader role were to be identified, I would recommend that any practitioners taking on that broader role be appropriately compensated.

## RECOMMENDATIONS

- 7.302 I recommend the SRC Act be amended to restrict compensation for Schedule 8 medications to those that are prescribed by the employee’s nominated legally qualified medical practitioner.
- 7.303 I recommend the term “nominated legally qualified medical practitioner” be defined in s 4 of the SRC Act as follows:
- nominated legally qualified medical practitioner*** means a legally qualified medical practitioner who has been nominated by an employee using the prescribed form for the purpose of prescribing Schedule 8 medications.
- 7.304 I further recommend that s 16 be amended by inserting a new subsection immediately after subsection (3) as follows:
- 16 (3A) An amount of compensation in respect of Schedule 8 medications will only be payable under subsection (1) if that medication has been prescribed for the employee’s use by the employee’s nominated legally qualified medical practitioner.
- 7.305 To ensure Comcare has the power to prescribe the necessary forms, Division 1 of Part II of the SRC Act should be amended to allow Comcare to prescribe a form in which an employee would nominate a legally qualified medical practitioner for the purpose of prescribing Schedule 8 medications.

### RECOMMENDATION 7.26

I recommend that the SRC Act be amended to restrict compensation for Schedule 8 medications to those that are prescribed by the employee’s nominated legally qualified medical practitioner.

I further recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prescribe a form in which an employee would nominate a legally qualified medical practitioner for the purpose of prescribing Schedule 8 medications.

## NURSING CARE

- 7.306 Nursing care is not defined in the SRC Act. It is referred to in the definitions of attendant care services, and in paragraph (h) of the definition of medical treatment. There is no requirement that “nursing care” be provided by a qualified nurse.

## RECOMMENDATIONS

- 7.307 To ensure the proper use of attendant care services, “nurse” and “nursing care” should be defined in a manner that promotes professional standards.

256. Sections 43(1) and 270 of the 1998 NSW Act.

257. WorkCover NSW, *Doctors and WorkCover—your nominated treating doctor*, p 3. Available at: [http://www.workcover.nsw.gov.au/formspublications/publications/Documents/doctors\\_and\\_workcover\\_nominated\\_treating\\_doctor\\_0543.pdf](http://www.workcover.nsw.gov.au/formspublications/publications/Documents/doctors_and_workcover_nominated_treating_doctor_0543.pdf)

7.308 The following definitions could be inserted into s 4(1) of the SRC Act:

**nurse** means a person registered under the Health Practitioner Regulation National Law to practise in the nursing profession as a nurse (other than as a midwife or as a student); and

**nursing care** means care rendered by a nurse.

#### RECOMMENDATION 7.27

I recommend that “nurse” and “nursing care” be defined.

### WHAT IS REASONABLE MEDICAL TREATMENT: THE CLINICAL FRAMEWORK FOR DELIVERY

7.309 In June 2012, all State and Territory workers compensation schemes and the Comcare scheme endorsed the Clinical Framework.<sup>258</sup> The Clinical Framework is based on a document published in 2005 by WorkSafe Victoria and the Victorian Transport Accident Commission.

7.310 The Clinical Framework is an evidence-based policy framework that outlines a set of five guiding principles for the delivery of allied health services to injured employees. It reflects a contemporary bio-psycho-social approach to the treatment of injured employees, with the primary aim of achieving the best possible outcome for injured employees.

7.311 Those principles also support healthcare professionals in their treatment of an injury through:

- (a) measurement and demonstration of the effectiveness of treatment;
- (b) adoption of a bio-psycho-social approach;
- (c) empowering the injured person to manage their injury;
- (d) implementing goals focused on optimising function, participation and return to work; and
- (e) basing treatment on best available research evidence.

7.312 There is now strong evidence that, over and above individual injury characteristics and compensation system features, there is a considerable variation in health and return to work outcomes that is attributable to the quality and focus of the treatment provided.<sup>259</sup>

7.313 The role of health professionals in the workers compensation process cannot be underestimated. Determinations about compensation payable under the SRC Act must be based on medical evidence. Claims managers in the Comcare scheme rely on health professionals managing the medical and rehabilitative needs of injured employees effectively and appropriately.

7.314 However, health professionals are also subject to other pressures that can impact on the management of an injured employee's claim for compensation.

- (a) For example, in Australia in 2009–10, only 1.6 % of GPs' general practice encounters were –related to their patients' employment.<sup>260</sup>
- (b) In addition to the time constraints generated by the volume of their work, GPs may also feel torn between the desire to “advocate” for their patients and their legal responsibility to provide an objective assessment of their patients' level of work disability, particularly when the patients' conditions lack objective clinical features (for example “back pain” or mild mental health problems<sup>261</sup>).
- (c) The priority of many GPs is likely to be maintaining a good relationship with the GP's patient. As a result, even if the GP is not convinced by the patient's presentation, the GP may acquiesce in the patient's wishes to avoid confrontation or damaging rapport.<sup>262</sup>

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258. Available at: <http://www.tac.vic.gov.au/upload/clinical-framework-single.pdf>

259. P Cotton, *The Impact of the Psychosocial Quality of Work on Wellbeing and Performance*, Queensland Alliance of Mental Health Inc, 7 June 2012, p 7. Available at: <http://www.alteringstates.com.au/wp/wp-content/uploads/2012/07/Dr-Peter-Cotton.pdf>

260. RACGP, *The RACGP Curriculum for Australian General Practice 2011, Occupational Medicine*, p 334. Available at: <http://curriculum.racgp.org.au/media/12332/occupationalmedicine.pdf>

261. DA Dunstan, “Are sickness certificates doing our patients harm?”, 38 *Australian Family Physician* 1–2 (January–February 2009) p 62. Available at: <http://www.racgp.org.au/afp/200901/200901dunstan.pdf>

262. DA Dunstan, “Are sickness certificates doing our patients harm?” 38 *Australian Family Physician* 1–2 (January–February 2009) p 61.

- 7.315 Section 16(1) of the SRC Act is simply stated: a determining authority is liable to pay compensation in respect of medical treatment that was reasonable for an injured employee to obtain. There have been many cases over the years that have considered what is “reasonable” medical treatment. In each case, what is “reasonable” has been determined by reference to the employee’s individual circumstances.<sup>263</sup>
- 7.316 While there are some general guiding principles that can be, and largely are, applied to the consideration of reasonableness, it continues to be an area that generates disputes, which can last for years and may impede the employee’s recovery.
- 7.317 The SRC Act is characterised as “beneficial” legislation; as such, where legislative ambiguities arise, the legislation is interpreted in a way that benefits employees. The SRC Act does not define “reasonable” and any consideration of what is “reasonable” must be undertaken against the assumption that the legislation is beneficial.
- 7.318 For example, in *Re Monk and Comcare* [1996] AATA 280, the AAT found that the provision of a new motor vehicle, which had been modified to allow Ms Monk to drive her electric wheelchair on and off, was reasonable in the circumstances because:
- (a) Ms Monk was financially unable to acquire the vehicle;
  - (b) provision of the vehicle would be beneficial to Ms Monk’s mental health;
  - (c) provision of transport for the wheelchair was recommended by Ms Monk’s rehabilitation provider; and
  - (d) Ms Monk was not mobile without the wheelchair.
- 7.319 In *Re Mikic and Comcare* [2002] AATA 125, the AAT approved the continuation of massage therapy as part of a broader treatment plan, despite the fact that there was no curative effect associated with the massage therapy, which had cost \$29,000 over an eight-year period.
- 7.320 In *Re Holt and Comcare* [2006] AATA 1059, the AAT found that it was reasonable for Mr Holt (who had “generalised anxiety disorder and adjustment reaction with brief depressive reaction”) to attend a Buddhist meditation retreat in another city because he identified as a Buddhist.
- 7.321 Although the SRC Act is beneficial, Comcare also has a responsibility, not only as a Commonwealth authority, but also as the administrator of the Comcare scheme and as a determining authority, to protect the health and wellbeing of injured employees receiving compensation and to ensure the appropriate usage of Commonwealth funds.
- 7.322 Comcare has a responsibility as regulator of the Comcare scheme to ensure, where possible, that health practitioners are held accountable for their conduct, and that they do not exploit what is, in effect, a publicly-funded scheme by overcharging, over-servicing or providing services that do not meet basic professional standards.
- 7.323 With the exception of arranging for an injured employee to attend a medical examination under s 57 of the SRC Act, a determining authority has no involvement in, or control over, an injured employee’s choice of medical or therapeutic practitioner or treatment—even in situations where health professionals do not, or refuse to, comply with treatment guidelines or are otherwise not appropriately qualified to provide such services.
- 7.324 Services provided by unregistered health practitioners and over-servicing, by both registered and unregistered health practitioners, can put injured employees at risk. Each Australian workers compensation scheme manages that risk in different ways.
- (a) For example, WorkSafe Victoria relies on the Medicare Australia provider numbers and registration details for medical practitioners. Medical practitioners providing services in the Victorian scheme must be registered with Medicare Australia in order to be paid.<sup>264</sup>
  - (b) In Tasmania, medical practitioners who wish to sign workers compensation medical certificates must be accredited by the WorkCover Tasmania Board.<sup>265</sup>
- 7.325 Registration standards, such as those in Victoria and Tasmania, provide an extra layer of protection that is currently lacking in the Comcare scheme. The SRC Act cannot deal effectively with issues relating to service providers who, although they are not obviously fraudulent, are providing inappropriate services (for example, services provided by an unregistered health practitioner).

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263. See, for example: *Re Jorgensen and Commonwealth* [1990] AATA 129; (1990) 11 AAR 543; 23 ALD 321; *Re Monk and Comcare* [1996] AATA 280; (1996) 43 ALD 677; 24 AAR 97; *Re Sinclair and Comcare* [1997] AATA 807; *Re Mikic and Comcare* [2002] AATA 125; (2002) 67 ALD 144; *Re O’Shaughnessy and Department of Defence* [1998] AATA 950; *Re Scott and Comcare* [2004] AATA 318; and *Re Holt and Comcare* [2006] AATA 1059.

264. WorkSafe Victoria, *Policy for Medical Practitioners*, November 2011. Available at: <http://www.worksafe.vic.gov.au/forms-and-publications/forms-and-publications/medical-practitioner-policy>

265. Available at: [http://www.workcover.tas.gov.au/health\\_providers/medical\\_providers/how\\_to\\_become\\_accredited/becoming\\_an\\_accredited\\_medical\\_provider](http://www.workcover.tas.gov.au/health_providers/medical_providers/how_to_become_accredited/becoming_an_accredited_medical_provider)

- 7.326 The Clinical Framework reflects the most contemporary approach to treatment and incorporates recent developments in evidence-based practice and the use of objective outcome measures in clinical practice. It represents an opportunity for Comcare to implement a framework that:
- (a) encourages best practice from treatment providers;
  - (b) outlines Comcare's expectations of treatment providers and employees; and
  - (c) ensures employees are receiving optimal treatment for their compensable injuries.
- 7.327 Under the Clinical Framework, "reasonable" medical treatment is medical treatment that achieves the best possible health outcome for injured employees.
- 7.328 The importance of the bio-psycho-social approach has been highlighted by the Australian Psychological Society, which submits:<sup>266</sup>
- ... the APS would like to stress the notion that physical and mental health are inseparable and seriously integrated aspects of overall health. For any physical injury that occurs, there are inevitable and important-to-acknowledge psychological consequences or associated features. Likewise, any psychological injury is undoubtedly associated with physical health impacts and consequences. The recognition of the unavoidable interrelationship of physical and psychological aspects of health underlies much of the APS's membership work in the community, with its work with government policy development and particularly with injury compensation schemes.
- 7.329 Paragraphs (b) and (d) of the definition of medical treatment refer to therapeutic treatment obtained at the direction of an LQMP and, as noted at paragraph 7.267 above, therapeutic treatment by or under the supervision of legally qualified dental practitioners, physiotherapists, osteopaths, masseurs and chiropractors.
- 7.330 Therapeutic treatment is defined as including an examination, test or analysis done for the purpose of diagnosing, or treatment given for the purpose of alleviating, an injury: s 4(1) of the SRC Act.
- 7.331 The meaning of therapeutic treatment was considered by the Federal Court in *Comcare v Watson* [1997] FCA 149; (1997) 73 FCR 273, where Finn J said:<sup>267</sup>
- The applicant has submitted that a treatment can only be "therapeutic" if its object is to cure a disease or injury. Though some dictionary definitions do emphasise the "healing or curative" connotation of the words "therapy" and "therapeutic": see for example, Shorter Oxford English Dictionary (3rd ed); the latter's use in this context encompasses the alleviation of the pain of an injury. This view is consistent with the s 4 definition of "therapeutic treatment" which included "treatment given for the purpose of *alleviating* an injury" (emphasis added). The Shorter Oxford English Dictionary, for example, defines "alleviation" as "the action of lightening ... pain". That usage is an appropriate one to apply here given the s 4 definition itself. And it permits a construction which accords with the beneficial purposes of the legislation ...
- The only additional comments I would make on this are, first, that therapeutic treatment in this setting is a purposive activity – that is, its purpose or object must be the treatment of the particular injury in question. If such is not the actual, specified purpose of the activity then notwithstanding its beneficial effects, it will not relevantly be therapeutic treatment for present purposes. Secondly, because such treatment is purposive, an indicator that a doctor-prescribed activity is intended, relevantly, to be therapeutic will commonly be the adoption of some level of monitoring to gauge whether it is appropriately adapted to its purpose or is effective in some degree in realising that purpose.
- 7.332 In *Bashar v Comcare* [2002] FCA 837; (2002) 69 ALD 784 at [9], Madgwick J cited those paragraphs from *Comcare v Watson* with approval, and said:
- ... the notion of therapeutic treatment includes merely palliative treatment, what his Honour referred to as, "the alleviation of the pain of an injury". It may or may not be relevant to the case but, in the context of a statute such as this, the notion of "therapeutic" might well also include a further extension, namely, treatment for prophylactic or preventative purposes, that is to say, to prevent pain, or other effect of an injury from becoming worse or from appearing.
- 7.333 The use of the word "therapeutic" is ambiguous and therefore open to interpretation. That interpretation can result in a wide range of services and treatments being found reasonable, even though they may not be evidence based or considered best clinical practice. If a treatment is found to be reasonable, a determining authority is liable to compensate the employee for the cost of the treatment.

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266. Australian Psychological Society, Submission to the Review, p 5.

267. [1997] FCA 149; (1997) 73 FCR 273 at 276D–277A.

7.334 Paragraphs (a), (c) and (d) of the definition of “medical treatment” refer to treatment “under the supervision of” LQMPs, legally qualified dentists or physiotherapists, osteopaths, masseurs and chiropractors; and paragraph (b) of the definition refers to treatment “obtained at the direction of” LQMPs. In *Comcare v Watson*, Finn J noted:<sup>268</sup>

For my own part I would be prepared to adopt the “advised, prescribed or ordered” terminology of Hill J<sup>269</sup> as representing the proper meaning to be given to the “at the direction of” formula in the s 4 definition – these terms having relatively well understood and not greatly dissimilar connotations in the context of doctor-patient communications as to the undertaking of treatment for an injury. In consequence I reject not only the Tribunal’s apparent construction of the formula as meaning “guidance” – I also reject the applicant’s submission that direction requires monitoring, control or management by a doctor.

7.335 The phrase “under the supervision of”, in paragraphs (a), (c) and (d) of the s 4(1) definition of “medical treatment”, allows for compensation to be paid in respect of the cost of treatment given by any person, regardless of qualifications, so long as the treatment is under the supervision of an LQMP (or legally qualified dentist, physiotherapist, osteopath, masseur or chiropractor). Similarly, the phrase “obtained at the direction of”, in paragraph (b) of the definition, allows for compensation to be paid in respect of the cost of treatment given by any person, regardless of qualifications, so long as the treatment is obtained at the direction of an LQMP. In addition, there is no requirement for LQMPs to ensure the qualifications or expertise of service providers to whom they refer an employee. In some circumstances, the LQMP or other health provider may simply provide a referral for a type of treatment and leave the choice of provider up to the employee seeking the treatment.

7.336 Principle one of the Clinical Framework is underpinned by four key messages:<sup>270</sup>

1. Treatment should result in a measureable benefit to the injured person.
2. Relevant aspects of the person’s health status that are expected to change with treatment should be measured (such as pain, depression, activities of daily living, health-related quality of life and work performance).
3. When available, outcome measures that are reliable, valid and sensitive to change should be used.
4. Outcome measures must be related to the functional goals of therapy, relevant to the person’s injury, and address the components of the World Health Organisation International Classification of Functioning, Disability and health.

7.337 Measurement of treatment effectiveness has a number of benefits to the employee and the determining authority:

- (a) the employee is provided with information about her or his health status (improving, worsening, not changing) and is empowered to track and monitor her or his own progress and manage her or his own injury; and
- (b) the determining authority is provided with information and justification to support determinations to continue, change or cease payment of compensation in respect of the cost of particular forms of treatment.

7.338 The definition of “therapeutic treatment” (see paragraphs 7.330–7.331 above) and the phrases “under the supervision of” and “at the direction of” in the definition of “medical treatment” (see paragraphs 7.334–7.335 above) have the potential to frustrate the principles endorsed by the Clinical Framework.

## SUBMISSIONS RECEIVED

7.339 The need for the effectiveness of medical treatment to be measureable and subject to the Clinical Framework has been addressed in several submissions provided to the Review.

7.340 The Australian Psychological Society comments:<sup>271</sup>

The definition of therapeutic treatment (s 4) should be updated to ensure it is producing an outcome for workers. This will require a new clinical framework to be implemented addressing the issue of long term “maintenance” treatment within the scheme and also provide a nexus with “mental injury” (s 5A). The new framework will require an active partnership between the scheme, its providers and employers. The scheme should have access to a panel of expert clinicians reflective of its new bio-psycho-social focus, backed up with new guidelines on evidence-based clinical assessment and interventions. These expert clinicians have the responsibility to educate providers and employers on the new treatment framework and powers to direct providers to resubmit their treatment plans that do not comply. Employers on the other hand will be supported by expert clinicians who can assist them with early

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268. [1997] FCA 149; (1997) 73 FCR 273 at 276B-C.

269. In *Thiele v The Commonwealth* [1990] FCA 123; (1990) 22 FCR 342 at 348.

270. The Clinical Framework, p 3.

271. Australian Psychological Society, Submission to the Review, pp 3–4.

identification and intervention of claims (as well as prevention programs). Providers will be accessed in an appropriate and timely manner based on their training and qualifications and willingness to provide goal-oriented and evidence-based interventions...

7.341 Comcare submits that revising the definition of “medical treatment” so that the effectiveness of the treatment could be measured:<sup>272</sup>

... would allow injured employees, their medical providers and determining authorities to assess whether the treatment is improving, worsening or not changing the effects of the compensable injury. This informs and justifies medical treatment decisions and prevents the development of dependence on ineffective treatment which may worsen the health outcomes of injured employees. Measurement of outcomes to determine clinical effectiveness is considered best practice. Measures should be related to the functional goals of treatment and relevant to the [injured worker’s] injury.

7.342 Comcare further submits that the definition of therapeutic treatment should be amended to:<sup>273</sup>

... require the ability to produce a demonstrable clinical outcome or ensure treatment is provided in line with the Clinical Framework.

7.343 One of the medical experts consulted by the Review (who asked for anonymity) submits:

Evidence indicates that compensation patients have a worse clinical outcome when matched for injury.

Although not fully understood why, research indicates that a closer monitoring approach of treatment delivery by providers is required to drive best treatment outcomes in the compensation population.

One factor that is understood in the compensation patient cohort, is the unique 3 way value transaction.

The compensation client receives treatment and services, but makes no financial outlay and has reduced outcome leverage in the service provision. This results in a low financial risk for the patient and potentially reduces the tension over the cost benefit or cost effectiveness of treatment. The consequence is reduced accountability in the client - provider relationship for measurable health improvement and outcomes.

In compensation, the insurer as the 3rd party payer, therefore takes on a greater accountability for outcomes by the provider as it manages the financial transaction. Contemporary compensation legislation needs to take into account the financial risks of treatments and subsequent impact on scheme viability. Clinical justification principals [sic] [in the Clinical Framework] ensure treatment is reasonable, transparent and cost effective, as well as highlight the need for the provider to deliver value (or a functional outcome, such as return to work) to the injured worker.

In addition, research also indicates that when treatment is provided by experts in compensation care and in an environment of high accountability of clinical justification principals [sic], then broad health outcomes for compensation patients are vastly improved.

In the SRC Act, the term “therapeutic treatment” is not a clinically defined term and is inconsistent with best practice. Exemplary design of treatment definitions would include reference to clinical justification, outcome measurement and goal oriented treatment.

## RECOMMENDATIONS

7.344 As previously noted,<sup>274</sup> early recovery from injury provides a range of benefits for both employees and their employers. Early medical intervention in treating an injury or a disease is critical in ensuring an early and durable return to work. The adoption of the Clinical Framework, and the requirement for medical treatment to have a measurable benefit so that employees can track and monitor their own progress, would facilitate better return to work outcomes.

7.345 For that reason, the SRC Act should be amended so that, in order to be compensable, medical treatment must meet objective standards such as those in the Clinical Framework.

7.346 There are several ways in which that could be achieved—for example, by:

- (a) replacing the reference in s 16(1) of the SRC Act to “treatment that it was reasonable for the employee to obtain in the circumstances” with a reference to “treatment that is clinically justified and provides a measurable benefit to the employee”; or

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272. Comcare, Submission to the Review, p 33.

273. Comcare, Submission to the Review, p 34.

274. In paragraphs 6.2–6.3 above.

- (b) amending s 16 of the SRC Act to include a requirement that, for compensation to be payable in respect of the cost of medical treatment, the treatment must meet the principles of the Clinical Framework adopted by Comcare; or
- (c) inserting new subsections into s 16 in the SRC Act, as follows:
  - (1A) Comcare may prepare and issue Clinical Framework Guidelines relating to the management of an employee's injury.
  - (2A) In determining whether it was reasonable for an employee to obtain particular medical treatment, a determining authority shall have regard to the Clinical Framework Guidelines prepared and issued under subsection (1A).

- 7.347 Inserting new subsections into s 16 of the SRC Act, as proposed in paragraph 7.346(c) above, would provide a simple and effective means of enhancing the quality and efficacy of medical treatment, including therapeutic treatment. If that change is made, along with the change recommended in paragraph 7.276 above, the weaknesses in the current definition of "medical treatment" (discussed in paragraphs 7.329–7.338 above) should be resolved.
- 7.348 Where medical treatment is provided outside the Clinical Framework, or where there are concerns about the adequacy, appropriateness or frequency of medical treatment, a determining authority should have the capacity to refer the practitioners involved to the relevant professional regulatory body. That would include referral of the LQMP in circumstances where the LQMP has recommended treatment.

#### **RECOMMENDATION 7.28**

I recommend that the SRC Act be amended so that, in order to be compensable, medical treatment must meet objective standards such as those in the Clinical Framework.

#### **RECOMMENDATION 7.29**

I recommend that the SRC Act be amended to provide for the referral of practitioners to the appropriate professional regulatory bodies where treatment is provided outside the Clinical Framework, or where there are concerns about the adequacy, appropriateness or frequency of treatment—including where an LQMP has recommended the treatment.

### **THE APPROPRIATE LEVEL OF COMPENSATION FOR THE COST OF MEDICAL TREATMENT**

- 7.349 As noted in paragraph 7.265 above, the final step in deciding what compensation is payable is determining what amount is appropriate in respect of the cost of medical treatment that it was reasonable for an injured employee to obtain: s 16(1) of the SRC Act.
- 7.350 Compensation for medical treatment is payable to either the employee, the employee's legal personal representative or the person to whom the cost of treatment is payable: s 16(4).
- 7.351 Although s 16(1) makes the determining authority liable to pay "compensation of such amount as [the determining authority] determines is appropriate to that medical treatment", there is no provision in the SRC Act for Comcare as the regulator to prescribe appropriate medical service fees that would be binding on all decision-makers under the SRC Act. Section 16(1) proceeds on the basis that the determination of the appropriate amount to pay for medical treatment is made on a case-by-case basis. Any determination made by a determining authority as to the appropriate amount to pay for the treatment of a particular employee could also be varied on review by the AAT at the request of the employee.
- 7.352 When determining what constitutes an "appropriate" amount for medical treatment, Comcare (as a determining authority) refers to its medical service rates,<sup>275</sup> which lay down payment limits for various forms of medical treatment. The rates are a non-binding internal guideline. Where possible, those rates are based on the schedule of fees recommended by health professional organisations such as the Australian Medical Association (the **AMA**) and the Australian Psychological Society.
- 7.353 Where fees are disputed, Comcare (as a determining authority) will also have regard to schedules of fees established by other workers compensation schemes in the relevant State or Territory.

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275. Available at: [http://www.comcare.gov.au/claims/benefits\\_\\_and\\_\\_entitlements/medical\\_expenses/medical\\_service\\_rates](http://www.comcare.gov.au/claims/benefits__and__entitlements/medical_expenses/medical_service_rates)

7.354 In *Re Sinclair and Comcare* [2002] AATA 23; (2002) 67 ALD 247, the AAT set aside Comcare's decision to compensate Ms Sinclair for \$36.40 of the \$50.00 that she had paid for physiotherapy sessions, and directed that Ms Sinclair be compensated for the full \$50 per session. Comcare had determined the appropriate amount was that payable pursuant to the Queensland compensation scheme's schedule of fees. The AAT considered the average cost of physiotherapy treatments, and said, at [17]:

When deciding what amount is appropriate to particular medical treatment rendered, it is conceivable that reference must be made to the actual costs incurred. That is not to say that the issue of cost is open-ended. Clearly, if the majority of service providers charged between \$45-\$55 per session, and the costs incurred by the applicant for treatment from her practitioner of choice was vastly in excess of that amount, then it would be open to Comcare to determine that the amount was so disparate from the usual cost of providing such services, that it is not "appropriate to that medical treatment" and determine that a lesser amount be paid.

7.355 As noted in paragraph 7.352 above, the medical service rates used by Comcare are not enforced for use across the Comcare scheme, but are an internal guideline applied by Comcare as a determining authority. Accordingly, licensees can set their own medical service rates, which are not necessarily the same as those that Comcare uses. That variation might be thought to create inequitable outcomes for claims made under the one scheme; but that is not a sufficient reason to compel licensees to pay no more than Comcare pays by way of compensation for medical treatment.

7.356 Generally speaking, the approach taken by the AAT in *Sinclair*, that the amount of reimbursement should be based on the actual expense reasonably incurred by the employee (see paragraph 7.354 above), is understandable—that is, an employee should not have to subsidise costs for medical treatment reasonably obtained in relation to a compensable injury. However, that approach does not take into account the overall cost to the Comcare scheme.

7.357 In 2010–11, medical and rehabilitation costs represented 22.7 % of the total cost of claims liabilities under the Comcare scheme. That figure has been steadily increasing by at least 8 % each year for the past three years.<sup>276</sup>

7.358 On an individual basis, it may not be unreasonable for a determining authority to pay an "appropriate" fee that is (say) \$1, or even \$10, more per service than Comcare's schedule of fees allows. However, as at 30 June 2012, Comcare had 12,308 active claims,<sup>277</sup> in most of which the employee was receiving medical treatment. Individual exceptions to medical service rates are not uncommon and therefore must be viewed in terms of their overall cost to the scheme. Every time an exception is made to pay treatment costs that are higher than Comcare's set fees, the result is an overall increase in scheme costs.

7.359 Another issue with Comcare, or any other determining authority, making exceptions to its set fees for an individual is that, unless an injured employee challenges the determining authority's decision to pay only the set fee, the employee is less likely to be granted a payment exception. That can create inequitable outcomes.

7.360 Where an employee challenges a decision by a determining authority to pay less than the fee charged by a medical service provider, the cost incurred by the determining authority in defending its decision will almost always far exceed the amount in dispute. That is, the costs of a system that leaves the level of fees open to dispute are likely to outweigh the benefits of that system.

## SUBMISSIONS RECEIVED

7.361 The Australian Psychological Society suggests that Comcare should be given the power to gazette fees for health services, so as to allow "certainty for providers and workers as to what amounts will be paid".<sup>278</sup>

7.362 Mr John Vogt suggests that:<sup>279</sup>

Payment processes could be better processed via Medicare and be reimbursed by Comcare. This might address at a federal level, the issue of compensation being billed at different (higher rates). In the compensation environment, delaying payments to medical and para medical practitioners is typical and adds an unnecessary burden and delay in the rehabilitation process.

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276. See *Comcare–SRCC Annual Report 2011–12*, p 71; *Comcare–SRCC Annual Report 2010–11*, p 30; *Comcare–SRCC Annual Report 2009–10*, p 19. Available at: [http://www.srcc.gov.au/publications/srcc\\_annual\\_reports](http://www.srcc.gov.au/publications/srcc_annual_reports)

277. As provided by Comcare. Note: this figure is based on claims that received some kind of payment in the three months prior to 30 June 2012. There may be a small number of claims that remain active but which were dormant during this three-month period

278. Australian Psychological Society, Submission to the Review, p 4.

279. Mr John Vogt, Submission to the Review, p 12.

## RECOMMENDATIONS

- 7.363 The Comcare scheme covers a relatively small number of employers and employees (compared to State and Territory schemes), with a large geographic span. As a result, there are limitations that reduce the practicality of implementing a wide-ranging accreditation framework.
- 7.364 In order to restrain expenditure, and to avoid both inconsistencies in the amount of compensation paid for medical expenses and disputes about the amount of compensation paid, it would be preferable for the SRC Act to authorise Comcare to prepare and issue a table of rates of payment for the cost of specific types of medical treatment, in a form that would not be reviewable by the AAT.
- 7.365 To achieve those objectives, a new subsection (1A) could be inserted in s 16, authorising Comcare to prepare and issue, as a legislative instrument, a table of medical service rates that are to apply throughout the Comcare scheme. The “appropriate” amount of compensation for medical treatment, which determining authorities would be liable to pay by s 16(1) of the SRC Act, would be linked to those rates.
- 7.366 In order to ensure that the rates do not result in reduced access to treatment, Comcare should consider relying on existing scales of payment in the relevant State and Territory workers compensation schemes.
- 7.367 It would also be sensible for any scale of fees issued by Comcare to permit a higher fee to be paid where, for example because of the isolated location at which medical treatment is to be provided, some additional cost will be incurred.
- 7.368 Because the scale of fees would define the quantum of the liability imposed on determining authorities by s 16(1) of the SRC Act, the scale would not prevent a licensee from paying a higher rate for a particular medical treatment service if the licensee chose to do so; although Comcare, as a Commonwealth authority that is involved in spending public funds, would be constrained from making any higher payment.

### RECOMMENDATION 7.30

I recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prepare and issue, as a legislative instrument, a table of medical service rates that are to apply throughout the Comcare scheme as the rates at which determining authorities are liable to pay compensation under s 16(1) of the SRC Act. The “appropriate” amount of compensation for medical treatment would be linked to those rates.

- 7.369 **Recommendation 7.30** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

## COMPENSATION FOR COSTS ASSOCIATED WITH TRAVEL TO AND FROM MEDICAL TREATMENT

- 7.370 As noted in paragraph 7.264 above, an injured worker is entitled to be compensated for expenditure reasonably incurred in making a necessary journey for the purpose of obtaining medical treatment: s 16(6) of the SRC Act.
- 7.371 Assuming the distance travelled was “necessary” and “reasonable”,<sup>280</sup> compensation is only payable if each journey<sup>281</sup> exceeds 50 kilometres. An employee who travelled 46.4 kilometres in a round trip<sup>282</sup> is not eligible for any compensation. However, an employee who travelled further than 50 kilometres is entitled to compensation for the travel, calculated by the formula prescribed in s 16(6)(c), which provides:
- [A determining authority] is liable to pay compensation to the employee:
- (c) in respect of the journey – of an amount worked out using the formula:
- Specified rate per kilometre x Number of kilometres travelled ...
- 7.372 An employee who travels 51 kilometres will be compensated for 51 kilometres of travel. However, an employee who travels 49 kilometres will not be compensated at all, even though the expense of the travel will be very close to the expense of travelling 51 kilometres.

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280. See, for example, *Re Corfield and Australian Postal Corporation* [2000] AATA 533; and *Re Elmazny and Australian Postal Corporation* [1995] AATA 321.

281. See *Re Allen and Comcare* [2001] AATA 379 at [5]. Ms Allen made six 30-kilometre round-trip visits to her treating doctor, none of which was found to be compensable because each journey must be 50 kilometres.

282. As was the case in *Re West and Comcare* [2004] AATA 364.

7.373 The Australian Council of Trade Unions submits that:<sup>283</sup>

... if an injured worker requires necessary treatment for their compensable injury that requires the injured worker to travel then all travel costs should be reimbursed.

## RECOMMENDATIONS

7.374 I am not persuaded that all travel should be compensated. Before any consideration is given to such a proposal, it would need to be properly costed. Nor am I persuaded that any change to s 16(7)(a) of the SRC Act would avoid the types of anomalies that can arise under the current provisions (as explained in paragraph 7.371 above).

7.375 In order to avoid those anomalies and the resulting inequity between different employees, a discretion to pay compensation for travel might be considered. However, a discretion would inevitably lead to disputes about its extent and application. Although the cost of travel up to 50 kilometres by private vehicle may be appreciable, it is not sufficient to warrant the costs that would be involved in disputing its payment.

7.376 Any arbitrary rule (such as that found in s 16(7)(a) of the SRC Act) will lead to a situation where some individuals fall short of the line, wherever that line might be. Changing the distance at which employees qualify for compensation for travel would lead to the same type of situation, unless that distance was zero. However, Parliament clearly intended that not all travel by private transport to medical treatment would be compensable.

7.377 The 50-kilometre qualifying distance only applies to employees who travel by private transport. Employees who need to use public transport or travel by ambulance because of their injuries qualify to have the cost of the entire journey compensated: s 16(7)(b) of the SRC Act.

7.378 Therefore, I do not recommend any change to ss 16(6) or (7) of the SRC Act.

## THE CALCULATION AND METHOD OF COMPENSATION FOR PART XI CLAIMS

7.379 Eligibility for medical treatment expenses for defence-related claims managed by the MRCC under Part XI of the SRC Act is assessed in the same way as any other claim under the SRC Act. In 2009, the MRC Act Review received a number of submissions relating to healthcare provisions under the SRC Act, including proposals to issue Repatriation Health Cards (for specific conditions) to ADF claimants under the SRC Act.

7.380 Introducing Repatriation Health Cards for claimants managed by the MRCC under Part XI would bring the treatment of those claimants in line with provisions under the VE Act and the MRC Act.

7.381 The advantages of introducing Repatriation Health Cards for ADF claimants under the SRC Act include:<sup>284</sup>

- (a) the convenience for claimants of not having to pay at the time of treatment, then claim and wait for reimbursement;
- (b) consistency in provisions across the VE Act, SRC Act and MRC Act for ADF personnel; and
- (c) administration and departmental savings.

7.382 However, the disadvantages are that many amounts payable under the DVA fee schedule are significantly lower than the amounts that are paid under the SRC Act, such as standard GP consultations and most specialist consultations.

7.383 Recommendation 24.1 of the MRC Act Review was as follows:

24.1 Repatriation Health Cards – For Specific Conditions (White Cards) for specific conditions be issued to Part XI defence-related claimants under the SRC [Act] to achieve consistency in treatment arrangements for all former ADF members. Cards should be provided subject to a needs assessment showing long-term treatment needs, and the current reimbursement arrangements for the treatment of short-term conditions should be retained ...

7.384 The Government responded to Recommendation 24.1 as follows:

The Government accepts this recommendation. Implementation of this recommendation will result in a consistent method of access for medical treatment for all former members of the ADF whose conditions accepted under the VE [Act], SRC [Act] and MRC [Act] are chronic and there is evidence of long-term treatment needs. Issuing a Repatriation Health Card – For Specific Conditions (White Card) to SRC [Act] clients will simplify access to treatment for them and simplify administration for providers, particularly for those former members with conditions accepted

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283. Australian Council of Trade Unions, Submission to the Review, p 6. (Emphasis in original).

284. Department of Veterans' Affairs, MRC Act Review, Volume 2, p 333. Available at: [http://www.dva.gov.au/pensions\\_and\\_compensation/Military%20Compensation%20Review/report/Pages/default.aspx](http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx)

under more than one Act. This recommendation will require consultation with the medical and allied health provider communities, and IT systems changes within DVA. The planned implementation date for this initiative is 10 December 2013, subject to legislation being passed.

7.385 Recommendation 24.2 of the MRC Act Review was as follows:

24.2 the Department of Veterans' Affairs (DVA) fee schedule be adopted for treatment provided to defence-related claimants under Part XI of the SRC Act ...

7.386 The Government responded to Recommendation 24.2 as follows:

The Government accepts this recommendation, which flows from Recommendation 24.1. This recommendation will result in a common fee for treatment of conditions irrespective of the Act that the treatment is provided under. The planned implementation date for this initiative is 10 December 2013, subject to legislation being passed.

## RECOMMENDATIONS

7.387 Because provision of Repatriation Health Cards for ADF claimants under the SRC Act, and alignment of these claims to the DVA fee schedule, are Government initiatives which are due for implementation in December 2013, I do not recommend any specific changes in that regard.

7.388 However, any changes that are made to compensation for medical expenses under the SRC Act should bear in mind the proposal to provide Repatriation Health Cards to ADF claimants under the SRC Act, so that those changes complement the implementation of Recommendations 24.1 and 24.2 of the MRC Act Review.

### RECOMMENDATION 7.31

I recommend that any changes that are made to compensation for medical expenses under the SRC Act bear in mind the proposal to provide Repatriation Health Cards to ADF claimants under the SRC Act, so that those changes complement the implementation of Recommendations 24.1 and 24.2 of the MRC Act Review.

## COMPENSATION FOR SERVICES PROVIDED IN THE HOME

7.389 Compensation for household and attendant care services is dealt with in s 29 of the SRC Act. There are different considerations for determining whether compensation is payable for either household services or attendant care services. However, the amount of compensation payable for both household and attendant care services is the same and, other than determining whether services are reasonably required:

- (a) there is no management or regulation of the provision of those services;
- (b) there is no distinction between services required by severely or catastrophically injured employees; and
- (c) there is no limit on the duration for which compensation for household or attendant care services is payable.

7.390 In this section:

- (a) I discuss the services that are currently compensated: paragraphs 7.391–7.399 below;
- (b) I then propose a three-tier system of services for the severely injured: paragraphs 7.400–7.427 below;
- (c) I consider the amount of compensation that should be payable for household, attendant care and ongoing services: paragraphs 7.428–7.443 below;
- (d) then I consider the assessment of the need for services: paragraphs 7.445–7.460 below; and
- (e) finally, I consider who should provide those services: paragraphs 7.461–7.476 below.

## SERVICES CURRENTLY COMPENSATED

### HOUSEHOLD SERVICES

7.391 Household services are defined to mean, in relation to an employee, services of a domestic nature (including cooking, house cleaning, laundry and gardening services) that are required for the proper running and maintenance of the employee's household: s 4(1) of the SRC Act.

- 7.392 Compensation for household services is payable if an employee reasonably requires the assistance as a result of her or his compensable condition. However, compensation for household services is not payable for the first 28 days after an employee's injury unless the determining authority determines otherwise on the ground of financial hardship or the need to supervise dependent children: s 29(5) of the SRC Act.
- 7.393 For household services, a determining authority is liable to pay an amount that is reasonable in the circumstances, which is not less than 50 % of the amount per week paid or payable by the employee for those services, and not more than the indexed statutory amount (currently \$421.50): s 29(1) of the SRC Act.
- 7.394 The matters that a determining authority may take into account when determining liability for household services include:
- (a) a comparison between the extent to which an employee provided household services before the date of injury and the extent to which the employee is able to provide household services after the date of injury: s 29(2)(a);
  - (b) how many household members there are, the ages of those members and their need for household services: s 29(2)(b);
  - (c) the household services that were provided by household members before the employee was injured: s 29(2)(c);
  - (d) how reasonable it is for household members to provide household services for themselves and the employee following the employee's injury: s 29(2)(d); and
  - (e) the need to avoid substantial disruption to employment, or other activities, of household members when considering whether they are able to provide household assistance following the employee's injury: s 29(2)(e).
- 7.395 In *Lander v Comcare* [2000] FCA 339; (2000) 102 FCR 11, the Federal Court considered the extent to which members of an employee's family might reasonably be expected to provide household services for themselves and the employee, in particular whether s 29(2)(d) of the SRC Act extended to take into account services those family members could pay for as opposed to perform personally. Finn J said, at [10], that:
- ... what is clear both from the text of s 29(2)(d) considered in its context and the statutory purpose of the provision in the compensation scheme of the Act, is that the household services envisaged are those provided by the household members themselves. They are not services for which those members make provision for the injured employee through the agency of third party providers.

## **ATTENDANT CARE SERVICES**

- 7.396 Attendant care services are defined to mean services (other than household services, medical or surgical services or nursing care) that are required for the essential and regular personal care of an employee: s 4(1) of the SRC Act.
- 7.397 Compensation for attendant care services is payable if an employee reasonably requires those services as a result of her or his compensable condition: s 29(3) of the SRC Act. For attendant care services, a determining authority is liable to pay:
- (a) the indexed statutory amount (currently \$421.50); or
  - (b) the amount per week paid or payable by the employee for the services;
- whichever is less.
- 7.398 The matters that a determining authority may take into account when determining liability for attendant care services include:
- (a) the degree to which the employee's injury impairs the employee's self-care capacity: s 29(4)(a) of the SRC Act;
  - (b) the extent to which any medical service or nursing care received by the employee provides for her or his essential and regular personal care: s 29(4)(b) of the SRC Act;
  - (c) how reasonable it is to meet the employee's wish to live outside an institution: s 29(4)(c) of the SRC Act;
  - (d) how necessary attendant care services are to enable the employee to undertake or continue employment: s 29(4)(d);
  - (e) any rehabilitation assessment made in relation to the employee: s 29(4)(e) of the SRC Act; and
  - (f) the extent to which a relative of the employee might reasonably be expected to provide attendant care services to the employee: s 29(4)(f) of the SRC Act.
- 7.399 If an employee is receiving compensation, the employee is entitled to compensation for attendant care services that are reasonably required. No distinction is made based on the nature of an employee's incapacity.

## A NEW THREE-TIER MODEL OF SERVICES

- 7.400 Currently, compensation for attendant care services is available to all employees, regardless of the nature of the injuries that they have sustained. For example, an employee with an acquired brain injury may, among other things, be unable to wash her or his hair. An employee with tenosynovitis<sup>285</sup> may, under the current legislation, be able to demonstrate a reasonable requirement for the same services despite sustaining an injury that is somewhat less severe, and from which the employee is likely to recover.
- 7.401 Depending on the severity and complexity of an injury, attendant care services may be required:
- (a) from the date of injury for the rest of a person's life;
  - (b) during the acute phase of an injury; or
  - (c) for a short period of time—for example following an operation or release from hospital.
- 7.402 Currently, there is no limit on the period for which compensation for household and attendant care services is payable. If those services are reasonably required, then a determining authority is liable to pay compensation for them, up to the indexed statutory amount: see paragraphs 7.393 and 7.397 above.
- 7.403 Although the Comcare scheme is not known for the catastrophic nature of the injuries sustained by employees within the scheme, Comcare has informed me that in 2010–11 it spent approximately \$761,098 on attendant care services and in 2011–12 this amount increased to \$959,088.
- 7.404 The Victorian Transport Accident Commission, as a transport accident insurer, covers road trauma injuries that can be catastrophic. The Transport Accident Commission will fund household services for up to a maximum of five years after the date of injury: s 60(2)(d) of the *Transport Accident Act 1986* (Vic) (the **TA Act**).<sup>286</sup> However, for clients who are assessed as having sustained a “severe injury”, household services may continue beyond that time: s 60(2AC)(a) of the TA Act.
- 7.405 The TA Act defines “severe injury” in s 3(1) as follows:
- severe injury**, except in Part 6, means:
- (a) a significant acquired brain injury, paraplegia, quadriplegia, amputation of a limb or burns to more than 50% of the body; or
  - (b) any other injury specified by the regulations for the purposes of this definition ...
- 7.406 In addition, s 5 of the *Transport Accident Regulations 2007* (Vic) prescribes a “severe injury” as:
- (a) an injury that results in permanent blindness;
  - (b) burns to not more than 50 percent of the body that cause severe disfigurement and comprise of full-thickness burns-
    - (i) to the head, neck, arms or lower legs; or
    - (ii) that result in severe difficulties in performing mobility, communication and self-care tasks;
  - (c) a brachial plexus injury that results in the loss of the use of a limb.
- 7.407 The Transport Accident Commission's overarching policy behind the provision of attendant care services is as follows:<sup>287</sup>
- The TAC can pay for attendant care where it is identified as being the most age appropriate and least restrictive response to a client's needs. Attendant care agencies must provide all services in a way which is consistent with and promotes the principles and goals of the Independent Support Approach. This approach is a way of providing assistance to TAC clients that optimises their independence by, as far as is functionally possible, enabling them to make choices and do things for themselves, i.e. take part in the activities of everyday life independent of assistance from others.
- 7.408 One of the medical experts consulted by the Review (who asked for anonymity) submits that the Comcare scheme should provide for:
- ... services linked to impairment significance. For example access to services cease at 3 years or continuing access to services only occurs when impairment is found to meet a certain threshold eg >30% impairment.

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285. Tenosynovitis is inflammation of the lining of the sheath that surrounds a tendon (the cord that joins muscle to bone).

286. See Transport Accident Commission, “Home Services for Accidents on or after 1 January 2005”. Available at: <http://www.tac.vic.gov.au/policies/home-services-for-accidents-on-or-after-1-january-2005>

287. Available at: <http://www.tac.vic.gov.au/policies/attendant-care>

- 7.409 Despite Comcare spending \$959,088<sup>288</sup> on attendant care services, there are only approximately 12 employees, for whom Comcare is the determining authority in the scheme who, using the definition in the TA Act, would qualify as severely injured. For those employees, there is no question that ongoing attendant care is vital to support them in living as independently as possible.
- 7.410 In my view, given the typical nature of injuries covered by the Comcare scheme, the way household and attendant care services are compensated should be changed. And, in recognition of the different times when attendant care may be required, the assessment for those services and their provision could be separated into two situations:
- (a) post-acute care; and
  - (b) ongoing attendant services.

## HOUSEHOLD SERVICES

- 7.411 Provision of household services should be limited to three years following the date of injury.
- 7.412 As discussed at paragraphs 7.446 and 7.448 below, when considering provision of household services it is necessary to take into account the employee's aspirations for rehabilitation and their personal circumstances. The provision of household services should form part of the rehabilitation package and a way of further facilitating the employee's return to work. A determining authority should consider provision of household services in conjunction with the employee's Injury Management Plan, as discussed at paragraphs 6.110–6.133 above.
- 7.413 The rehabilitation of an employee should focus not only on a safe and durable return to work but also on providing the employee with coping mechanisms that provide the employee with the tools to manage her or his condition post-injury.
- 7.414 Although the ultimate goal of rehabilitating an employee will always be to return the employee to full functioning, it will not always be possible to do this. The permanent impairment provisions recognise that fact; however, meeting the criteria to receive compensation for permanent impairment payment does not mean that an employee will forever be unable to undertake work around her or his own home. As discussed in the report *Is Work Good for your Health and Well-being?*:<sup>289</sup>
- More fundamentally, it is wrong to view physical demands from a purely negative perspective as “hazards” with potential only to cause “harm”. Different physical activities may either load or unload musculoskeletal structures. Physical activity is fundament to physiological health and fitness and an essential part of a rehabilitation from injury or illness.
- 7.415 As outlined at paragraph 7.460 below, any claim for household services must be assessed by a physiotherapist or occupational therapist. As part of that assessment process, it is expected that the assessor will recommend the provision of any aids or appliances that will assist the employee to undertake the same household tasks that the employee undertook before sustaining injury.
- 7.416 Occupational Therapy Australia is the peak professional body of occupational therapists in Australia and has described occupational therapy as follows:<sup>290</sup>
- The primary goal of occupational therapy is to enable people to participate in the activities of everyday life. Occupational therapists achieve this outcome by working with people and communities to enhance their ability to engage in the occupations they want to, need to, or are expected to do, or by modifying the occupation or the environment to better support their occupational engagement.
- 7.417 In line with that intended outcome, the assessment process would also include the provision of advice by the assessor on strategies to allow the employee to undertake the tasks that they undertook previously. For example, an employee with an overuse injury who previously completed her or his ironing in a bulk lot one night a week may be advised to spread the activity over the course of two or three nights.
- 7.418 The purpose of compensation is not to reward injured employees for failing to adapt; rather, it is to recognise that they have been injured and provide them with the tools and strategies they require in order to move on with their lives. As I discussed at paragraphs 6.110–6.116 above, 7.241–7.242 above, and 9.1 below, the compensation process itself can contribute to needless disability. Successful rehabilitation must include the cessation of benefits—otherwise an employee may never be encouraged to move on.

288. Figure supplied by Comcare for financial year 2011–12.

289. G Waddell and A Kim Burton, *Is Work Good for your Health and Well-Being?*, Department for Work and Pensions, UK, 2006, p 27. Available at: <http://www.dwp.gov.uk/docs/hwwwb-is-work-good-for-you.pdf>

290. Available at: <http://www.otaus.com.au/about/about-ot/about-ot>

- 7.419 For those reasons, I recommend limiting compensation for household services and post-acute care (which is discussed at paragraphs 7.422–7.423 below) to a maximum period of three years. That will provide sufficient time for employees to recover from most injuries, be rehabilitated for return to the workforce and learn any coping strategies that they need to manage any residual impairment.
- 7.420 An exception to that limitation could be made in circumstances where an employee has sustained a severe injury, which would need to be defined for that purpose.
- 7.421 The SRC Act should continue to specify a maximum weekly rate for household services. The weekly rate could be specified in the same way that Comcare specifies the medical services rates, as in **Recommendation 7.30** above.

### **POST-ACUTE CARE SERVICES**

- 7.422 Post-acute care is the care that is required in the immediate period following an injury. It is needed to support injured employees in returning to work and facilitating lifestyle adjustments to cope with their injuries. Post-acute care may also be needed following a particular event, for example an operation in relation to the injury.
- 7.423 Post-acute care could be available:
- (a) during the first three years after the date of injury; and
  - (b) at any time throughout the life of a claim for a maximum of six months following specific events, for example when an employee undergoes an operation in hospital in relation to her or his injury.

### **ONGOING ATTENDANT SERVICES**

- 7.424 Employees who are severely injured would qualify for attendant services for the life of the claim. In addition, in recognition of the nature of the injury sustained, I propose a different maximum payment at paragraph 7.442 below.

### **RECOMMENDATIONS**

- 7.425 In recognition of the different types of injuries that may be sustained, and the different support that they require, a new term, “severe injury”, should be defined in s 4(1) of the SRC Act, in the following terms:
- severe injury** means:
- (a) a significant acquired brain injury, paraplegia, quadriplegia, amputation of a limb or burns to more than 50 percent of the body; or
  - (b) any other injury specified by the regulations for the purposes of this definition.
- 7.426 Section 29 of the SRC Act should be repealed and a new legislative model, based on a three-tiered system of services and support provided in the home, be implemented. The new model would provide for compensation for three types of services provided in the home:
- (a) household services;
  - (b) post-acute care services; and
  - (c) ongoing attendant care services for the severely injured.
- 7.427 The compensation payable for those services should be limited as follows:
- (a) household services for three years from the date of injury;
  - (b) post-acute care services for three years from the date of injury and for six months following specific events; and
  - (c) ongoing attendant care services for the severely injured throughout the life of a claim.

### **RECOMMENDATION 7.32**

I recommend that a new term, “severe injury” be defined in s 4(1) of the SRC Act.

### RECOMMENDATION 7.33

I recommend that s 29 of the SRC Act be repealed and a new legislative model based on a tiered system of services and support provided in the home be implemented. The new model would provide for compensation for three types of services provided in the home:

- (a) household services, payable for three years from the date of injury;
- (b) post-acute care services, payable for three years from the date of injury and for six months after specific events; and
- (c) ongoing household and attendant care services for the severely injured.

## THE AMOUNT PAYABLE

7.428 The existence of the indexed cap on both household and attendant care services in the SRC Act indicates that Parliament recognised the potential for the costs of provision of household and attendant care services to adversely affect the scheme's viability.<sup>291</sup>

### THE AMOUNT PAYABLE FOR HOUSEHOLD SERVICES

7.429 Compensation for household services is currently not payable for the first 28 days after an injury: s 29(5) of the SRC Act; and, as noted at paragraph 7.393 above, the maximum weekly amount payable is capped at (currently) \$421.50: s 29(1) of the SRC Act.

7.430 There is no formal evidence available to support the reasoning behind the 28-day qualifying period for household services in s 29(5) of the SRC Act. The following explanations have been suggested:

- (a) it is a cost saving measure;
- (b) it is designed to ensure that employees do not become (over) reliant on household services in the early stages after an injury, with a consequent loss of independence; and
- (c) it allows a period of stabilisation and recovery—in the early stages of a claim, it is not clear what the ultimate outcome of an injury may be; an employee who sprains an ankle may be unable to do housework for a couple of weeks following the injury but would be able to undertake housework after the acute phase of the injury has passed.

7.431 In deciding whether household services are reasonably required, the determining authority is required to consider a number of factors, including the extent to which other members of the employee's household could reasonably be expected to provide those services: s 29(2)(d) of the SRC Act.

- (a) However, the principal consideration, based on s 29(1) of the SRC Act, will be the effect of the injury in creating a need for household services: what is the level of services that the employee is unable to undertake due to her or his injury?
- (b) For that reason, in the majority of cases, compensation for the cost of household services will be a short-term benefit, paid whilst an employee is returning to work and the activities of daily living.
- (c) As a result, the services that are required will generally decrease as an employee's capacity for work and life increases.

7.432 Comcare suggests in its submission to the Review:<sup>292</sup>

The current provision provides a threshold of 28 days before household and attendant care services<sup>293</sup> can be provided. While the original policy intent may have been that the injured employee should be encouraged to not become dependent on such services at such an early stage, Comcare's view is that where an injured employee requires such services, it should be irrelevant that 28 days has not elapsed.

7.433 I am not persuaded that any exclusionary period for compensation for household services should be retained. While the SRC Act, like any workers compensation scheme, requires inbuilt cost-saving mechanisms in order to retain scheme viability, it seems to me that household services are most reasonably required in the acute and sub-acute phases of an injury. Household services are less likely to be required in the later stages of injury following a return to work.

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291. Household and attendant care services are both capped at \$421.50 a week as at 1 July 2012. Available at: [http://www.comcare.gov.au/claims/benefits\\_and\\_entitlements/statutory\\_rates](http://www.comcare.gov.au/claims/benefits_and_entitlements/statutory_rates).

292. Comcare, Submission to the Review, pp 34-35.

293. Section 29(5), imposing the 28-day qualifying period, relates only to the provision of household services.

7.434 I am also not persuaded that any change is required to the maximum amount payable by way of compensation for household services. During the Review, there was no issue raised with this amount and no submissions were received.

### THE AMOUNT PAYABLE FOR POST-ACUTE SERVICES

7.436 As noted in paragraph 7.397 above, the current maximum amount payable for attendant services is capped at \$421.50: s 29(3) of the SRC Act. That is the same as the amount payable for household services.

7.437 In relation to care provided to those employees who are not severely injured, I am not persuaded that any change is required.

### THE AMOUNT PAYABLE FOR ONGOING ATTENDANT CARE SERVICES

7.438 The Review has considered whether the SRC Act should provide for respite care services for catastrophically injured employees and whether the statutory cap on provision of attendant care services for catastrophically injured employees should be retained.

7.439 In its submission to the Review, Comcare suggests:<sup>294</sup>

Currently the Act does not provide for respite care services. Comcare suggests that the review explore the inclusion of such services for catastrophically injured employees.

And:<sup>295</sup>

Comcare suggests that the review explore the statutory cap on provision of attendant care services for catastrophically injured employees.

7.440 The monetary cap on attendant care services potentially limits severely injured employees from receiving the full level of attendant care services that they require. Although it is clear that a cap is required, I am not persuaded that the current cap protects the scheme in a manner that allows the most severely injured employees to receive the care that they require.

7.441 I note that the s 4(1) definition of medical treatment (compensation for which is not capped) includes the provision of nursing care: see paragraph 7.267(e) above; while the s 4(1) definition of attendant care services (compensation for which is capped) excludes nursing care: see paragraph 7.396 above. It is apparent, therefore, that severely injured employees can access a wide range of services, either as medical treatment or ongoing attendant care services, depending on their needs.

### RECOMMENDATIONS

7.442 In view of the variety of services available as either medical treatment or attendant care services, it is appropriate that the amount payable for ongoing attendant care services for the severely injured be capped at a maximum of 40 hours per week, up to a maximum cost of \$1,700 (indexed).

#### RECOMMENDATION 7.34

I recommend that the amount payable for ongoing care services for the severely injured be capped at a maximum of 40 hours per week, up to a maximum cost of \$1,700 (indexed).

7.443 **Recommendation 7.34** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

### SERVICES THAT ARE REASONABLY REQUIRED

7.444 The SRC Act provides that a determining authority is liable to pay compensation for household and attendant care services that an employee reasonably requires: ss 29(1) and (3) of the SRC Act. I do not propose any change to that qualification for the payment of services. The determining authority must therefore make an assessment of the employee's need for the services, before any compensation is payable.

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294. Comcare, Submission to the Review, "Final Comments", p 2.

295. Comcare, Submission to the Review, "Final Comments", p 3.

## ASSESSING THE NEED FOR SERVICES: A FRAMEWORK

- 7.445 In order to determine whether services are reasonably required, the employee's need for household and attendant care services must first be assessed.
- 7.446 The concept of "need" was discussed in the Inquiry Report of the Productivity Commission *Disability Care and Support*,<sup>296</sup> which stated that: "... defining and determining 'need' is by no means straight forward. There is a danger that people will ratchet up their claims for support by presenting wants as needs."<sup>297</sup> In discussing the assessment process for applicants to the National Disability Insurance Scheme, the Productivity Commission suggested that the assessment process should focus on two factors: it is about assessing an individual's needs, but "it should not disregard their aspirations."<sup>298</sup>
- 7.447 In that respect, the United Kingdom Department of Health's *Guidance on Eligibility Criteria for Adult Social Care* recommends:<sup>299</sup>
- Once eligible needs are identified, councils should take steps to meet those needs in a way that supports the individual's aspirations and the outcomes that they want to achieve ... Throughout the process of assessment, people should be supported and encouraged to think creatively about how their needs can best be met and how to achieve the fullest range of outcomes possible within the resources available to them.
- 7.448 In determining eligibility to receive compensation under the SRC Act, any consideration of an employee's needs and aspirations would need to consider the scope of the employee's injury and the proposed purpose of the SRC Act as outlined at paragraph 3.12 above. In particular, consideration should be given to how the services requested will protect the health, safety and wellbeing of the employee and enhance her or his work capacity. Consideration of an injured employee's aspirations is consistent with the approach taken in the bio-psycho-social model that underpins the Clinical Framework, as discussed in paragraphs 7.309–7.328 above.
- 7.449 The International Classification provides a framework that demonstrates health and disability at individual and population levels. The International Classification identifies nine "activity and participation domains" that are used as indicative measures of an individual's or a population's health and disability. Those domains are:<sup>300</sup>
- (a) communication: communicating by language, signs and symbols, carrying on conversations, and using communication devices and techniques;
  - (b) mobility: walking, running or climbing, changing location or body position, carrying, moving or manipulating objects, and using various forms of transportation;
  - (c) self-care: attending to one's hygiene, dressing, eating and looking after one's health;
  - (d) domestic life: carrying out everyday tasks such as acquiring necessities (like a place to live and goods and services), preparing meals, caring for household objects and assisting others;
  - (e) interpersonal interactions and relationships: relating with strangers, formal and informal social relationships, family and intimate relationships;
  - (f) learning and applying knowledge: learning, applying the knowledge that is learned, thinking, solving problems, and making decisions;
  - (g) community, social and civic life: engaging in community, civil and recreational activities;
  - (h) general tasks and demands: carrying out single or multiple tasks, organising routines and handling stress; and
  - (i) major life area: carrying out responsibilities at home, work or school and conducting economic transactions.
- 7.450 Each of those domains is multi-faceted and contains multiple sub-categories that provide further detail about what is meant by each heading. In that regard, the International Classification is a framework, not an assessment tool. Because the International Classification measures all kinds of health and disability, it can be impractical to use on a day-to-day basis. For that reason, the World Health Organization developed the Disability Assessment Schedule (the **WHODAS 2.0**) to measure health and disability using six of the nine "activity and participation domains."<sup>301</sup>

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296. Productivity Commission, *Disability Care and Support*, Inquiry Report No 54, 2011. Available at: <http://www.pc.gov.au/projects/inquiry/disability-support/report>

297. Productivity Commission, *Disability Care and Support*, Inquiry Report No 54, 2011, Vol I, p 307.

298. Productivity Commission, *Disability Care and Support*, Inquiry Report No 54, Vol I, p 308.

299. UK Department of Health 2010, *Prioritising Need in the Context of Putting People First: A whole system approach to eligibility for social care*, Guidance on Eligibility Criteria for Adult Social Care, UK, p 20 at [53]. Available at: [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/@ps/documents/digitalasset/dh\\_113155.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_113155.pdf)

300. World Health Organization, ICF Browser, Activities and Participation, Part d. Available at: <http://apps.who.int/classifications/icfbrowser/>

301. They are: Cognition, Mobility, Self-care, Getting along, Life activities and Participation. See: <http://www.who.int/classifications/icf/whodasii/en/index.html>

- 7.451 The scope of the International Classification demonstrates the complexity involved in any assessment of need. However, the WHODAS 2.0 shows that it is possible to develop an assessment tool that incorporates "... the best mix of indicators or relevant domains of need. The preferred assessment tool(s) would still be consistent with the overarching [International Classification] framework."<sup>302</sup>
- 7.452 In order for the Comcare scheme to ensure that only services that are reasonably required are compensated, there should be some form of objective assessment tool, against which the need for those services is measured.

### WHO SHOULD CONDUCT THE NEEDS ASSESSMENT

- 7.453 The identity and qualifications of the person who conducts the needs assessment are as important as the assessment tool itself. As noted by the Productivity Commission:<sup>303</sup>

Who conducts needs assessments can have big implications for both the reliability of the results and the extent to which an individual seeking support feels that they are central to the process. Typically, assessments of need have been conducted by trained assessors ... The evidence shows that this produces higher rates of reliability.

- 7.454 Consistent with the bio-psycho-social approach, the Productivity Commission recommended that, for the National Disability Insurance Scheme, any "assessment should be carried out as a collaborative process, and in a way that is understandable for the person seeking support ...". The Commission went on to recommend that health professionals who have previously treated a person should not be involved in any assessment:<sup>304</sup>

In order to promote independent outcomes, assessors should be drawn from an approved pool of allied health professionals. Assessors should also be independent of the person being assessed to reduce the potential for "sympathy" bias. This means that health professionals – GPs and others – with past treatment and support responsibilities for the person, would not undertake assessments. It is clear from the experiences of [appeals to the Victorian Civil and Administrative Tribunal] on [Victorian Transport Accident Commission] benefit decisions that treating professionals are often placed in an invidious position when asked by their patients to make an assessment that determines the person's eligibility for benefits.

- 7.455 The Productivity Commission went on to state that, while the individual undertaking the assessment should be independent, that individual should involve, and have regard to the opinions of, other interested parties in the process. Those other interested parties would include the GP, other treating professionals, family members and carers.<sup>305</sup>
- 7.456 A medical expert consulted by the Review (who asked for anonymity) submits that:

There is poor and limited reliance on the medical practitioner to justify the requirement for these services, despite the fact that Section 29 adequately and reasonably is written to do specifically that task.

### RECOMMENDATIONS

- 7.457 The SRC Act currently provides insufficient mechanisms for governance of the assessment of needs of injured employees.
- 7.458 To address that deficiency, Comcare should establish a formal framework for the assessment of need for services provided in the home, based on the International Classification.
- 7.459 The framework should include a requirement that the assessor liaise with any other interested parties in the course of the assessment, and that the assessor would ultimately be responsible for recommending any required household services, post-acute services or ongoing attendant care services.
- 7.460 Any need for household assistance and attendant care services should be assessed by an independent party. That assessment could be by any physiotherapist or occupational therapist registered by AHPRA.

302. Productivity Commission, *Disability Care and Support*, Inquiry Report No 54, 2011, Vol I, p 311. Available at: <http://www.pc.gov.au/projects/inquiry/disability-support/report>

303. Productivity Commission, *Disability Care and Support*, Inquiry Report No 54, 2011, Vol I, pp 323–32

304. Productivity Commission, *Disability Care and Support*, Inquiry Report No 54, 2011, Vol I, p 326.

305. Productivity Commission, *Disability Care and Support*, Inquiry Report No 54, 2011, Vol I, p 327.

### RECOMMENDATION 7.35

I recommend that Comcare establish a formal framework for the assessment of need for services provided in the home, based on the International Classification, with the inclusion of requirements that the assessor:

- (a) liaise with any other interested parties in the course of the assessment; and
- (b) be responsible for recommending any required household services, post-acute services, or ongoing attendant care services.

### RECOMMENDATION 7.36

I recommend that any need for household assistance and attendant care services be assessed by an independent party. That assessment could be by any physiotherapist or occupational therapist registered by AHPRA.

## SERVICE PROVIDERS

- 7.461 Following acceptance of liability for household services, post-acute services or ongoing attendant care services, a provider must be engaged. Currently that engagement is the responsibility of the employee. One submission to the Review, provided in confidence, outlined the problems with dividing the responsibility for the assessment of need and the engagement of a service provider:
- (a) there is no mechanism to ensure the quality of the care;
  - (b) there is no requirement for the development of formal care plans;
  - (c) there is no assessment undertaken of the training needs for the carer to perform the tasks adequately; and
  - (d) there is the risk that a family income dependence may entrench disability; this is particularly relevant for personal care tasks.
- 7.462 Agencies such as the Victorian Transport Accident Commission and DVA have been dealing with those issues for a number of years.

### SERVICE PROVIDERS FOR HOUSEHOLD SERVICES

- 7.463 For household assistance, the Victorian Transport Accident Commission has a list of preferred providers and an associated fee schedule. Funding for preferred household help providers is higher than funding for non-preferred providers.<sup>306</sup>
- 7.464 Although there is some risk involved in not prescribing who should provide household services, the limit on the amount of compensation payable for household services limits the exposure of the Comcare scheme.

### SERVICE PROVIDERS FOR ATTENDANT CARE SERVICES: POST-ACUTE AND ONGOING

- 7.465 The Transport Accident Commission in its Attendant Care policy states that the Commission:<sup>307</sup>
- ... pays for best practice attendant care which is provided by agencies and delivered by support workers who are trained to support clients to become as independent as possible. Attendant care agencies must meet the criteria specified in the Schedule of Disability Services.
- 7.466 The Transport Accident Commission will pay for attendant care services to be provided by family members or friends in limited circumstances. However, the Attendant Care policy clarifies that:<sup>308</sup>
- ... the family or friend must be registered with an attendant care agency and meet all requirements of that agency. In addition, the family member will be required to receive training in independence support to provide them with the skills to maximise and improve the client's outcomes.

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306. See Transport Accident Commission Victoria, "Schedule of Fees for Home Service (Preferred Providers)" and "Schedule of Fees for Home Service (Non Preferred Providers)", available at: <http://www.tac.vic.gov.au/media/upload/home20services20fees20preferred20providers.pdf> and <http://www.tac.vic.gov.au/media/upload/home20services20fees20non20preferred.pdf>

307. Available at: <http://www.tac.vic.gov.au/policies/attendant-care>

308. Available at: <http://www.tac.vic.gov.au/policies/attendant-care>

- 7.467 DVA provides a Care Plan to veterans and war widows who are granted domestic assistance. The Care Plan details the service arrangements, such as:<sup>309</sup>
- (a) the tasks to be done;
  - (b) the start and end date of services;
  - (c) the frequency of services;
  - (d) any referrals to other home support services, if required;
  - (e) co-payment;
  - (f) an assessment review date; and
  - (g) contact details of the Veterans' Home Care service provider who will provide the services.
- 7.468 The Australian Capital Territory has introduced legislation aimed to reduce the risk of harm or neglect to vulnerable people. The *Working with Vulnerable People (Background Checking) Act 2011* (ACT) (the **Working with Vulnerable People Act**) commenced on 8 November 2012.<sup>310</sup>
- 7.469 The Working with Vulnerable People Act requires persons who, while engaging in regulated activities and services, have contact with vulnerable people to register with the Office of Regulatory Services. The Tasmanian Government Department of Health and Human Services has a submission before Cabinet seeking approval for draft legislation, based on the Working with Vulnerable People Act, to expand the systems currently in place for checking people working with children and people working with vulnerable adults.
- 7.470 In Queensland, Part 10 of the *Disability Services Act 2006* (Qld) requires all people engaged by a department-funded non-government service provider to hold a prescribed notice before they are eligible to provide the relevant service. In effect, where a person does not have a criminal record, the person will be able to obtain a prescribed notice: s 85 of the *Disability Services Act 2006* (Qld). Prescribed notices are valid for three years only; and, if the person wishes to continue working for a department-funded non-government service provider, the person must apply for another prescribed notice and, in effect, undergo a further police check.
- 7.471 As noted at paragraph 7.321 above, Comcare has a responsibility, both as a Commonwealth authority and as the administrator of the Comcare scheme, to protect the health and wellbeing of injured employees receiving compensation and to ensure appropriate usage of Commonwealth funds. However, the mechanisms currently provided by the SRC Act are insufficient to allow for the effective management of household and attendant care services funded by the Comcare scheme. Comcare also has no power to regulate the provision of those services, and the lack of regulation creates a high risk of fraud.
- 7.472 The regulation of attendant care services faces similar obstacles to those outlined at paragraph 7.363 above in relation to medical service rates—namely, the size of the Comcare scheme compared to its large geographic span. The Victorian Transport Accident Commission, which operates exclusively in Victoria, has been able to regulate attendant care providers by entering into specific agreements with a number of attendant care providers.
- 7.473 It would be administratively prohibitive for Comcare to regulate the provision of household and attendant care services in a similar way to the Victorian Transport Accident Commission. One of the medical experts consulted by the Review (who asked for anonymity) submits that Comcare could:
- ... utilise existing preferred providers for Commonwealth service delivery to reduce any administrative burden on Comcare to create agency providers.
- 7.474 The Attendant Care Industry Association Australia, the peak body for attendant care services providers operating across Australia, has developed the ACIMSS in order to promote quality and best practice within the industry. The ACIMSS is the only independent national quality management standard that specifically addresses the provision of attendant care services.<sup>311</sup> The ACIMSS is endorsed by, amongst others, the Victorian Transport Accident Commission, the Tasmanian Motor Accidents Insurance Board and WorkCover NSW.

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309. Department of Veterans' Affairs, *Veterans' Home Care: Domestic Assistance*, fact sheet HCS06. Available at: <http://factsheets.dva.gov.au/factsheets/documents/HCS06%20Domestic%20Assistance.pdf>

310. See also: [http://www.ors.act.gov.au/community/working\\_with\\_vulnerable\\_people](http://www.ors.act.gov.au/community/working_with_vulnerable_people)

311. Available at: <http://www.aciansw.org.au/acimss-certification>

7.475 In my view, determining authorities should only pay for attendant care services that are provided by a registered entity or attendant care provider. There are limited situations in which it would be appropriate for a family member to provide attendant care services; however, where a family member is engaged they should be registered with an attendant care agency and would have to meet all the qualifying requirements of that agency. The family member should also be required to receive training in independence support to provide the family member with the skills to maximise and improve the employee's outcomes.

## **RECOMMENDATIONS**

7.476 The SRC Act should be amended to authorise Comcare to prepare and issue, as a legislative instrument, a list of approved/registered attendant care providers, based on the list of ACIMSS accredited providers.<sup>312</sup> In order to ensure that this does not result in reduced access to providers, Comcare should also be able to refer to approved provider lists established by Government departments, such as DVA, and State and Territory workers compensation schemes.

### **RECOMMENDATION 7.37**

I recommend that the SRC Act be amended to allow Comcare to prepare and issue, as a legislative instrument, a list of approved/registered attendant care providers.

That list should be based on the list of ACIMSS accredited providers and any approved provider lists established by Government departments, such as DVA, and State and Territory workers compensation schemes.

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312. Available at: <http://www.aciansw.org.au/images/stories/certification/register%20of%20acimss%20certified%20organisations%20-%20july%202012.pdf>

# 8. COMPENSATION FOR PERMANENT IMPAIRMENT

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## PERMANENT IMPAIRMENT

- 8.1 Permanent impairment compensation is paid as a lump sum. The compensation is separate from, and additional to, incapacity benefits payable to injured employees under the SRC Act. Incapacity benefits are paid to replace an employee's regular salary or wages and are referred to as compensation for economic loss; while permanent impairment compensation can be described as compensation for non-economic loss, and is paid to compensate for loss of use of bodily functions: s 24 of the SRC Act and pain and suffering: s 27.
- 8.2 Section 28(1) of the SRC Act authorises Comcare to prepare a written document, to be called the "Guide to the Assessment of the Degree of Permanent Impairment" (the **Approved Guide**), that sets out the:
- (a) criteria for determining the degree of the permanent impairment of an employee resulting from an injury;
  - (b) criteria for determining the degree of non-economic loss suffered by an employee as a result of an injury; and
  - (c) methods by which the degrees of permanent impairment and non-economic loss, as determined under those criteria, shall be expressed as a percentage.
- The Approved Guide must be approved by the Minister: s 28(3) of the SRC Act. The Approved Guide can also be varied or revoked by Comcare under s 28(2) of the SRC Act, with the Minister's approval: s 28(3).
- 8.3 In making any assessment of the degree of permanent impairment or non-economic loss, a determining authority or the AAT must apply the relevant provisions of the Approved Guide: s 28(4) of the SRC Act.
- 8.4 The obligation to apply the Approved Guide is also expressed in s 24(5), which directs the determining authority to determine the degree of permanent impairment of an employee resulting from an injury under the provisions of the Approved Guide.
- 8.5 The amount of compensation payable to an employee who has a permanent impairment resulting from an injury is the same percentage of the maximum amount payable under s 24 as the degree of permanent impairment (expressed as a percentage) determined under the Approved Guide: s 24(3), (4) and (6) of the SRC Act. An employee who has 10 % permanent impairment will receive 10 % of the maximum payable under s 24 of the SRC Act, which is currently \$168,605.02, and a percentage of the current maximum of \$63,226.92 for non-economic loss under s 27 of the SRC Act, calculated under Division 2 of the Approved Guide.

## MEASURING IMPAIRMENT: THE APPROVED GUIDE

- 8.6 Permanent impairment benefits are calculated on the basis that degrees of impairment can be measured, with the level of compensation intended to reflect the degree of loss of bodily functions and pain and suffering.
- 8.7 Since the introduction of the SRC Act on 1 December 1988,<sup>313</sup> Comcare has issued three Approved Guides for the measurement of impairment. The first edition was published in 1989, the second edition in 2006 and edition 2.1 in June 2011.<sup>314</sup> Both the Second Edition and Edition 2.1 are stand-alone guides, largely based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition (**AMA5**).
- 8.8 Compared to the First Edition, the Second Edition and Edition 2.1 provide greater clinical focus, with comprehensive criteria for the assessment of the degree of impairment.
- 8.9 Currently, the various Australian workers compensation schemes use different guides to assess permanent impairment, the majority based on the fourth or fifth edition of the American Medical Association guides. The diversity in approach to assessment means that benefits can vary significantly from one scheme to another, and that there is little capacity for scheme administrators to learn from shared experience. Medical assessors also have difficulty in developing assessment skills that can be used across the schemes.

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313. As the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*, renamed as the SRC Act by amending legislation passed in 1992 and 1993.

314. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0015/100905/Guide\\_to\\_the\\_assessment\\_of\\_the\\_degree\\_of\\_permanent\\_impairment.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0015/100905/Guide_to_the_assessment_of_the_degree_of_permanent_impairment.pdf)

- 8.10 Action area five of the National Workers' Compensation Action Plan 2010–2013<sup>315</sup> requires Safe Work Australia to investigate and report on options for nationally consistent arrangements relating to the assessment of permanent impairment. That objective is to be achieved by:
- (a) investigating choices for assessment tools;
  - (b) analysing and reporting on options to promote national consistency;
  - (c) developing agreed nationally consistent permanent impairment approaches and guidance material; and
  - (d) promoting nationally consistent use of permanent impairment assessment tools and guidance materials.
- 8.11 Following the publication of the Second Edition of the Approved Guide, Comcare received criticism from doctors and other key stakeholders concerning the application and operation of the Approved Guide. Those criticisms have been strengthened over the years by a number of significant cases in the Federal Court and High Court, which have brought into question the capacity of the Approved Guide to compensate workers fairly and equitably for permanent impairment.
- 8.12 In *Broadhurst v Comcare*,<sup>316</sup> a single Judge of the Federal Court found that, to the extent that Table 9.17 of the Approved Guide failed to provide a 10 % impairment rating, it frustrated the operation of the statutory scheme, which requires a determination as to whether the degree of permanent impairment resulting from a particular injury is less than 10 %.<sup>317</sup> The Judge also found that, where a particular table in the Approved Guide could not be used, the Approved Guide required that assessment of the degree of permanent impairment should be made in accordance with the sixth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA6)*.<sup>318</sup>
- 8.13 Comcare successfully appealed against the decision that AMA6 should be applied where the Approved Guide does not contain a 10 % rating. In *Comcare v Broadhurst*,<sup>319</sup> the Full Federal Court held that the correct edition of the reference guide to be used was **AMA5**.<sup>320</sup>
- 8.14 Those decisions emphasised the growing list of problems with the Second Edition of the Approved Guide and the urgent need for Comcare to address those problems.<sup>321</sup>
- 8.15 On 13 June 2011, in response to *Comcare v Broadhurst*, Comcare issued Edition 2.1 of the Approved Guide, which came into effect on 1 December 2011. Edition 2.1 addresses not only the problem highlighted in *Comcare v Broadhurst*, but also the problems raised in *Canute v Comcare* and *Fellowes v Military Rehabilitation and Compensation Commission* (discussed in paragraphs 8.27–8.29 below). I understand from Comcare that Edition 2.1 was intended to be an interim Approved Guide to address those problems as a matter of urgency, and consideration of its replacement continues to be a priority.
- 8.16 The Strategic Issues Group on Workers' Compensation<sup>322</sup> (the **SIG WC**) has agreed to seek endorsement from Safe Work Australia members in March 2013 on a national permanent impairment assessment guide (the **proposed National Guide**) and a proposed permanent impairment assessor document.<sup>323</sup> The proposed National Guide is based on AMA5, as amended by the New South Wales scheme.
- 8.17 The proposed permanent impairment assessor document has been developed to facilitate mutual recognition of permanent impairment assessors across the country. The document allows for some jurisdictional variations; however, it establishes nationally consistent eligibility criteria that a medical practitioner will need to satisfy if the practitioner wants to become an accredited permanent impairment assessor. The proposed National Guide and permanent assessor document are yet to be considered by Safe Work Australia.

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315. Available at: [http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/566/NationalWorkersCompensationActionPlan2010\\_2013.pdf](http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/566/NationalWorkersCompensationActionPlan2010_2013.pdf)

316. [2010] FCA 1034; (2010) 189 FCR 561.

317. [2010] FCA 1034; (2010) 189 FCR 561 at [55], [58]–[59] (Buchanan J).

318. [2010] FCA 1034; (2010) 189 FCR 561 at [63].

319. [2011] FCAFC 39; (2011) 192 FCR 497.

320. [2011] FCAFC 39; (2011) 192 FCR 497 at [15] and [73].

321. The decision in *Lilly v Comcare* [2013] FCA 26 provides a recent addition to the list of problems.

322. The SIG WC oversees work on the improvement of workers compensation arrangements throughout Australia and other workers compensation matters as required. It also provides policy advice and recommendations to Safe Work Australia. The SIG WC is tripartite and is constituted by Safe Work Australia members and their nominees.

323. Victoria does not support the National Guide.

## SUBMISSIONS RECEIVED

8.18 The Australian Council of Trade Unions submits:<sup>324</sup>

It has been our long standing position that the Minister should take steps to revoke the 2nd Edition Guide and re-implement the 1st Edition Guide under s.28 of the SRC Act. Additionally the National Permanent Impairment Guides Introductory Chapter, developed via the processes of Safe Work Australia, should be incorporated into the 1st Edition Guides and any subsequent Guides. If the Minister approves a further Guide, it should also be on the proviso that if compensation would have been payable under the 1st Edition Guide, it should also be payable under any further version of the Guide.

8.19 Maurice Blackburn also raises concerns with Comcare's current guide:<sup>325</sup>

... the Guidelines used to define the threshold ought to be drafted by the legislature and not delegated to Comcare, so that the new Guide is drafted fairly and validly. It is important to have an approved Guide which enables the original legislative intent of the SRC Act to award lump sum amounts to persons with more than minor, low-level or nuisance impairments. It must be remembered that significant common law rights were given up in order to gain access to a broader and supposedly more generous coverage of permanent impairment compensation. Comcare's 2.0 and 2.1 editions of the approved Guide have eroded that coverage.

8.20 The Law Council of Australia is opposed to the use of the American Medical Association *Guides to the Evaluation of Permanent Impairment* in determining levels of impairment for compensable purposes.<sup>326</sup>

8.21 Comcare submits that any changes to the SRC Act in the area of permanent impairment should take Safe Work Australia's work in this area into account.<sup>327</sup>

## RECOMMENDATIONS

8.22 The disadvantages of the current diverse approach to the assessment of permanent impairment, summarised in paragraph 8.9 above, are so clear that remedial action, as recommended by the National Workers' Compensation Action Plan (see paragraph 8.10 above), is urgently required.

### RECOMMENDATION 8.1

I recommend that Comcare adopt the proposed National Guide as the Approved Guide, and the proposed permanent impairment assessor document.

## MEASURING IMPAIRMENT: MULTIPLE INJURIES ARISING OUT OF THE ONE EVENT

8.23 Multiple injuries arising out of the one event, each of which results in permanent impairment, require special consideration. There are three key concepts that interlink when considering those impairments:

- (a) whole person impairment;
- (b) the combined values chart; and
- (c) the combining of injuries under the SRC Act.

8.24 The American Medical Association *Guides to the Evaluation of Permanent Impairment* estimate the impact of an impairment (whether affecting one bodily system or several bodily systems) on an individual's overall ability to perform the activities of daily living (excluding work), by providing for the calculation of the percentage of the individual's whole person impairment.<sup>328</sup>

8.25 The combined values chart in the American Medical Association guides was designed to enable physicians to account for the effects of multiple impairments with a combined or summary value. A standard formula was used to ensure that, regardless of the number of impairments, the summary or combined value would not exceed 100 % of the whole person.<sup>329</sup> It is the combined values chart, not the "whole person impairment" concept that accounts for the effects of multiple impairments.

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324. Australian Council of Trade Unions, Submission to the Review, p 12.

325. Maurice Blackburn, Submission to the Review, p 23.

326. Law Council of Australia, Submission to the Review, p 12.

327. Comcare, Submission to the Review, p 28.

328. AMA5, 2005, p 4.

329. AMA5, 2005, p 9.

- 8.26 Most workers compensation schemes in Australia are event-based or accident-based. The concept of combining impairments arising from one event or accident is a concept that is and has been used in workers compensation schemes, even when they were still using a table of maims to assess impairment. However, the American Medical Association guides cannot be used to combine impairment values without the use of the whole person impairment concept, or the use of the combined values chart.
- 8.27 Combining impairment values to determine one overall impairment value was the original intent of the legislation. That process is consistent with the modern approach to the assessment of permanent impairment. It may be argued that the High Court's decisions in *Canute v Comcare*,<sup>330</sup> and *Fellowes v Military Rehabilitation and Compensation Commission*,<sup>331</sup> have substantially affected the ability of the Approved Guide to provide fairly for the assessment of compensation for permanent impairment, and have resulted in inequitable outcomes for injured employees.
- 8.28 In *Canute v Comcare*,<sup>332</sup> the High Court found that Mr Canute's adjustment disorder (following a compensable spinal injury) was an injury that must be assessed separately from the spinal injury:<sup>333</sup> the impairment from the disorder could not be combined with the impairment from the spinal injury (to calculate "whole person impairment") before considering the 10 % threshold in s 25(4) of the SRC Act.
- 8.29 The High Court noted that the majority of the Full Federal Court in *Canute* had observed that the SRC Act seemed to require a consequential injury to be treated as an aspect of the impairment created by the initial injury,<sup>334</sup> and Comcare had supported that approach in the High Court. The High Court rejected that approach:<sup>335</sup>
- Comcare's case depends upon confining the meaning of "injury" to exclude such "consequential injuries". However, there is no foundation in the Act for any such distinction between "an injury" and a consequential or secondary injury. Neither of these qualifiers finds any expression in the Act. The Act speaks exclusively in terms of "an injury".
- 8.30 Earlier, the Court had stressed that the SRC Act obliges Comcare to pay compensation not in respect of an employee's impairment but in respect of an "injury", which is defined in terms of the resultant effect of an incident or ailment upon the employee's body; that the SRC Act assumes that an employee may sustain more than one "injury" in a workplace incident;<sup>336</sup> that the SRC Act assumes that "an injury" may result in more than one "impairment";<sup>337</sup> and that the SRC Act does not import a "whole person" approach to the determination of the degree of permanent impairment.<sup>338</sup>
- 8.31 After rejecting the Full Federal Court's view, the High Court went on to note:<sup>339</sup>
- The Act only adopts the "whole person impairment" approach with respect to permanent impairments resulting from each "injury". That "whole person" approach cannot properly be used to deny the applicability of s 24 to something which corresponds to the legislative definition of an "injury". The statutory criterion of an "injury" is antecedent to the concept of "whole person" impairment, not the other way around.
- 8.32 One consequence of the High Court's reasoning in *Canute* is that, where the one event results in a number of injuries, the permanent impairment resulting from each injury must be assessed separately, and the permanent impairment from each injury must individually satisfy the 10 % threshold in s 24(7), or the 5 % threshold for hearing loss in s 24(7A).
- 8.33 As a result, an employee who has been involved in a work-related accident and has 9 % impairment to the foot, 7 % impairment to the ankle and 7 % impairment to the wrist will receive no permanent impairment benefits.
- (a) That is because each value falls below the 10 % threshold in s 24(7), and the High Court found in *Canute* that the SRC Act proceeds on the basis that more than one injury may be caused in a workplace incident, and compensation is payable under s 24 in respect of the impairment from each injury—not in respect of an employee's whole person impairment.
- (b) If those separate impairments of 9 %, 7 % and 7 % could be combined to achieve a combined impairment value (using the combined values chart in the Approved Guide), the employee would achieve a combined impairment value of 20 %, and would qualify for compensation under both s 24 and s 27 of the SRC Act.

330. [2006] HCA 47; (2006) 226 CLR 535.

331. [2009] HCA 38; (2009) 240 CLR 28.

332. [2006] HCA 47; (2006) 226 CLR 535.

333. [2006] HCA 47; (2006) 226 CLR 535 at [36].

334. [2005] FCAFC 299; (2005) 148 FCR 232 at [76].

335. [2006] HCA 47; (2006) 226 CLR 535 at [34].

336. [2006] HCA 47; (2006) 226 CLR 535 at [10].

337. [2006] HCA 47; (2006) 226 CLR 535 at [11].

338. [2006] HCA 47; (2006) 226 CLR 535 at [15].

339. [2006] HCA 47; (2006) 226 CLR 535 at [37].

- 8.34 Another consequence of the *Canute* reasoning is that the combined values chart can only be used in very limited circumstances.
- That is because the purpose of the combined values chart is to derive a permanent impairment percentage that arises from multiple impairments. Multiple impairments usually arise as a result of a primary injury and secondary or consequential injuries. Because each injury must be assessed as a separate injury, the combined values chart cannot be used in that situation.
  - After *Canute*, the combined values chart can only be used where a single injury gives rise to multiple losses of function, and therefore multiple impairments. To obtain the degree of permanent impairment in respect of that single injury, the scores for each loss of function (impairment) are combined using the combined values chart.
- 8.35 In *Fellowes v Military Rehabilitation and Compensation Commission*,<sup>340</sup> the majority of the High Court held that the degree of permanent impairment that Ms Fellowes suffered from an injury to her right knee should be assessed independently from the degree of permanent impairment that she suffered from a discrete injury that she had previously sustained to her left knee.<sup>341</sup> The MRCC had accepted liability for both injuries but, because the MRCC had already paid for the impairment to Ms Fellowes' left knee, it decided it was not liable to pay for the same injury to her right knee. (Ms Fellowes had already been compensated for a 10 % permanent impairment to her lower limbs.)
- 8.36 The High Court held that the reference in the Approved Guide to two injuries causing the "same impairment" required consideration of the particular effect of the injuries.<sup>342</sup> Although Ms Fellowes suffered injuries to her knees, both of which were assessed as creating 10 % permanent impairment, they were separate injuries with separate effects, and therefore separately compensable. The MRCC was liable to pay for the second impairment of 10 %.
- 8.37 As noted in paragraph 8.33 above, the reasoning in *Canute* disadvantages an injured employee who might, for example, have 9 % impairment to the foot, 7 % impairment to the ankle and 7 % impairment to the wrist: each is a separate injury according to the *Canute* reasoning and must be assessed separately, and each value falls below the 10 % threshold prescribed by s 24(7) of the SRC Act.
- 8.38 By comparison, an injured employee who is similarly injured and assessed as having a 10 % impairment to the foot, 10 % impairment to the ankle and 3 % impairment to the wrist will be awarded 10 % permanent impairment for the foot and 10 % for the ankle. As at 1 July 2012, the total amount of compensation for permanent impairment under s 24 that would be payable to the injured employee in this second example would be \$33,721.00. That employee would also be eligible to receive a lump sum amount for non-economic loss under s 27 of the SRC Act.
- 8.39 Additionally, Comcare cannot adopt the proposed National Guide as currently drafted under s 28 of the SRC Act, unless the SRC Act is amended in order to support the use of the combined values chart in the American Medical Association guides.

## SUBMISSIONS RECEIVED

- 8.40 I have received several submissions arguing about the unfairness of the decision of *Canute* in practice.
- 8.41 Maurice Blackburn submits:<sup>343</sup>
- We have seen the grossly unfair result of this decision [*Comcare v Canute*] in practice. For example, an employee might have injuries to both his shoulders, back and both knees, each of these injuries resulting in 8% impairment. Accordingly, that person would receive nothing. We therefore believe that the Court's judgment should be addressed by way of a legislative amendment making clear that injured workers are able to access permanent impairment compensation on a whole person impairment basis (i.e. impairments from separate accepted injuries can be combined).
- 8.42 That view is echoed in the submission from Ryan Carlisle Thomas:<sup>344</sup>
- Reversing the post-*Canute* position would mean that at least those workers with multiple injuries would have enhanced prospects of receiving a lump sum.

340. [2009] HCA 38; (2009) 240 CLR 28.

341. [2009] HCA 38; (2009) 240 CLR 28 at [21] and [25].

342. [2009] HCA 38; (2009) 240 CLR 28 at [26].

343. Maurice Blackburn, Submission to the Review, p 22.

344. Ryan Carlisle Thomas, Submission to the Review, p 17.

## RECOMMENDATIONS

- 8.43 The SRC Act should be amended so that separate impairments arising from a single injury occurrence can be combined to achieve a combined impairment value. That result could be achieved by inserting a new subsection (6A) in s 24, to the effect that, if an employee sustains more than one injury in a single incident arising out of or in the course of employment, the impairments resulting from each injury are to be combined under the provisions of the Guide so as attribute a single value for the degree of permanent impairment for the purpose of this Division.

### RECOMMENDATION 8.2

I recommend that the SRC Act be amended so that separate impairments arising from a single injury occurrence can be combined to achieve a combined impairment value.

**Recommendation 8.2** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

## COMPENSATING FOR PERMANENT IMPAIRMENT: THRESHOLDS, CALCULATING LEVELS AND THE MAXIMUM BENEFIT PAYABLE

- 8.44 Once the level of an employee's permanent impairment has been determined, the next questions are:
- From what level of impairment should compensation be payable—what should the threshold for payment of compensation be?
  - How much compensation should be payable for what level of impairment?
  - What should the maximum compensation payable be?

The answers to these questions are informed by both policy and the need to protect the financial viability of the scheme.

### THRESHOLDS

- 8.45 As noted in paragraphs 8.4 and 8.5 above, s 24(3), (4), (5) and (6) of the SRC Act direct that the level of compensation payable for an employee's permanent impairment is determined by the employee's degree of permanent impairment (expressed as a percentage) under the Approved Guide. If the degree of permanent impairment is less than 10 % (for impairments generally) or 5 % (for hearing loss), no compensation is payable: s 24(7) and (7A) of the SRC Act. However, no minimum level of impairment applies to the loss, or loss of the use, of a finger or toe, and to the loss of the sense of taste or smell: s 24(8) of the SRC Act.
- 8.46 The thresholds are also applied to the situation where, after the level of an employee's permanent impairment has been assessed, the employee claims that the degree of permanent impairment has increased. Unless the subsequent increase is 10 % or more, or 5 % or more for hearing loss, no further amount of compensation is payable for the increase: s 25(4) and (5) of the SRC Act.
- 8.47 In 1988, when the 10 % threshold was implemented, it was technically difficult to assess an impairment below 10 %. However, with advances in medical science, this is now less problematic because there is more certainty in assessing the degree of impairment at lower percentages.
- 8.48 The Pearson Royal Commission on Civil Liability and Compensation for Personal Injury in the United Kingdom provided recommendations on the issue of tort law reform. Those recommendations also provide some insight into the justification for permanent impairment thresholds. The Commissioner offered three distinct arguments in favour of compensation for permanent impairment—namely, that it:<sup>345</sup>
- serves as a palliative or solace to the victim;
  - allows the injured employee to purchase alternative sources of satisfaction to those he or she has lost; and
  - helps to meet the hidden costs of the impairment (that is, the impact on lifestyle).

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345. United Kingdom, *Royal Commission on Civil Liability and Compensation for Personal Injury*, 1978 (the **Pearson Royal Commission**), Volume 1, p 85.

- 8.49 There are several reasons why permanent impairment compensation should only be provided where the impairment reaches a particular threshold:
- (a) if permanent impairment compensation is paid to meet the hidden costs of impairment, then those costs must be real (and the impairment significant) for the objective to be realised;
  - (b) there is a cost–benefit ratio—each claim for permanent impairment incurs significant administrative costs; and
  - (c) where there is no threshold at all, the amounts of compensation paid for permanent impairment can be very low, and often the amount paid out in legal costs can well exceed the amount of compensation paid for the permanent impairment.
- 8.50 The philosophical rationale for a threshold is to distinguish between serious impairments and those losses of bodily function that can be considered minor. If it can be agreed that a threshold is necessary, the question then remains: at what level should that threshold be set? And, following payment of permanent impairment compensation, should the threshold to access permanent impairment payments after any worsening or a secondary condition be set at the same level?
- 8.51 Permanent impairment threshold levels vary considerably throughout Australian jurisdictions.

**TABLE 5: JURISDICTIONAL COMPARISON OF PERMANENT IMPAIRMENT THRESHOLDS**

Thresholds expressed as a percentage of whole person impairment			
Jurisdiction	General	Hearing	Psychological
Comcare	10 %	2 % <sup>a</sup>	10 %
Australian Capital Territory	No threshold.	3.9 % (approximately) <sup>b</sup>	N/A <sup>c</sup>
New South Wales	11 %	11 %	15 %
Northern Territory	5 %	5 %	5 %
Queensland	1 %	5 %	1 %
South Australia	5 %	5 %	N/A <sup>d</sup>
Tasmania	5 %	2 % <sup>e</sup>	10 %
Victoria	10 %	10 %	30 %
Western Australia	1 %	6 %	15 %

- a. In the SRC Act, the threshold for hearing loss is “binaural hearing loss [of] 5 %”, which equates to a 2 % whole person impairment; whereas the threshold for a permanent impairment other than a hearing loss is a “degree of permanent impairment [of] 10%”.
- b. Not directly comparable – the threshold is 6 % hearing loss (not 6 % whole person impairment). Hearing loss is 65 % of the total amount payable for a single impairment, and 6 % of 65 % = 3.9 %, so therefore 3.9 % whole person impairment is an approximate comparison.
- c. There is no permanent impairment benefit payable for psychological conditions in the ACT scheme.
- d. In South Australia, there is no entitlement for permanent impairment in relation to a psychiatric impairment.
- e. In Tasmania, the threshold is 5 % binaural hearing loss, which equates to a 2 % whole person impairment.

8.52 As can be seen, leaving aside permanent impairment for psychological injuries, thresholds vary from no threshold (in the Australian Capital Territory) to 11 % (in New South Wales). It is interesting to note that, with the exception of Queensland<sup>346</sup> and the Northern Territory (where the same threshold is applied), the threshold for psychological injuries (where permanent impairment compensation is payable) is higher than that applied for general conditions.

346. Comparisons between the Comcare and Queensland schemes should be made with a great degree of caution given the short-tail nature of the Queensland scheme.

**TABLE 6: BREAKDOWN OF PERMANENT IMPAIRMENT CLAIMS LODGED, BY BODILY LOCATION<sup>347</sup>**

Body location major group	Accepted <sup>a</sup>	Rejected <sup>b</sup>	Total
<b>Claims for permanent impairment assessed in 2011–12</b>			
Psychological system	88	29	117
Trunk	40	52	92
Upper limbs	34	58	92
Head	51	18	69
Lower limbs	16	31	47
Neck	16	9	25
Multiple locations	4	8	12
Systemic locations	1	2	3
Unspecified	0	3	3
<b>Total</b>	<b>250</b>	<b>210</b>	<b>460</b>
<b>Claims for permanent impairment assessed in 2010–11</b>			
Psychological system	75	17	92
Trunk	20	24	44
Upper limbs	8	17	25
Head	32	25	57
Lower limbs	14	27	41
Neck	3	7	10
Multiple locations	2	3	5
Systemic locations	1	3	4
Unspecified	2	2	4
<b>Total</b>	<b>157</b>	<b>125</b>	<b>282</b>

- a. That is, the determining authority has assessed that compensation is payable for permanent impairment.  
b. That is, the determining authority has assessed that compensation is payable for permanent impairment.

- 8.53 I consider that maintaining the same threshold for both “general” conditions and psychological conditions is appropriate. I do not see any reason why a distinction should be drawn between psychological injuries and other types of injuries. Psychological injuries are real injuries, the impairments caused by psychological injuries are real and can be just as disabling as physical injuries. Introducing a higher threshold for psychological injuries would discriminate against psychological injuries.<sup>348</sup> This has particular relevance for the Comcare scheme when considering the information provided in **Table 6**, and that approximately a quarter of permanent impairment claims assessed in 2011–12 were for psychological injuries. Further, for the reasons outlined in paragraphs 8.63–8.64 below, I do not recommend lowering the 10 % initial threshold prescribed by s 24(7) of the SRC Act.
- 8.54 One issue that has been raised through submissions, and in the consultations, is the challenge for an employee needing to meet the 10 % threshold for initial claim for permanent impairment compensation, and then having to meet that threshold again at a later date should any worsening occur or any secondary condition arise, as prescribed by s 25(4) of the SRC Act.

347. **Table 6** provides the number of permanent impairment requests determined, based on the financial year in which the request was received, for premium-paying agencies only. Only limited data is available for self-insured licensees.

348. See also the discussion in paragraphs 5.46 and 5.61 above.

- 8.55 That issue should be considered in context. The SRC Act provides for interim permanent impairment payments. If the impairment of an employee is 10 % or greater, is not likely to improve, and may in fact deteriorate, the employee may request that an interim assessment of permanent impairment and payment of compensation be made: s 25(1) and (2) of the SRC Act.
- 8.56 That option can be attractive to employees because the subsequent permanent impairment payment does not need to meet any further threshold. The final assessment of permanent impairment may be as low as 11 % and the employee will still qualify for an additional payment of compensation under s 25(3) of the SRC Act to reflect the 1 % increase. However, some employees may not wish to access s 25 payments because they cannot access s 27, non-economic loss component, until the final permanent impairment assessment is made: s 27(1) of the SRC Act requires compensation to be payable pursuant to s 24 of the SRC Act before payments under s 27 of the SRC Act can be made.
- 8.57 Given the fact that the interim payment option exists, it is difficult to argue that no threshold should exist for subsequent permanent impairment claims made for any worsening of primary conditions or for secondary conditions. However, interim payments are not an attractive (or available) option in every scenario. For that reason, an argument can be raised that, once an employee has met the 10 % threshold, the threshold should be relaxed for any subsequent permanent impairment claims made for any worsening or secondary conditions—see paragraph 8.65 below.

### SUBMISSIONS RECEIVED

- 8.58 Several submissions have argued that the permanent impairment threshold should be changed.
- 8.59 The Law Council of Australia submits that there is value in examining a 5 % threshold.<sup>349</sup>
- 8.60 That view is also supported by Ryan Carlisle Thomas:<sup>350</sup>
- ... an overall reduction of the threshold to 5% would mean that there is consistency in the rate at which lump sum impairment is payable given that the 5% rate applicable in the case of loss of hearing, sense of smell etc. It would also mean that the pendulum could be swung back some way in terms of ensuring that workers with significant injuries can access lump sum compensation whereas currently many are missing out.
- 8.61 Maurice Blackburn submits:<sup>351</sup>
- ... there should be no threshold for permanent impairment benefits ... We believe it is appropriate to remove or significantly reduce the current 10% threshold in light of more precise medical assessment methods.
- 8.62 In contrast, Telstra submits:<sup>352</sup>
- The assessment for a 10% [whole person impairment] in respect of psychological impairment is not sufficiently rigorous. TAC and other schemes have more stringent requirements in relation to secondary psychological conditions and those schemes merit some consideration.

### RECOMMENDATIONS

- 8.63 I do not recommend any changes to the initial threshold prescribed by s 24(7) of the SRC Act. In my view, the 10 % threshold for both “general” conditions and psychological conditions (other than for a hearing loss) is appropriate, because it treats psychological and other injuries in the same way (for the reasons outlined in paragraph 8.53 above), and because of the other recommendations that I make about the level of compensation to be paid and how that compensation is to be calculated: see paragraphs 8.82–8.84 below.
- 8.64 I am proposing a significant increase to the maximum compensation payable for permanent impairment. In order to restrain the growth of outlays, which will be under significant upward pressure from the changes I propose, I do not recommend a change to the 10 % initial threshold (for impairments other than a hearing loss) as prescribed by s 24(7) of the SRC Act. It is within the range of thresholds applied in the various State and Territory schemes, and provides a balance to the upward pressure on outlays that will be caused by increasing the maximum benefit payable, as recommended in paragraph 8.83(c) below. Further, maintaining a strong threshold ensures that only impairments with clearly discernible effects are compensated.<sup>353</sup> For the same reasons, I do not recommend a change to the initial threshold for a hearing loss of 5 % binaural hearing loss, as prescribed by s 24(7A) of the SRC Act.

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349. Law Council of Australia, Submission to the Review, p 13.

350. Ryan Carlisle Thomas, Submission to the Review, p 17.

351. Maurice Blackburn, Submission to the Review, p 22.

352. Telstra, Submission to the Review, p 12.

353. See the conclusions of the Pearson Royal Commission, referred to in paragraph 8.48 above.

8.65 However, I am proposing a lower threshold for any subsequent permanent impairment claims made for any worsening of the condition or a secondary condition (other than a hearing loss). The importance of minimising the disadvantage imposed on employees who do not take advantage of the right to an interim assessment of permanent impairment pursuant to s 25(1) and (2) (for good reason—see paragraphs 8.56–8.57 above) needs to be balanced against the considerations identified in paragraph 8.64 above—primarily, counteracting the upward pressure on outlays that will be caused by increasing the maximum benefit payable, as recommended in paragraph 8.83(c) below.

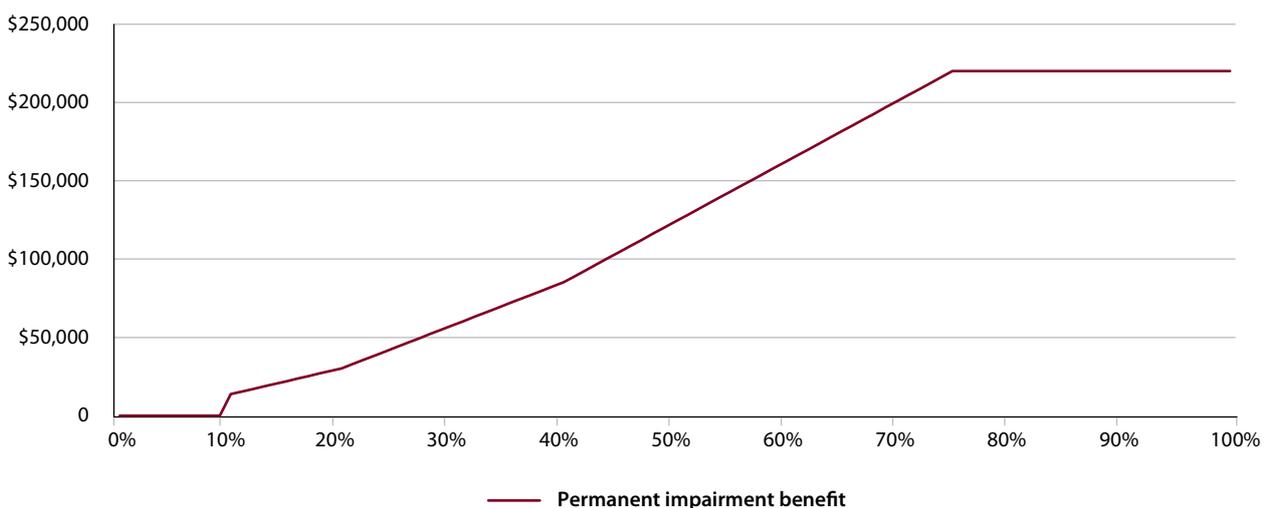
## CALCULATING THE LEVEL OF BENEFIT

8.66 There are essentially two methods for calculating the level of permanent impairment benefits:

- (a) a linear model, where the benefit payable is a straight percentage of a maximum benefit; this is the method currently used in the Comcare scheme; or
- (b) an algorithmic model, where a more complex formula is applied, so that employees who have the greatest impairment receive the greatest amount of compensation, whereas employees with lower levels of impairment receive less compensation than they would if the linear model were used.<sup>354</sup>

8.67 Both the linear and algorithmic models are in use in Australia. The New South Wales algorithm illustrates the impact of algorithmic models. Only where an employee has an impairment level of at least 42 % will the New South Wales algorithm provide a level of impairment benefit equal to the benefit that would be provided under a linear model. The amount of compensation received by an employee who has an impairment of 41 % and below is significantly less than the amount that would be received under a linear model.

**Figure 4: Benefits payable for permanent impairment claims made on or after 19 June 2012 in New South Wales.**



8.68 Under the New South Wales algorithmic model, once an employee’s impairment level exceeds 42 %, the amount of compensation received increases at a faster rate until the employee is assessed as being 75 % impaired, when the maximum impairment benefit is automatically paid.

8.69 Using an algorithm to calculate the permanent impairment benefit for a particular level of impairment has the advantage of maximising the level of compensation available to very seriously injured employees, while maintaining a degree of scheme viability through restricting the access of less injured employees to higher amounts of compensation.

## RECOMMENDATIONS

8.70 As part of a package of changes, I recommend that the SRC Act adopt an algorithmic model to calculate the level of benefits. This will mean that the most seriously impaired employees will receive the greatest level of benefits.

354. Exceptions to this proposition include Tasmania, where an employee with a low percentage impairment could receive more compensation under the algorithm; and the MRC Act, where the algorithm includes a variable that reflects the age of the employee, so that the result will vary according to age.

## THE MAXIMUM BENEFIT PAYABLE

- 8.71 Section 24(9) of the SRC Act fixes the maximum amount of compensation payable under s 24 of the SRC Act at \$80,000, which is indexed annually pursuant to s 13. As noted in paragraph 8.5 above, the maximum amount of compensation payable under s 24 of the SRC Act is currently \$168,605.02.
- 8.72 Section 27(1) of the SRC Act creates an additional liability for determining authorities to pay compensation for non-economic loss to an employee to whom compensation is payable for permanent impairment. The level of compensation for non-economic loss is determined by undertaking two calculations:
- First, the percentage of impairment, as determined in accordance with the Approved Guide, is applied to the amount specified in s 27(2) of the SRC Act (originally \$15,000, indexed annually pursuant to s 13 of the SRC Act).
  - Second, the formula prescribed in Division 2 of the Approved Guide is applied to the amount specified in s 27(2) of the SRC Act (also originally \$15,000, indexed annually pursuant to s 13) of the SRC Act.
  - Third, the two results are added together, to give a proportion of the maximum amount. As noted in paragraph 8.5 above, the total maximum amount of compensation payable under s 27 of the SRC Act is currently \$63,226.92.
- 8.73 The total amount payable under ss 24 and 27 of the SRC Act together is currently \$231,831.94,<sup>355</sup> (the **maximum benefit payable for permanent impairment**), which is considerably lower than the sum payable in many Australian workers compensation schemes,<sup>356</sup> and considerably less than the death benefit payable under the SRC Act. Compensation for permanent impairment pursuant to s 24 of the SRC Act comprises 72.72 % of the maximum benefit payable for permanent impairment, and compensation for pain and suffering pursuant to s 27 of the SRC Act comprises 27.27 %.
- 8.74 Only the West Australian scheme and the Australian Capital Territory private sector scheme provide for lower permanent impairment lump sums. However, both the West Australian and Australian Capital Territory schemes, unlike the Comcare scheme, permit injured employees significant access to common law damages. The SRC Act caps any common law damages at \$110,000, an amount that is not indexed: see s 45(4) of the SRC Act.
- 8.75 The indexed maximum amount of compensation payable under s 17 of the SRC Act where an employee's injury results in death is currently \$475,962.79,<sup>357</sup> more than double the maximum benefit payable for permanent impairment. (The lack of consistency between the maximum benefit payable for permanent impairment and the amount payable by way of death benefits exists in all schemes except the Victorian scheme.)
- 8.76 There are good arguments for setting the maximum benefit payable for permanent impairment at a level that is at least commensurate with either:
- other schemes that have less restricted access to common law damages; or
  - the death benefit payable under the Comcare scheme.

## SUBMISSIONS RECEIVED

- 8.77 A number of stakeholders have argued for an increase to the maximum payable for permanent impairment.
- 8.78 The Communications Electrical and Plumbing Union (Communications Division) observes:<sup>358</sup>
- The lump sums available for permanent impairment are set at a much lower value than those available in most State schemes, particularly for major impairments.
- 8.79 Maurice Blackburn submits:<sup>359</sup>
- It is unjust to have the current rates below the other States. The maximum permanent impairment amount should therefore be increased to \$543,920 so that it is consistent with the Victorian scheme, being a much fairer rate of compensation.
- 8.80 This view is echoed by Ryan Carlisle Thomas, which submits:<sup>360</sup>
- The maximum damages available by way of non economic loss should also be aligned with the maximum impairment rate and the death benefit. A current maximum of \$475,000 is consistent with maximum thresholds set in other jurisdictions. This figure should be indexed in line with the indexation of the maximum rate payable for impairment.

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355. See: [http://www.comcare.gov.au/claims/benefits\\_\\_and\\_\\_entitlements/statutory\\_rates](http://www.comcare.gov.au/claims/benefits__and__entitlements/statutory_rates)

356. Which varies from \$131,785 to \$527,610. See Table 4.3 in Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, April 2012, pp 86–89, available at: <http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

357. See: [http://www.comcare.gov.au/claims/benefits\\_\\_and\\_\\_entitlements/statutory\\_rates](http://www.comcare.gov.au/claims/benefits__and__entitlements/statutory_rates)

358. Communications Electrical and Plumbing Union (Communications Division), Submission to the Review, p 8.

359. Maurice Blackburn, Submission to the Review, p 22.

360. Ryan Carlisle Thomas, Submission to the Review, p 16.

8.81 Another participant in the Review's consultations (name withheld) submits:<sup>361</sup>

Overall, tying the maximum entitlement under section 24 with a percentage of the death benefits, and eliminating section 27 assessments would lead to a much less complex system than [sic] currently exists. The trade-off would, however, be an increase in contested claims and in all probability an increase in the number of claims for permanent impairment lodged by injured employees.

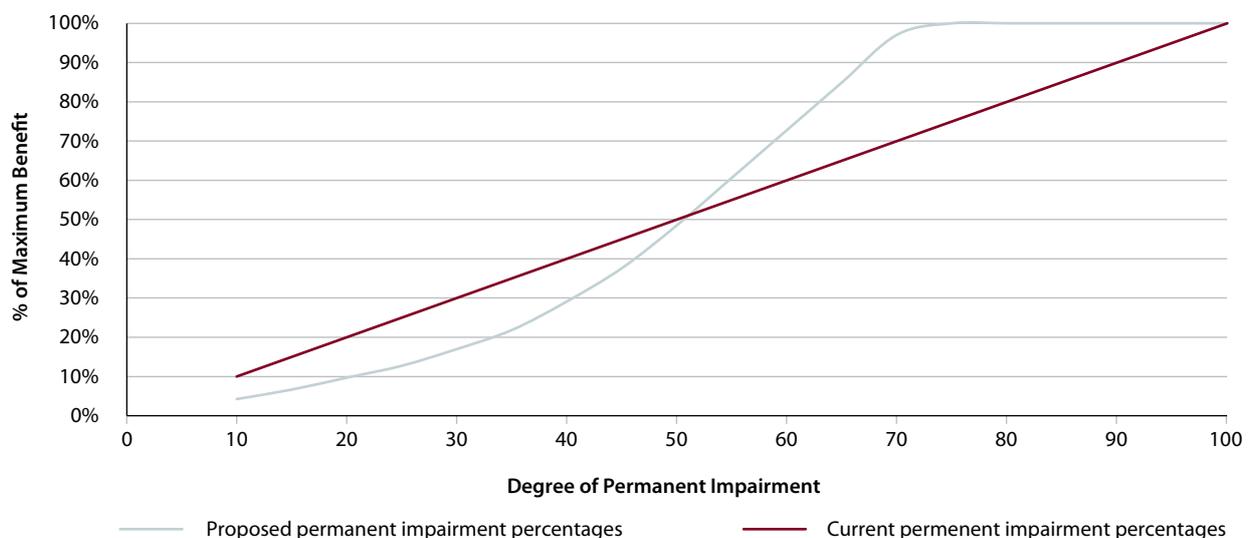
## RECOMMENDATIONS

8.82 Bearing in mind the final sentence of the terms of reference, I propose a package of amendments to permanent impairment payments: an increase to the maximum benefit payable in line with the death benefit, together with amendments to the level of benefit to be paid for permanent impairments.

8.83 The package that I propose involves the following elements:

- (a) the threshold for the payment of compensation for permanent impairment other than for hearing loss remain at 10 % (and the hearing loss threshold remain at a binaural hearing loss of 5 %);
- (b) following payment of permanent impairment compensation, the permanent impairment threshold under the SRC Act for any worsening of the original or secondary condition, other than for hearing loss, be reduced to 5 % (and the hearing loss threshold remain at a subsequent increase of 5 % in binaural hearing);
- (c) the maximum benefit payable for permanent impairment (being the combined amount payable pursuant to s 24 and s 27) be the same amount as the lump sum compensation payable pursuant to s 17 for a death, with the maximum s 24 payment being 72.72 % of the death benefit and the maximum s 27 payment being 27.27 % of the death benefit; and
- (d) an algorithmic model be introduced for calculating permanent impairment compensation, consistent with the model outlined in **Figure 5**.

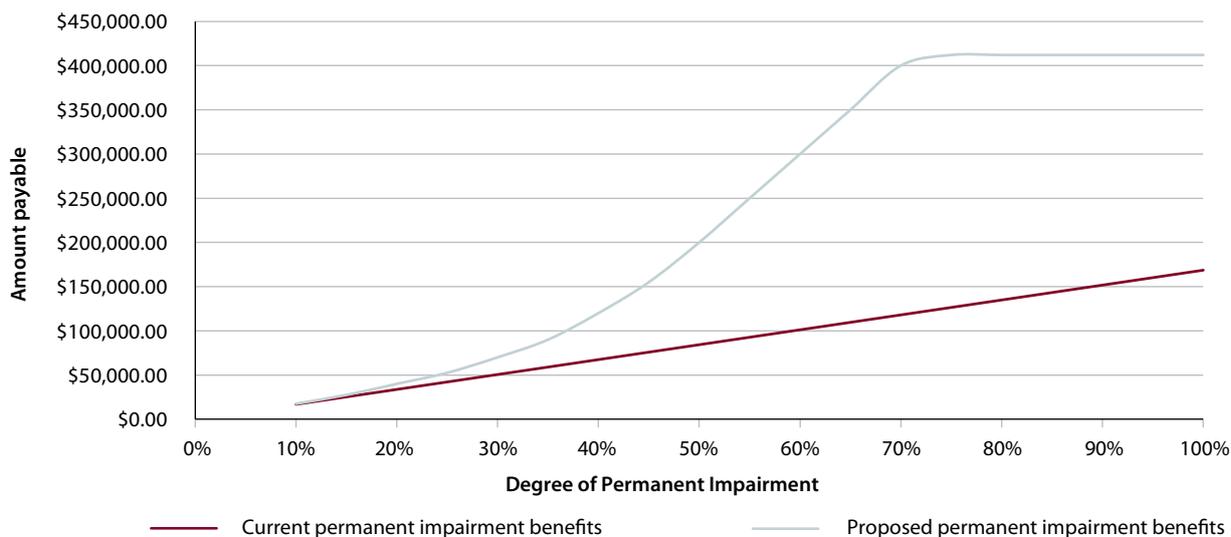
**Figure 5: Comparison of the linear and algorithmic models for payment of benefits, as a percentage of the maximum benefit**



8.84 As can be seen in **Figure 5** (consistent with the situation in New South Wales), at a certain point the percentage of the maximum benefit received under the algorithmic model is greater than that received under the linear model. This ensures that those employees with the greatest level of impairments receive the greatest compensation. As shown in **Figure 6**, once the maximum benefit payable for permanent impairment is increased to a level equivalent to the death benefit (see paragraph 8.83(c) above), employees who are eligible for permanent impairment compensation at any level of impairment receive no less than they would receive under the existing system. The percentage of the compensation pool that a particular employee receives may be less; however, in real terms no employee will receive less than he or she would receive under the existing system. Those employees with the lowest level of impairment will still receive at least the same amount of compensation.

361. Submission 7 (name withheld), Submission to the Review, pp 11–12.

**Figure 6: SRC Act permanent impairment benefits—current benefit levels compared to recommended benefit levels**



**RECOMMENDATION 8.3**

I recommend that, following payment of permanent impairment compensation, the permanent impairment threshold under the SRC Act for any worsening of the original or secondary condition (other than a hearing loss) be reduced to 5 %.

8.85 **Recommendation 8.3** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

**RECOMMENDATION 8.4**

I recommend that the maximum benefit payable for permanent impairment (being the combined amount payable pursuant to s 24 and s 27) be the same amount as the lump sum compensation payable pursuant to s 17 for a death that results from an injury, with the maximum s 24 payment being 72.72 % of the death benefit and the maximum s 27 payment being 27.27 % of the death benefit.

**RECOMMENDATION 8.5**

I recommend that an algorithmic model be introduced for calculating permanent impairment compensation, consistent with the model outlined in **Figure 5**.

8.86 **Recommendation 8.4** and **Recommendation 8.5** have been the subject of actuarial costing. Taylor Fry has provided an estimate of the effect of this proposal, available at Chapter 2, **Table 2**.

8.87 Because the proposal would also impact Part XI claims, the Australian Government Actuary also considered the proposal. The cost estimated by the Australian Government Actuary is available at Chapter 2, **Table 3**.

# 9. CLAIM DETERMINATION, RECONSIDERATION AND REVIEW

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- 9.1 Non-medical factors, such as administrative delays and the barriers created by compensation and return to work systems that contribute to disability in a workers compensation setting, can contribute to “needless disability”.<sup>362</sup> Effective claims administration lessens the risk of needless disability by ensuring that claims are dealt with in a timely way, which contributes to the rehabilitation of injured employees.
- 9.2 In this Chapter, I make recommendations about a number of critical claims administration matters such as claims reporting and determination timeframes, the dispute resolution process under the SRC Act, information-gathering powers, fraud control, recovery of incapacity payments and compensation for defective administration.

## CLAIM LODGEMENT AND DETERMINATION TIMEFRAMES

- 9.3 In modern workers compensation schemes, legislation is designed to facilitate early reporting of injuries, easy access to benefits and quick decisions. That is achieved through the trio of:
- (a) legislated timeframes for the reporting of injuries and lodgement of claims;
  - (b) access to provisional liability; and
  - (c) legislated timeframes for the determination of claims.
- 9.4 The timeframes for reporting and lodgement of claims and their determination are discussed in this Chapter. Provisional liability is discussed in Chapter 6.

## REPORTING OF INJURIES AND MAKING CLAIMS IN THE COMCARE SCHEME

- 9.5 Before the SRC Act applies to any injury, notice of the injury must be given to the relevant authority: s 53(1). That notice must be given “as soon as practicable” after the employee becomes aware of the injury: s 53(2); or after the death of an employee: s 53(3). Notice is also taken to be received, even if it is not given “as soon as practicable”, where the relevant authority is not prejudiced by the delay: s 53(3).
- 9.6 I discuss further the requirements for the reporting of injuries, and recommend a number of changes, in paragraphs 6.48–6.49 above.
- 9.7 A claim must be in writing in accordance with the form approved by Comcare: s 54 of the SRC Act.
- 9.8 On 7 December 2011, amendments to the SRC Act took effect following the commencement of SRCOLA 2011. Two of those amendments require determining authorities to determine any claim and to complete any reconsideration of a determination within the periods prescribed by regulations made by the Governor-General: s 61(1A) in relation to claim determination and s 62(6) in relation to reconsideration.
- 9.9 In the second reading speech for the Bill for SRCOLA 2011, the Parliamentary Secretary for Employment stated:
- To encourage timely determination of workers’ compensation claims, the Bill amends the SRC Act to enable the setting of statutory time limits within which claims must be determined. Claims determined quickly tend to be shorter in duration and less costly.<sup>363</sup>
- 9.10 To date, the regulations that will prescribe the time limits have not been made, so there are currently no decision-making timeframes under the SRC Act; nor, once the regulations are made, will there be any consequences for non-compliance with the timeframes—because the 2011 amendments to the SRC Act do not authorise the imposition of any sanction or penalty for a failure to meet the prescribed timeframes.

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362. American College of Occupational and Environmental Medicine, *Preventing Needless Work Disability by Helping People Stay Employed*, 2006. Available at: <http://www.ocoem.org/PreventingNeedlessWorkDisability.aspx>

363. *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2011*, second reading speech by the Minister for Employment Participation and Childcare and Minister for the States of Women, The Hon. Kate Ellis: House of Representatives, 23 March 2011, p2868. Available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2011-03-23%2F0033%22>

- 9.11 Provisional liability would go some way to ensuring that claims will be determined quickly, by providing consequences for inaction. However, provisional liability may not continue until an employee is able to return to work, and the existence of provisional liability is not in itself an acceptance of liability for the claim. In addition, there are claims that will not be subject to provisional liability and those claims still need to be determined in a timely manner.
- 9.12 The SRCC is a statutory body with regulatory functions relating to workers compensation and an oversight role relating to work health and safety. In the exercise of its regulatory functions in relation to workers compensation, the SRCC sets key performance indicators (**KPIs**) for all determining authorities, including Comcare. Those KPIs are known as determining authority key performance indicators (**DAKPIs**). The time limits set by DAKPI 7 for the determination of new claims are as follows:<sup>364</sup>
- (a) determination of new injury claims (DAKPI 7)—20 calendar days; and
  - (b) determination of new disease claims (DAKPI 7)—60 calendar days.
- 9.13 The SRCC's target is that 75 % of all claims decided by a particular determining authority (that is, by Comcare and each licensee) be determined within the DAKPIs.<sup>365</sup>
- 9.14 Currently, there are no statutory consequences for failing to meet the DAKPIs. However, the DAKPIs provide criteria against which licensees are audited for compliance with the terms of their licences under the SRC Act. A consistent failure by a licensee to meet the DAKPIs could lead to serious consequences, such as the eventual loss of its licence.

### CHALLENGES FOR MEETING REPORTING TIME LINES

- 9.15 A common challenge for many employers is the delay that often occurs in the reporting of injuries. That delay triggers a chain reaction of setbacks in managing medical treatment, return to work outcomes and the claims themselves. As a result, the rehabilitation and compensation scheme becomes reactive and ineffectual in bringing about optimal results. Early intervention (as discussed in paragraphs 6.5–6.21 above) is designed to initiate a proactive and coordinated response at the earliest and most critical point where quality care, general health and employment outcomes and claims costs can be influenced.
- 9.16 Although it is well understood that immediate injury reporting leads to improved outcomes for employees, their employers and the scheme, there can be barriers to achieving timely reporting.
- 9.17 One of those barriers may be the length of the standard claim form used in the Comcare scheme. It is currently 20 pages long and must be completed by both the employee and the employer.<sup>366</sup> Nine of the 20 pages must be completed by the employee. By way of comparison, in New South Wales, an employee needs to complete only four pages of the claim form.<sup>367</sup>
- 9.18 Another barrier may be the way in which a claim form is required to be lodged. The SRC Act requires a claim to be made by "written claim" and given to Comcare (in the case of employees of premium-paying agencies) or to the employing licensee: s 54(2). By way of comparison, several jurisdictions have amended their processes to enable lodgement of claims electronically, or by facsimile or telephone.
- 9.19 Historically, the SRC Act was not subject to the *Electronic Applications Act 1999*, having been excluded by the operation of the *Electronic Transactions Regulations 2000*. However, that exclusion no longer exists and there is no legal reason why the SRC Act could not permit the electronic lodging of claims.
- 9.20 The SRC Act is consistent with other jurisdictions in the requirement that an employee report an injury as soon as practicable. However, other reporting timeframes are not specified in the SRC Act. It might be argued that the nature of the participants in the Comcare scheme (a significant proportion of large employers with mature systems) suggests that less prescription, rather than more, is appropriate. Nevertheless, prescribing timeframes within which employees and employers should lodge claims would add certainty to employers' obligations and ensure that claims are actioned in a timely way.
- 9.21 In paragraphs 6.47–6.62 above, I recommend a system of access to provisional liability. That system will necessarily involve the preparation of a form to notify an injury and from which determining authorities can decide whether there is a reasonable excuse not to commence compensation payments. Arrangements will also need to be made to ensure that notification of an injury can be made by email, telephone or facsimile.

364. SRCC, *Determining Authority KPI Specifications*, July 2011, p 16. Available at: [http://www.srcc.gov.au/\\_\\_data/assets/pdf\\_file/0014/51026/dakpi-specifications.pdf](http://www.srcc.gov.au/__data/assets/pdf_file/0014/51026/dakpi-specifications.pdf)

365. *Comcare–SRCC Annual Report 2011–12*, p 71. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0019/115822/Comcare-SRCC\\_Annual\\_report\\_2011-2012.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0019/115822/Comcare-SRCC_Annual_report_2011-2012.pdf)

366. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0006/36789/claim-for-workers-compensation.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0006/36789/claim-for-workers-compensation.pdf)

367. Available at: [http://www.workcover.nsw.gov.au/formspublications/publications/Documents/workers\\_injury\\_claim\\_form\\_5299.pdf](http://www.workcover.nsw.gov.au/formspublications/publications/Documents/workers_injury_claim_form_5299.pdf)

## RECOMMENDATIONS

- 9.22 I recommend that the SRC Act be amended to ensure that claim forms can be lodged electronically and or by facsimile. That could be done by removing the word “written” (qualifying a “claim”) in s 54(2)(a) and s 54(3) and by inserting the words “in the manner prescribed by the regulations” in the opening paragraph of s 54(2), as follows:
- (2) A claim shall be made by giving the relevant authority, in the manner prescribed by the regulations;
- 9.23 Section 53(1) and (2) of the SRC Act should also be amended by removing the words “in writing” (as qualifying “notice”) in s 53(1) and by inserting the words “in the manner prescribed by the regulations” at the end of the opening paragraph in each of s 53(1) and s 53(2).
- 9.24 Permitting the method of lodgement to be prescribed by the regulations will mean that the method(s) for lodgement can evolve with advances in technology.

### RECOMMENDATION 9.1

I recommend that the SRC Act be amended to allow for electronic notification of injury and electronic lodgement of claim forms.

## REPORTING OF INJURIES AND CLAIMS IN OTHER SCHEMES

- 9.25 In the majority of Australian workers compensation schemes, there are obligations on employees to notify their employers of an injury and timeframes within which claims for compensation must be lodged. There are also obligations on employers for timely reporting of injuries and forwarding of claims. Those timeframes are set out in **Table 7** and **Table 8** below.

**TABLE 7: PRESCRIBED TIME LIMITS FOR INJURY NOTIFICATION<sup>368</sup>**

Scheme	Injured employee notifies employer/ insurer of injury	Employer notifies insurer/ authority of injury to worker
<b>Commonwealth</b>	As soon as practicable: s 53(1)(a).	Not specified.
<b>Australian Capital Territory</b>	As soon as possible: s 93(1).	Within 48 hours of becoming aware: s 93(2).
<b>New South Wales</b>	As soon as possible: s 44(1).	Within 48 hours of becoming aware: s 44(2).
<b>Northern Territory</b>	As soon as practicable: s 80(1).	Verbal reporting as soon as practicable and written reporting within 48 hours of occurrence: s 65 of the <i>Workplace Health and Safety Act 2007</i> (NT).
<b>Queensland</b>	Not specified.	Within eight business days: s 133(3).
<b>South Australia</b>	Within 24 hours or as soon as practicable: s 51(2).	Within five business days: s 51(6).
<b>Tasmania</b>	As soon as practicable: s 32(1)(a).	Within three working days after becoming aware that worker has suffered a workplace injury: s 143A.
<b>Victoria</b>	Within 30 days after becoming aware of injury: s 102(1). Beyond 30 days after becoming aware of injury in certain conditions: s 102(6).	Not applicable. There is only an obligation to forward a claim.
<b>Western Australia</b>	As soon as practicable: s 178(1)(a). Claim within 12 months of injury: s 178(1)(b).	Five days after claim is made: s 57A(2A).

368. Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, April 2012, p 24. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.docx>

**TABLE 8: PRESCRIBED TIME LIMITS FOR CLAIM SUBMISSION<sup>369</sup>**

Scheme	Injured employee puts in claim form	Employer passes on claim form to insurer/authority
<b>Commonwealth</b>	No specified time: s 54(1).	Not specified
<b>Australian Capital Territory</b>	Three years: s 120(1)(b)	Seven days: s 126(1).
<b>New South Wales</b>	Six months (1998 Act, s 65(7)) or three years: s 65(13)	Seven days: 1998 Act, s 69(1)(a).
<b>Northern Territory</b>	Six months: s 182(1).	Three working days: s 84(1).
<b>Queensland</b>	Six months: s 131(1). If beyond 20 days, extent of the insurer's liability to pay compensation is limited to a period starting no earlier than 20 business days before the day on which the valid application is lodged: s 131(2). Beyond six months: s 131(5).	Not specified.
<b>South Australia</b>	Prescribed period is six months commencing on the day on which the entitlement to make the claim arises: s 52(1)(b).	Five business days: s 52(5).
<b>Tasmania</b>	Six months: s 32(1)(b).	Employer must notify insurer of claim within three working days of receiving claim: s 36(1AA). Employer must complete employer's report section of claim and forward it to insurer within five working days of receiving claim: s 36(1).
<b>Victoria</b>	As soon as practicable with injury employer for weekly payments, two years for death claims, six months after relevant service for claim for medical and like service: s 103.	Within 10 days after the employer receives the claim: s 108(1).
<b>Western Australia</b>	12 months: s 178(1)(b).	five working days: s 57A(2A).

9.26 Most workers compensation schemes in Australia also contain consequences for an employer's failure to forward a claim to the insurer or scheme administrator. In most cases, when a claim is not forwarded in time, it is deemed to be accepted. One notable exception is the *Seafarers Rehabilitation and Compensation Act 1992* (the **Seafarers Act**), pursuant to which a claim is deemed to be rejected if a decision is not made within the decision-making timeframe: s 72(5) (death claims); s 73(6) (claim for incapacity payments, property damage or medical treatment); and s 73A(6) (claim for permanent impairment).

369. Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, April 2012, pp 25–26. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.docx>

## SUBMISSIONS RECEIVED

9.27 The AAT submits.<sup>370</sup>

The delays that occur when new claims are made could also be ameliorated by the introduction of the time limits for decision-making under the SRC Act contemplated by subsections 61(1A) and 62(6). Consideration could also be given to amending the SRC Act in a manner similar to the *Seafarers Rehabilitation and Compensation Act 1992* to the effect that, if at the end of the time limit, the determining authority has not determined the claim, the authority is taken to have made a decision disallowing the claim.

9.28 The Communications Electrical Plumbing Union, Postal and Telecommunications Branch Victoria, submits that there should be enforceable time limits implemented for a liability decision to be made by the employer.<sup>371</sup>

9.29 Slater and Gordon also submits that timeframes be introduced for determining authority decision making and a mechanism for review when those timeframes are not met.<sup>372</sup>

9.30 The Australian Council of Trade Unions submits:<sup>373</sup>

The ACTU recently submitted to Comcare that the time limit for determining new injury and disease claims (excluding psychological injuries) should be 15 days. The time limit for determining psychological injuries should be 50 days ... The time starts when a determining authority receives a claim per s.54 of the SRC Act.

## RECOMMENDATIONS

9.31 Because early reporting of injuries leads to a number of desirable outcomes, such as earlier provision of rehabilitation support to the injured employee and to the employer and the earlier determination of claims,<sup>374</sup> I have recommended, as part of the package of amendments making provision for access to early intervention (see paragraphs 6.47–6.62 above), that statutory timeframes for the early reporting of injuries be enacted in the SRC Act.

9.32 In addition to that recommendation (**Recommendation 6.2**), I recommend that the SRC Act be amended to require employers to forward any claims to the determining authority within three days of receipt from an employee.

9.33 Although the DAKPIs already set target timeframes for the determination of new claims (see paragraph 9.12 above), they are not necessarily the appropriate timeframes to adopt in the legislation. The DAKPI timeframes are set to measure the overall performance of a determining authority in relation to all of its claims. The DAKPIs anticipate that a significant proportion of claims will not meet the timeframe and only require that 75 % of all claims (in relation to both injuries and diseases) be determined on time. It would therefore be possible for a determining authority not to meet the target of all of its disease claims and still meet the 75 % target.<sup>375</sup>

9.34 Statutory timeframes apply to all claims and require absolute compliance. For that reason, it is arguable that any statutory timeframe needs to be longer than the DAKPI. However, if statutory timeframes are taken as a package together with provisional liability and the imposition of a consequence for non-determination (deemed acceptance or rejection), the statutory timeframes could be closely aligned with the timeframes in the DAKPIs.

9.35 The benefit of a deemed rejection model such as that used in the Seafarers Act (see paragraph 9.26 above) is that it provides certainty and then immediate access to the next decision-making layer (that is, reconsideration).<sup>376</sup> Deemed acceptance provides less certainty, because that decision can still be overturned if a decision is ultimately made to reject the claim; so there is little gained for the employee except perhaps a few weeks extra incapacity payment. If the claim is ultimately rejected, access to the next layer of dispute resolution is delayed. Additionally, liability would be revoked and an overpayment could be raised against the employee.

9.36 Statutory timeframes should be introduced, as contemplated by the SRCOLA 2011 (that is, by making the regulation prescribing a period for the purposes of s 61(1A) of the SRC Act), requiring all determining authorities to determine claims within the following periods:

- (a) 30 days for injury claims; and
- (b) 60 days for disease claims.

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370. AAT, Submission to the Review, p 9.

371. Communications Electrical Plumbing Union, Postal and Telecommunications Branch Victoria, Submission to the Review, p 4.

372. Slater and Gordon, Submission to the Review, p 2.

373. Australian Council of Trade Unions, Submission to the Review, p 19.

374. See the discussion at paragraphs 6.5–6.14.

375. For example, where a determining authority's disease claims were all met outside the target but were less than 25 % of the total claims, and at least 75 % of the total claims (all being injury related) were decided within the target.

376. Discussed at paragraphs 9.56–9.66 below.

- 9.37 As discussed in paragraph 6.53, if provisional liability is being met as a result of a previously lodged injury notification, the claim must be determined by the end of the provisional liability period.
- 9.38 I recommend that, if a claim is not determined within the timeframe, the claim should be deemed to be rejected.

#### **RECOMMENDATION 9.2**

I recommend that the SRC Act be amended to require employers to forward claims received to the determining authority within three days.

#### **RECOMMENDATION 9.3**

I recommend that the SRC Act be amended to include statutory timeframes for the determination of claims and that, on a failure to meet those timeframes, the claim be deemed to be rejected.

The determining authority must determine the claim:

- (a) within 30 days for injury;
- (b) within 60 days for disease; or
- (c) if provisional liability is being met as a result of a previously lodged injury notification, by the end of the provisional liability period;

whichever is the longer.

### **PSYCHOLOGICAL INJURY CLAIMS**

- 9.39 The diagnosis of psychological injuries calls for expertise. At present, compensation for psychological injuries can be paid on the basis of a GP's report and can be paid for significant periods of time<sup>377</sup> without any confirmation of that diagnosis by a specialised practitioner.
- 9.40 At common law, mental stress such as grief or anxiety is not compensable unless there is a recognisable psychiatric injury or illness.<sup>378</sup>
- 9.41 Various submissions to the Review indicated that there were problems with psychological claims, particularly with regard to the rigour of the diagnosis and the overlap with workplace relations grievances, which are essentially non-medical issues.<sup>379</sup>
- 9.42 In determining eligibility for compensation, either in determining provisional liability or in determining a formal claim, a medical report from a GP should be sufficient. However, for compensation for psychological injuries to continue beyond 12 weeks, the injury should be considered by a practitioner with the relevant expertise—for example, a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare. In paragraph 7.276, I recommend that Comcare be given the function of recognising, accrediting and monitoring medical treatment providers who are not subject to AHPRA regulation. As part of that function, Comcare could also approve the standard required for practitioners to diagnose, or confirm the diagnosis of, psychological injuries post 12 weeks.
- 9.43 I have also considered requiring diagnosis of a psychological injury by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare when considering liability. However, there could be accessibility issues with such a regime. Allowing access to compensation based on a GP's report, subject to a later confirmatory diagnosis (at the determining authority's expense) at 12 weeks, should not present significant barriers to access to compensation (including treatment and incapacity payments).
- 9.44 At paragraph 6.133 above, I recommend claim reviews at 12 and 52 weeks. The 12-week review of claims relating to psychological injuries will provide the opportunity for the diagnosis to be confirmed by a suitably qualified practitioner, if that is required.

377. As noted in paragraph 5.47 above, the average duration of compensation payments for psychological injuries is 12.3 months.

378. See, for example, *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317 at [7].

379. See, for example, Australian Psychological Society, Submission to the Review, p 4.

## RECOMMENDATIONS

- 9.45 I recommend that the SRC Act be amended so that, for liability to pay compensation to continue in respect of a psychological injury for more than 12 weeks from the date of a claim, the diagnosis must be confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare—if not initially made by such a practitioner.
- 9.46 That could be achieved by inserting a new subs (1A) in s 14, immediately after s 14(1), as follows:
- (1A) Compensation is not payable in respect of a psychological injury for more than 12 weeks after the lodging of the relevant claim unless the diagnosis of the injury has been made or confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare.
- 9.47 I also recommend that a cross-reference be included in s 5A to the effect that, for compensation to be payable beyond 12 weeks after the lodging of a claim, the diagnosis of a psychological injury must be made or confirmed by a psychiatrist, clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare.

### RECOMMENDATION 9.4

I recommend that the SRC Act be amended so that, for liability to pay compensation to continue in respect of a psychological injury after 12 weeks from the date of a claim, the diagnosis must be confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare—if not initially made by such a practitioner.

## RECONSIDERATION OF DECISIONS

- 9.48 Reconsideration, or internal review, is undertaken to assess an initial decision and determine whether the original decision maker made the correct decision. It involves:
- (a) review of rehabilitation decisions made under ss 36 and 37 of the SRC Act: s 38(4); and
- (b) reconsideration of all other decisions under the SRC Act: s 62;
- leading to “reviewable decisions” (s 60) which must be notified in writing to the claimant under s 63 of the SRC Act.
- 9.49 In accordance with s 62(4) of the SRC Act, on receipt of the request for reconsideration, the determining authority must cause the determination to be reconsidered by another decision maker. The person reconsidering the determination may make a decision affirming, revoking or varying the determination s 62(5) of the SRC Act and that decision is a “reviewable decision”: s 60(1) of the SRC Act.
- 9.50 The reconsideration will take into account all evidence available as at the date of the reconsideration and is not confined to the material that was before the original decision maker.
- 9.51 Once a reviewable decision has been made, an application can be made by the claimant or the employer to the AAT for review of that reviewable decision: s 64(1) of the SRC Act. See paragraph 9.85 below.
- 9.52 Currently, claims managed by the MRCC pursuant to Part XI of the SRC Act are subject to the same reconsideration process, with the reconsideration conducted by the MRCC as the determining authority.

## RECONSIDERATION

- 9.53 According to the latest Comcare–SRCC Annual Report, 2,048 reconsiderations were decided in the Comcare scheme in 2011–12. This does not include claims managed by the MRCC pursuant to Part XI of the SRC Act.

**TABLE 9: NUMBER OF RECONSIDERATIONS**<sup>380</sup>

	Comcare / premium paying agencies	Licensees	Scheme total
<b>2010–11</b>			
Full-time equivalent (FTE) employees	215,721	167,556	383,277
Reconsiderations decided	991	1023	2014
<b>2011–12</b>			
Full-time equivalent (FTE) employees	218,522	164,467	382,989
Reconsiderations decided	1061	987	2048
<b>Percentage change: 2010–11 to 2011–12</b>			
Full-time equivalent (FTE) employees	1.3 % increase	1.8 % decrease	0.1 % decrease
Reconsiderations decided	7.1 % increase	3.5 % decrease	1.7 % increase

9.54 The majority of those reconsiderations affirmed the original decision. As **Table 10** shows, that has been the case consistently since 2006–07 and is true for reconsiderations by both Comcare and the licensees.

**TABLE 10: AFFIRMATION RATE AT RECONSIDERATION**<sup>381</sup>

	2007–08	2008–09	2009–10	2010–11	2011–12
Comcare	72 %	72 %	69 %	70 %	68 %
Licensees	77 %	80 %	81 %	80 %	78 %
Scheme average	74 %	76 %	74 %	75 %	73 %

9.55 The DAKPI set by the SRCC<sup>382</sup> for requests for reconsideration (in relation to both injury and disease claims) is for 74 % of decisions to be made within 30 days: DAKPI 8. As **Table 11** below shows, Comcare’s performance is well below the scheme target, while licensees have comfortably met the scheme target. **Table 12** below shows the average time taken to decide requests for reconsideration

**TABLE 11: COMPLIANCE WITH DAKPI 8**<sup>383</sup>

Decisions on requests for reconsideration (DAKPI 8)	Comcare	Licensees	Scheme average
2010–11	39 %	82 %	61 %
2011–12	34 %	86 %	59 %

380. Drawn from *Comcare–SRCC Annual Report 2011–12*, p 71. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0019/115822/Comcare-SRCC\\_Annual\\_report\\_2011-2012.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0019/115822/Comcare-SRCC_Annual_report_2011-2012.pdf)

381. Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers’ Compensation Statistics*, December 2012, p 39.

382. See the discussion at paragraphs 9.12–9.14 above.

383. *Comcare–SRCC Annual Report 2011–12*, p 71. Available at: [http://www.comcare.gov.au/\\_\\_data/assets/pdf\\_file/0019/115822/Comcare-SRCC\\_Annual\\_report\\_2011-2012.pdf](http://www.comcare.gov.au/__data/assets/pdf_file/0019/115822/Comcare-SRCC_Annual_report_2011-2012.pdf)

**TABLE 12: AVERAGE TIME (CALENDAR DAYS) TO DECIDE REQUESTS FOR RECONSIDERATION<sup>384</sup>**

Year	Type of claim	Comcare	Licensees	Scheme average
2010–11	Injury	47	21	31
	Disease (excl. psych)	44	20	31
	Psychological	46	20	38
2011–12	Injury	43	24	32
	Disease (excl. psych)	47	20	33
	Psychological	48	20	39

## THE RECONSIDERATION PROCESS

- 9.56 The Review has identified a number of weaknesses in the reconsideration process:
- (a) the absence of any incentive for employees to engage assertively and constructively in the process;
  - (b) the adoption by determining authorities of an essentially adversarial approach to reconsiderations; and
  - (c) the perception that, because very few primary determinations are changed on reconsideration, the process serves no purpose other than to delay access to the AAT.
- 9.57 At the reconsideration stage, few employees lodge additional medical support for their claims. That may be because they do not have the funds to obtain up-to-date medical opinions. Applicants for reconsideration are also rarely supported by lawyers, who could add considerable value to the consideration process. However, even where an employee is legally represented, that representation is best described as token.
- 9.58 As the lawyers who spoke to the Review frankly acknowledge, the current system encourages employees and their lawyers to defer investing any time or energy into a case until that case reaches the AAT, where employees' legal costs can be recouped.
- 9.59 Although many injured employees seek legal support when commencing the reconsideration process, the support provided is often quite limited because there is no access to legal costs, including the costs of obtaining a medical report, until AAT proceedings are commenced.
- 9.60 Maurice Blackburn submits to the Review that, for meaningful settlement discussions to have any effect, it would be necessary for employees to have access to legal advice. Maurice Blackburn also submits that reasonable legal costs and disbursements ought to be recoverable prior to AAT review.<sup>385</sup>
- 9.61 In the Review's consultations, the concept of providing funding for representation and a medical report at the reconsideration stage was generally endorsed.
- 9.62 As the *Comparison of Work Health and Safety and Workers' Compensation Schemes in Australia and New Zealand*, Comparative Performance Monitoring Report (the **CPM Report**) noted:<sup>386</sup>
- Where there is a lag in the collection, exchange and lodgement of information by one or more parties, disputes are likely to be more adversarial and therefore more costly.
- 9.63 The adoption by determining authorities of an adversarial approach to reconsiderations is likely to entrench attitudes of hostility and alienation between employees and their employers (whether a premium-paying agency or a licensee).
- 9.64 There is a perception amongst many employees and their legal representatives that the reconsideration process is too protracted and, because very few primary determinations are changed on reconsideration, that the process serves no purpose other than to delay access to the AAT.

384. Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers' Compensation Statistics*, December 2012, p 39.

385. Maurice Blackburn, Submission to the Review, pp 24–25.

386. Safe Work Australia, *Comparison of Work Health and Safety and Workers' Compensation Schemes in Australia and New Zealand*, 14th Edition, p 36. Available at: [http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/716/CPM\\_14.pdf](http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/716/CPM_14.pdf)

- 9.65 I note that s 62(6) of the SRC Act requires determining authorities, including licensees, to decide requests for reconsideration within the time period prescribed by the regulations. However, no such timeframes have been set.<sup>387</sup>
- 9.66 It is vital that determining authorities grasp the opportunity to explore a positive resolution of disputes at the reconsideration stage. If, as I anticipate, subsidising employees' legal and medical costs results in a more constructive and better supported approach by employees, determining authorities need to seize the opportunity for pursuing early and agreed resolutions. That should result in significant cost savings for determining authorities; and it would also remove a significant obstacle to successful rehabilitation.

## RECOMMENDATIONS

- 9.67 I recommend that the SRC Act be amended to provide for the payment of employees' costs at the reconsideration stage, including the cost of obtaining medical evidence (capped at the cost of obtaining one report, including incidental diagnostic costs) and legal costs (capped at \$1,500, indexed).
- 9.68 That could be achieved by inserting a new paragraph into s 62(3) immediately after paragraph (a), and inserting a new s 62A as follows:
- 62(3) (aa) state whether the employee seeks payment of costs for obtaining a medical report and for legal advice and representation;
- 62A Payment of expenses**
- Within 30 days of receipt of:
- (1) copy invoices or receipts relating to the cost of one medical report, and any incidental diagnostic costs, on which the employee relied in the reconsideration; and
- (2) copy invoice or receipt from a legal practitioner for advice and representation in the reconsideration;
- the determining authority shall pay the cost of obtaining the medical report including incidental diagnostic costs and the employee's legal costs up to a maximum of \$1,500.
- 9.69 As mentioned at paragraph 9.33 (above), although the DAKPIs already set target timeframes for the determination of new claims, they are not necessarily the appropriate timeframes to adopt in the legislation. The same issue exists in relation to the DAKPIs for the reconsideration process.
- 9.70 The DAKPI timeframes are set to measure the overall performance of a determining authority in relation to all of its claims. The DAKPIs anticipate that a significant proportion of reconsiderations will not meet the timeframe and only require that 74 % of all reconsiderations (in relation to both injuries and diseases) be determined on time.
- 9.71 I further recommend that regulations prescribing statutory timeframes for reconsiderations should be introduced, as contemplated by the SRCOLA 2011. The regulations should prescribe a period for the purposes of s 62(6) of the SRC Act, requiring all determining authorities to reconsider claims within 60 days.
- 9.72 To address the other weaknesses, I urge determining authorities actively to pursue resolution of disputes at the reconsideration stage, via mediation or other appropriate forms of alternative dispute resolution.<sup>388</sup>

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387. The 2009 review of self-insurance under the Comcare scheme discussed the application of timeframes to reconsiderations but did not directly recommend their application: see paragraph 4.13 and Recommendation 10 of the *Report of the Review of Self-insurance Arrangements under the Comcare Scheme*, January 2009. Available at: <http://deewr.gov.au/comcare-review-report#foidoc-VHXHEKYVQW>

388. I considered changing the reconsideration process to an alternative dispute resolution process or, alternatively, requiring mediation or another form of alternative dispute resolution prior to lodging an application for review with the AAT. The Sourdin Report, *Mediation in the Supreme and County Courts of Victoria*, Report to the Victorian Department of Justice, March 2009, found that there are benefits to commencing any alternative dispute resolution early in the dispute resolution process: at p iv. Sourdin found that earlier action meant that disputes are more likely to be finalised at mediation than are older disputes—that is, where mediation has been delayed: at p 65. Early mediation also has the advantage of pre-empting significant litigation costs and avoids the problem that parties can become too involved in a dispute to make a considered decision about settlement by the time an opportunity to settle it arises. However, having considered the submissions and the information provided in the consultations, I am not persuaded that changing the reconsideration process in that way would have a more positive effect on resolving disputes than funding employees to obtain legal assistance and medical evidence during the reconsideration process. In particular, it was put to me by many participants in the Review's consultations that the real problem with reconsiderations was that relevant supporting information was not provided by employees. Requiring alternative dispute resolution prior to the commencement of the AAT process would simply add another step and further delay the ultimate resolution of matters.

### RECOMMENDATION 9.5

I recommend that the SRC Act be amended to provide for the payment of an employee's costs at the reconsideration stage, including the cost of obtaining medical support (capped at the cost of obtaining one report, including incidental diagnostic costs) and legal costs (capped at \$1,500, indexed).

- 9.73 **Recommendation 9.5** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

### RECOMMENDATION 9.6

I recommend that regulations be made to prescribe the period within which a decision on a request for reconsideration must be made, for the purposes of s 62(6) of the SRC Act, as contemplated by the SRCOLA 2011, and that this prescribed period should be 60 days.

## RECONSIDERATION OF CLAIMS MANAGED BY THE MRCC PURSUANT TO PART XI

- 9.74 The MRCC submits.<sup>389</sup>

Chapter 17 of the MRCA Review considered the reconsideration and review pathways which are currently available under the MRCA and made a number of recommendations regarding mechanisms for alternative dispute resolution and how this process could be simplified (or streamlined) for claimants. The Government broadly accepted these recommendations on the basis of further consultation with stakeholders.

In this respect, the Veterans' Review Board (VRB) has raised the question of whether it would be appropriate to amend the review mechanisms within the SRCA to allow former ADF members to access the VRB in the same manner as claims under the MRCA.

- 9.75 As discussed in paragraphs 5.84–5.95 above, in order to promote consistency between the claims managed by the MRCC, I recommend that DEEWR and DVA examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the SoP regime. Modifying the reconsideration process for Part XI claims provides another opportunity to ensure that defence personnel making claims for compensation have access to the same processes, whether their claims arise under the SRC Act or the MRC Act.

- 9.76 As outlined in s 344 of the MRC Act (a "simplified outline" of Chapter 8—"Reconsideration and review of determinations"), claimants under the MRC Act can choose one of two appeal pathways. Section 344 reads:

Most determinations made by the Commission (the **original determinations**) can be reconsidered and reviewed. This also applies to decisions of service chiefs about rehabilitation.

The Commission or a service chief must give notice of an original determination to the claimant. The notice must set out the terms of and the reasons for the determination and the claimant's rights to apply for reconsideration or review.

There are 2 possible paths in the reconsideration and review process depending on the type of reconsideration sought by the claimant.

A claimant who has received notice of an original determination can ask the Commission to reconsider it or ask the Veterans' Review Board to review it. If dissatisfied with the determination on reconsideration or review (the **reviewable determination**), the claimant can apply to the Administrative Appeals Tribunal for review of the reviewable determination.

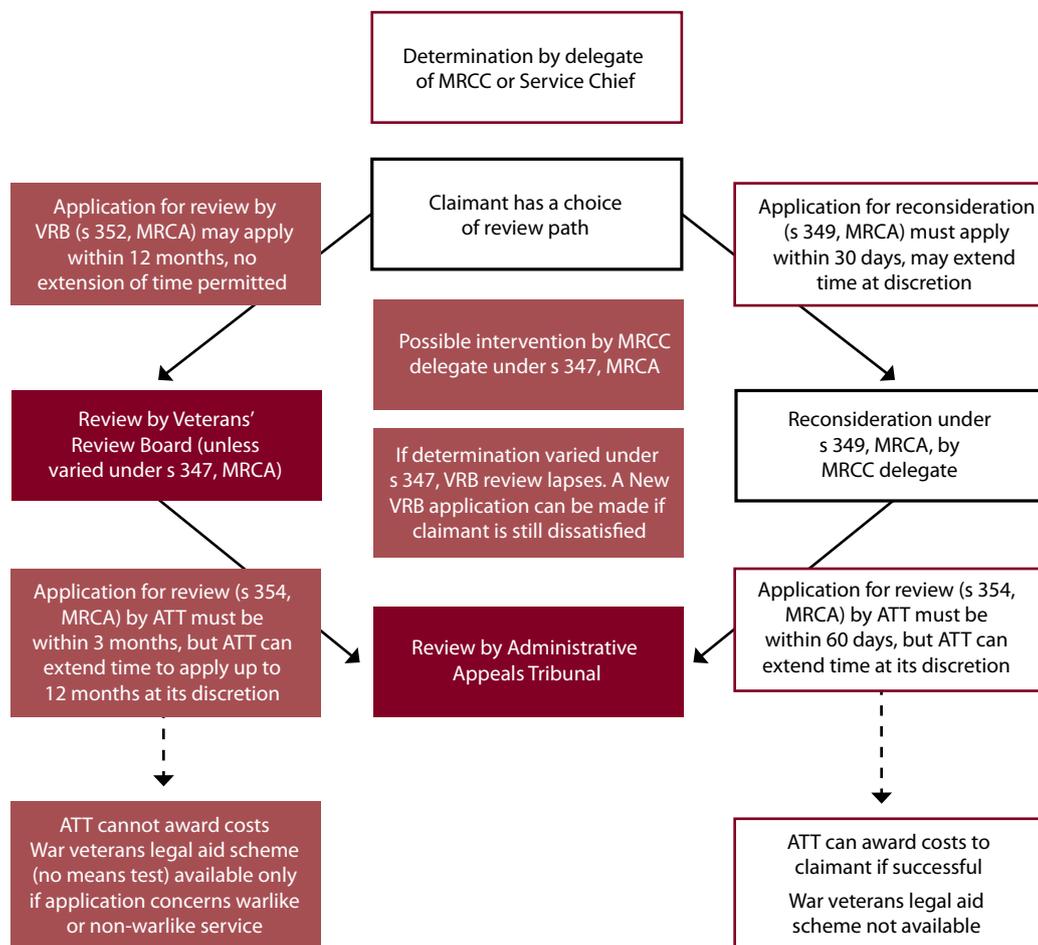
The Commission or a service chief can also initiate reconsideration of original determinations made by the Commission or the service chief.

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389. Military Rehabilitation and Compensation Commission, Submission to the Review, p 11.

9.77 Those pathways are also shown in **Figure 7**.<sup>390</sup>

**Figure 7: MRC Act determining system**



Note: Shaded boxes show the same path as available under the VEA.

- 9.78 Claimants under the SRC Act, whose claims are managed by the MRCC under Part XI of the SRC Act, cannot choose to have determinations reviewed by the Veterans’ Review Board.
- 9.79 If Part XI claimants had access to the system that operates under the MRC Act (outlined in **Figure 7** above), they could choose to have decisions reviewed by the Veterans’ Review Board or reconsidered under s 349 of the MRC Act—a reconsideration process that would be subject to timeframes. Both the review decision by the Veterans’ Review Board and the reconsideration decision under s 349 of the MRC Act would be subject to further review by the AAT, in the same way as reconsideration decisions under the SRC Act (“reviewable decisions”) are subject to that review.

390. MRCA Determining System, *Review of Military Compensation Arrangements Report*, Figure 17.1, released on 18 March 2011. See also paragraphs 17.19–17.25 of the report. Available at: [http://www.dva.gov.au/PENSIONS\\_AND\\_COMPENSATION/MILITARY%20COMPENSATION%20REVIEW/REPORT/Pages/default.aspx](http://www.dva.gov.au/PENSIONS_AND_COMPENSATION/MILITARY%20COMPENSATION%20REVIEW/REPORT/Pages/default.aspx)

## RECOMMENDATIONS

- 9.80 Consideration should be given to amending the SRC Act and the MRC Act so that determinations made on claims managed by the MRCC under Part XI of the SRC Act are dealt with at the reconsideration stage in the same way as reconsideration of determinations made under the MRC Act. That would require:
- (a) amendment of Part XI of the SRC Act to provide that determinations made by the MRCC as determining authority under the SRC Act are to be reconsidered in accordance with the MRC Act; and
  - (b) amendment of the definition of “original determination” in s 345 of the MRC Act to include determinations of claims made by the MRCC as determining authority under Part XI of the SRC Act.
- 9.81 **Recommendation 9.5** (providing for payment of an employee’s costs on reconsideration) should also apply to reconsideration of Part XI claims.

### RECOMMENDATION 9.7

I recommend that consideration be given to amending the SRC Act and the MRC Act so that determinations made on claims managed by the MRCC under Part XI of the SRC Act are dealt with at the reconsideration stage in the same way as reconsideration of determinations made under the MRC Act.

## REVIEW OF DECISIONS

- 9.82 Dispute resolution systems in workers compensation schemes are directed to ensuring integrity and accuracy in the provision of compensation benefits.
- 9.83 Disputes in no-fault compensation schemes, such as the Comcare scheme, centre on questions of access to, or the extent of, coverage: who is covered and what is covered by the scheme? In particular, those disputes centre on whether an injury is work related, the extent of an injury and the continuing access to entitlements.
- 9.84 There are three different stages of dispute resolution in the Comcare scheme:
- (a) internal review (reconsideration), as discussed in paragraphs 9.48–9.66 above, with the decisions made on internal review being classified as “reviewable decisions” (s 60);
  - (b) external review of reviewable decisions on the merits, by the AAT, pursuant to s 64 of the SRC Act and the general provisions of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**); and
  - (c) judicial review of the AAT’s decisions, on a question of law, by the Federal Court or the Federal Magistrates Court: s 44 of the AAT Act.
- 9.85 Applications for review of decisions under the SRC Act must be made to the AAT within 60 days after the initial reconsideration decision: s 65(4) of the SRC Act, and should include brief reasons as to why the decision is considered wrong: s 29(1)(c) of the AAT Act. In most matters under the SRC Act, the applicant for review is legally represented,<sup>391</sup> although that is not formally required. The AAT can award legal costs in matters under the SRC Act: s 67 of the SRC Act. (That makes the AAT’s jurisdiction under the SRC Act unique: otherwise, the AAT does not award legal costs in matters that it decides.)
- 9.86 The AAT is an independent body that was established to provide merits review for a broad range of administrative decisions made by Australian Government ministers, officials, authorities and other tribunals. As noted in paragraph 9.84(b) above, the AAT’s jurisdiction includes the review of certain decisions made by determining authorities under the SRC Act.
- 9.87 There are 75 members of the AAT and they come from a variety of professional backgrounds. AAT members are lawyers, medical practitioners, pharmacologists, environmental scientists, aviation experts, economists, actuaries, retired administrators, accountants and other professionals.
- 9.88 The review process before the AAT involves pre-hearing conferences and, if mutually agreed, may include mediation before a case is listed for hearing and determination by the AAT.

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391. In matters finalised in 2011, 76 % of applicants to the AAT in compensation matters (that is, applications for review under the Comcare scheme and the Seacare scheme) were represented by a lawyer. This number has declined since 1997, when 85.5 % were represented: AAT Submission to the Review, p 4.

- 9.89 The AAT can consider all evidence available at the time of its review, as well as the evidence that was available to the original decision maker. However, an employee requires leave to rely on evidence that was not disclosed at least 28 days before the day fixed for the hearing: s 66 of the SRC Act (discussed further in paragraphs 9.125–9.127 below). No such requirement for disclosure of evidence applies to the determining authorities, including the licensees. On review, the AAT will affirm, vary or set aside the original decision; and the AAT can substitute a new decision or send the matter back to the determining authority to make a new decision: s 43(1) of the AAT Act.
- 9.90 The AAT’s decision on all questions of fact is final, but an appeal can be taken from the AAT’s decision to the Federal Court or the Federal Magistrates Court on a question of law—such as the question of the proper interpretation of a provision in the SRC Act or a question as to the interaction between various provisions of the SRC Act. Federal Court decisions (and the occasional High Court decisions on further appeal from the Federal Court) have been influential in giving authoritative rulings on the construction and operation of the SRC Act.
- 9.91 If an appeal on a question of law succeeds, the Court commonly sends the matter back to the AAT for further consideration; but the Court will in some cases substitute a final decision on the matter decided by the AAT.

### AAT REVIEW: THE EXPERIENCE

- 9.92 Resolution of SRC Act disputes is a relatively lengthy process, although there has been a marked improvement over the last two years in the time it takes to resolve matters. The AAT aims to finalise applications within 12 months of lodgement and has set a target that it will finalise 75 % of workers compensation applications within that timeframe.<sup>392</sup>
- 9.93 The proportion of applications under the SRC Act and the small number of applications under the Seacare scheme (described together by the AAT as **compensation applications**) finalised by the AAT within 12 months in the last three financial years is set out in **Table 13** below.

**TABLE 13: PROPORTION OF AAT APPLICATIONS FINALISED WITHIN 12 MONTHS**<sup>393</sup>

	2009–10	2010–11	2011–12
Proportion of compensation applications finalised within 12 months	57 %	68 %	70 %

- 9.94 Most compensation applications are finalised by consent prior to a hearing and decision, either during the conference process or following conciliation or one of the other types of alternative dispute resolution process: see **Table 14** below.

**TABLE 14: RESOLUTION OF COMPENSATION APPLICATIONS BY DISPOSITION**<sup>394</sup>

	2009–10		2010–11		2011–12	
	No.	%	No.	%	No.	%
Application withdrawn	344	24	303	23	258	23
Finalised by consent	849	59	832	63	664	60
Heard and decided	213	15	167	13	144	13
Other	38	3	18	1	37	3
<b>TOTAL</b>	<b>1,444</b>	<b>100</b>	<b>1,320</b>	<b>100</b>	<b>1,103</b>	<b>100</b>

- 9.95 The number of compensation applications made to the AAT has been declining over an extended period but appears to have stabilised over the past three years: see **Table 15** below.

392. AAT, Submission to the Review, p 6.

393. AAT, Submission to the Review, p 6.

394. AAT, Submission to the Review, p 6. Note: internal table references not reproduced.

**TABLE 15: TOTAL NUMBER OF COMPENSATION APPLICATIONS LODGED WITH THE AAT BY YEAR**<sup>395</sup>

	2001–02	2006–07	2009–10	2010–11	2011–12
Total number of lodgements	2,254	1,451	1,178	1,086	1,157

9.96 As might be expected, over the last 10 years, the AAT has seen a marked growth in SRC Act cases involving licensees (other than Australia Post and Telstra).

**TABLE 16: APPLICATIONS LODGED WITH THE AAT BY RESPONDENT**<sup>396</sup>

Respondent	2001–02		2006–07		2011–12	
	No.	%	No.	%	No.	%
Australian Postal Corporation	508	23	385	27	179	15
Comcare	843	37	513	35	417	36
Department of Defence / Military Rehabilitation and Compensation Commission	376	17	274	19	136	12
Telstra Corporation Ltd	494	22	242	17	146	13
Other decision-makers	33	1	37	3	279	24
<b>TOTAL</b>	<b>2,254</b>	<b>100</b>	<b>1,451</b>	<b>100</b>	<b>1,157</b>	<b>100</b>

9.97 As noted in paragraph 9.93 above, the AAT has reported a marked increase in the percentage of compensation applications finalised within 12 months over the last three years. However, even after that increase, it is clear that the AAT's review processes are taking substantially longer to resolve disputes than the process used in any of the other Australian workers compensation schemes.

9.98 According to the CPM Report, Comcare scheme disputes take longer to resolve than disputes in other Australian workers compensation schemes. The CPM Report notes that:<sup>397</sup>

A high percentage of disputes resolved in a longer timeframe may also indicate that there are a high number of more complex disputes being dealt with within a jurisdiction, or that there are some mandatory medical or legal processes in place that inherently delay resolution.

9.99 **Table 17** below shows the timeframe for resolution of workers compensation disputes nationally, by jurisdiction.

**TABLE 17: PERCENTAGE OF DISPUTES RESOLVED WITHIN SELECTED TIME PERIODS (CUMULATIVE)**<sup>398</sup>

Jurisdiction	Within 1 month (%)	Within 3 months (%)	Within 6 months (%)	Within 9 months (%)
<b>2006–07</b>				
<b>Comcare</b>	4.6	14.5	29.0	44.8
<b>Seacare</b>	1.6	9.5	22.2	46.0
<b>New South Wales</b>	2.8	51.9	87.6	97.3
<b>Queensland</b>	14.7	77.3	90.0	94.2
<b>Tasmania</b>	45.2	59.9	77.0	85.1
<b>Victoria</b>	2.1	52.6	74.7	87.8

395. AAT, Submission to the Review, p 4.

396. AAT, Submission to the Review, p 4. The percentages have been rounded to the nearest whole number and so may not total 100 %.

397. CPM Report, p 36.

398. CPM Report, p 36, Indicator 23: Percentage of disputes resolved within selected time periods (cumulative). Note: figures were not available for the Northern Territory or South Australia.

Jurisdiction	Within 1 month (%)	Within 3 months (%)	Within 6 months (%)	Within 9 months (%)
<b>2006–07</b>				
Western Australia	19.5	44.2	65.2	74.1
<b>National average</b>	<b>6.6</b>	<b>52.7</b>	<b>78.3</b>	<b>88.7</b>
<b>2010–11</b>				
Comcare	3.6	11.9	27.4	50.1
Seacare	8.5	36.2	63.8	74.5
New South Wales	7.8	42.0	86.0	95.5
Queensland	15.2	81.6	93.1	95.7
Tasmania	59.4	71.6	83.2	90.7
Victoria	1.7	46.4	75.2	88.8
Western Australia	41.7	62.6	82.5	91.6
<b>National average</b>	<b>10.4</b>	<b>50.3</b>	<b>80.5</b>	<b>90.9</b>

- 9.100 For 2010–11, half of all disputes about workers compensation matters were resolved within three months of the date of lodgement, with Queensland resolving the highest proportion of disputes within that time (82 %) followed by Tasmania (72 %). However, only 12 % of Comcare scheme disputes were resolved within that time.
- 9.101 Although a large majority of compensation applications are finalised without a contested hearing and a formal decision by the AAT, it remains the fact that only 70 % of compensation applications are finalised by the AAT within 12 months, whereas 90 % of such applications across all Australian jurisdictions (including the Comcare scheme and Seacare scheme) are finalised within nine months: see **Table 17** above.
- 9.102 As I have already noted (see paragraphs 9.93 and 9.97 above), despite improvements over the past three years, the AAT's review processes are taking substantially longer to resolve disputes than the processes used by the schemes functioning in other Australian jurisdictions. Although it is plainly important that any dispute resolution process not sacrifice accuracy and reliability to speed, it is also clear that delayed resolution can have a negative impact on recovery and rehabilitation processes.
- 9.103 The AAT has pointed to several factors that might explain the time that it takes to finalise compensation applications,<sup>399</sup> including:
- (a) an inconsistency in approach taken by determining authorities (Comcare and licensees), discussed in paragraphs 9.110–9.118 below;
  - (b) the fact that employees are effectively discouraged from gathering new evidence in support of their claims until after an application for review is lodged with the AAT, discussed in paragraphs 9.56–9.68 below; and
  - (c) disputes over jurisdiction, partly reflecting the Full Federal Court's judgment in *Lees v Comcare*, discussed in paragraphs 9.129–9.139 below.
- 9.104 The AAT also highlighted a potential issue in relation to employees who suffer from a disease in situations where it is not clear which previous employment contributed to the disease. That issue is discussed in paragraphs 9.140–9.144 below.
- 9.105 There are a number of other areas where processes for dealing with disputes that have reached the AAT may be streamlined in order to improve dispute resolution timeframes. The Review has considered the following options:
- (a) referring medical and scientific disputes to a specialist panel, discussed in paragraphs 9.145–9.156 below;
  - (b) binding the parties to decisions of the Fair Work Commission that relate to the same subject matter as the subject matter before the AAT, discussed in paragraphs 9.157–9.173 below; and
  - (c) referring certain disputes to the Fair Work Commission, discussed in paragraphs 9.174–9.192 below.

399. AAT, Submission to the Review, pp 7–12.

9.106 It is reasonable to assume that implementation of my recommendations to support employees in the reconsideration process (see paragraph 9.67 above) and to subject licensees to the Model Litigant Guidelines (see paragraph 9.119 below) will facilitate the earlier resolution of some of the AAT's caseload. Apart from those modest contributions, the substantial responsibility for reducing finalisation times rests with the parties (employees and determining authorities) and with the AAT. Rigorous AAT case management processes can reduce finalisation times even further. The Review understands that the AAT has been developing, and intends to continue to develop, those processes. In its submission to the Review, the AAT says:<sup>400</sup>

The AAT continually reviews its procedures. Through a combination of the conference process, conciliations and other ADR processes, pre-hearing directions and hearings, the AAT strives to determine cases, including medical issues, in a cost effective and expeditious manner.

9.107 Mr Leo Grey submits:<sup>401</sup>

The Tribunal adopts a largely passive role, allowing the parties to determine for the most part how the case is conducted before it. It does not routinely indicate that it wants particular witnesses called, or particular issues explored, and relies upon legal representatives (where present) to determine the progress and direction of the matter. The process is anything but economical and quick.

9.108 The Australian Council of Trade Unions submits that:<sup>402</sup>

... Comcare disputes take an exorbitant amount of time to resolve. In 2006–07 only 29% of Comcare disputes were resolved within 6 months, compared to the Australian average of 74.4% of disputes resolved within 6 months. The Comcare disputes resolution process needs to be changed so that it is simple, accessible and low-cost for our members.

## RECOMMENDATIONS

9.109 I recommend that the AAT be encouraged to explore practical ways to achieve a further, and marked, reduction in the time taken to resolve compensation applications. The aim should be to approach the average standard recorded by compensation schemes throughout Australia: see **Table 17**.

### RECOMMENDATION 9.8

I recommend that the AAT be encouraged to explore practical ways to achieve a further, and marked, reduction in the time taken to resolve compensation applications.

## MODEL LITIGANT GUIDELINES

9.110 The AAT has highlighted the inconsistency of approach as between the various determining authorities and has identified the uneven application of the Model Litigant Guidelines in the Attorney-General's Legal Services Directions (the **Legal Services Directions**) as a possible factor contributing to those inconsistent approaches.

9.111 In resolving disputed claims, Comcare and the MRCC<sup>403</sup> must act in a manner that is consistent with the provisions of the SRC Act, the AAT Act and the Legal Services Directions.<sup>404</sup> Other determining authorities (that is, licensees) must comply with the SRC Act and the AAT Act but not the Legal Services Directions.

9.112 Many of the concepts contained in the Legal Services Directions are also contained in the AAT Act and so apply to licensees. However, the Legal Services Directions subject Comcare and the MRCC to "better practice" participation in alternative dispute resolution processes, which is not an obligation for licensees. Section 5.2 of the model litigant obligations, set out in Appendix B to the Legal Services Directions, provides that, when participating in alternative dispute resolution, the Commonwealth and its agencies are to ensure that their representatives:

(a) participate fully and effectively, and

... have authority to settle the matter so as to facilitate appropriate and timely resolution of a dispute.

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400. AAT, Submission to the Review, p 14.

401. Mr Leo Grey, Submission to the Review, p 4.

402. Australian Council of Trade Unions, Submission to the Review, p 47.

403. The MRCC is the determining authority for claims made under the SRC Act by members of the ADF.

404. The most recent version was issued in 2005. Available at: <http://www.comlaw.gov.au/Series/F2006L00320/Compilations>

- 9.113 In addition, the MRCC must not cause, or permit to be made on its behalf, a submission to a court or tribunal that Comcare or the SRCC has requested not be made: s 142(3) of the SRC Act. The opportunity for Comcare or the SRCC to object to a submission necessarily requires that they are aware of it. The MRCC has an obligation to advise Comcare of proceedings brought against it: s 144(7) of the SRC Act, but there is no obligation to provide Comcare with a copy of any relevant papers.
- 9.114 There are no equivalent statutory obligations on licensees. Licensees are simply required to maintain contact with Comcare and the SRCC to ensure that, as far as is practicable, there is equity of outcomes resulting from the administrative practices and procedures used by determining authorities: s 108E(c) of the SRC Act.
- 9.115 In addition to the obligation to participate in alternative dispute resolution, Comcare in its dealings both as the regulator and a determining authority is also bound by paragraphs 2–5 of Appendix C to the Legal Services Directions, relating to the settlement of monetary claims. Paragraph 2 of Appendix C provides, in part:
- Monetary claims covered by this policy are to be settled in accordance with legal principle and practice, whatever the amount of the claim or proposed settlement. A settlement on the basis of legal principle and practice requires the existence of at least a meaningful prospect of liability being established. In particular, settlement is not to be effected merely because of the cost of defending what is clearly a spurious claim.
- 9.116 Before settlement of any claim greater than \$25,000 can be entered into, the relevant agency must receive external legal advice: paragraph 4. As a result, it is difficult for Comcare to make commercial settlements in disputes about the decisions it has made as a determining authority.
- 9.117 It was noted during consultations that the inability of Comcare, as a respondent to proceedings in relation to decisions made by it as a determining authority, to settle matters on a commercial basis—that is, without any admission of liability; for example, by paying the legal costs of an applicant—is a barrier to the resolution of claims. At the time when applications are filed, the parties may not be aware of all of the relevant information, nor might they have in their possession up-to-date medical or other reports. Providing a mechanism by which disputes can be resolved without an admission of liability would assist both Comcare (defending decisions it has made as a determining authority) and employees.
- 9.118 Although the purpose of the Legal Services Directions appears to be to ensure that the Commonwealth only settles those matters where appropriate liability is identified, there is an argument that, acting effectively as an “insurer”, an inherently commercial role, Comcare as a determining authority should be able to make commercial settlements. That could resolve disputes earlier, thus saving money in the long run, but it would also facilitate the rehabilitation and recovery of employees involved in disputes with Comcare.

## RECOMMENDATIONS

- 9.119 I recommend that licensees be subject to the Legal Services Directions. That could easily be achieved by the SRCC varying the conditions attached to each licensee’s licence to require compliance with the Legal Services Directions. The SRCC has the power to impose and vary licence conditions: s 108D(2) of the SRC Act.
- 9.120 Licensees and any premium-paying agencies declared to be determining authorities (see paragraph 4.46 above) should be subject to the same requirement as the MRCC in s 142(3) of the SRC Act not to cause, or permit to be made on its behalf, a submission to a court or tribunal that Comcare or the SRCC has requested not be made and that all determining authorities other than Comcare (that is, licensees, the MRCC and any premium paying agencies declared to be determining authorities) have a positive obligation to inform Comcare of proceedings brought against them in the AAT.
- 9.121 That could be achieved by amending s 108E of the SRC Act, which sets out the functions of licensees, by placing the current content of s 108E in a subsection (1) and inserting new subsection (2) as follows:
- (2) The performance by a licensee of the functions referred to in subsection (1) is subject to the condition that the licensee will not cause or permit to be made on its behalf to a court or tribunal a submission that Comcare or the Commission has requested not be made.
- 9.122 I also recommend that, on request by Comcare, a determining authority provide Comcare with any documents in relation to proceedings in a court or tribunal under the SRC Act to which the determining authority is a party.
- 9.123 If Recommendation 9 in the Hawke Report is implemented, a premium payer that is permitted to be a determining authority will presumably be responsible for the reconsideration of claims that it determines and for responding to applications to the AAT for review of its “reviewable decisions”. Accordingly, premium payers that are also determining authorities should be subject to the same obligations as other determining authorities, namely the MRCC and licensees.

9.124 I further recommend that Comcare apply to the Attorney-General for a decision permitting it to settle cases involving Comcare as a determining authority in the AAT on a limited commercial basis, by the payment of an applicant's legal costs, without an admission of liability. The Attorney-General has the power to decide that agencies may comply with a modified version of the Legal Services Directions: paragraph 13 of the Legal Services Directions.

#### **RECOMMENDATION 9.9**

I recommend that licensees be required to follow the model litigant requirements in the Legal Services Directions .

#### **RECOMMENDATION 9.10**

I recommend that all determining authorities:

- (a) be prohibited from making submissions against the wishes of Comcare;
- (b) be obliged to advise Comcare of any proceedings brought against them; and
- (c) upon request by Comcare, provide Comcare with any documents relating to those proceedings.

#### **RECOMMENDATION 9.11**

I recommend that Comcare apply to the Attorney-General for permission to settle cases involving Comcare as a determining authority in the AAT on a limited commercial basis, by the payment of an applicant's legal costs, without an admission of liability.

### **DISCLOSURE OF EVIDENCE**

9.125 A claimant must disclose to the AAT any evidence on which he or she intends to rely at least 28 days before the hearing of the proceedings, otherwise the evidence is (without the leave of the AAT) inadmissible: s 66(1) of the SRC Act. There is no equivalent obligation on respondents to proceedings in the AAT (that is, Comcare, the MRCC and licensees).

9.126 The AAT operates on the basis that the material on which the parties intend to rely should generally be lodged as early as possible in the proceedings. Early disclosure assists the AAT and the parties in attempting to reach agreement. If a case proceeds to hearing, the AAT generally requires that the parties identify and lodge all relevant material in advance of the hearing.

9.127 In its submission to the Review, the AAT observes:<sup>405</sup>

The SRC Act presently prohibits claimants adducing evidence of matters in proceedings in the AAT if they have not disclosed that matter to the Tribunal at least 28 days before the date fixed for the hearing, unless leave is obtained from the AAT (subsection 66(1)). The Tribunal invites the Review to consider whether this obligation should apply to all parties. It would be consistent with the AAT's practices, procedural fairness and the Model Litigant Obligations.

#### **RECOMMENDATIONS**

9.128 I recommend that s 66(1) of the SRC Act be amended to provide that all parties to a matter before the AAT must disclose any evidence to the AAT at least 28 days before the hearing of the matter. That could be achieved by removing references to the "claimant" in s 66(1) and replacing it with reference to a "party", so that s 66(1) would read:

- (1) Where:
  - (a) a party to claimant who has instituted proceedings under this Part seeks to adduce any matter in evidence before the Administrative Appeals Tribunal in those proceedings; and
  - (b) the party claimant had not disclosed that matter to the Tribunal at least 28 days before the day fixed for the hearing of those proceedings;that matter is not admissible in evidence in those proceedings without the leave of the Tribunal.

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405. AAT, Submission to the Review, p 14.

## RECOMMENDATION 9.12

I recommend that s 66(1) of the SRC Act be amended to provide that all parties to a matter before the AAT must disclose any evidence to the AAT at least 28 days before the hearing of the matter.

## JURISDICTIONAL INEFFICIENCIES

- 9.129 The review jurisdiction of the AAT derives from s 25 of the AAT Act read with s 64 of the SRC Act. Section 25(3) makes the AAT's review jurisdiction contingent on meeting the conditions specified in s 64 of the SRC Act; s 64 limits the AAT to reviewing "reviewable decisions"; and ss 60(1) and 62(5) make it clear that a "reviewable decision" is a decision made on reconsideration of a determination.
- 9.130 As noted in paragraph 9.83 above, disputes under a scheme such as the Comcare scheme centre on access to, and the extent of, compensation. Part II of the SRC Act provides for compensation to employees in a variety of circumstances. The basic liability (and entitlement) provision is s 14(1), which provides:
- Subject to this Part, [determining authorities are] liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.
- 9.131 A series of sections then deal with liability to pay (and entitlement to receive) particular heads of compensation, as follows:
- (a) for medical expenses: s 16;
  - (b) for injuries resulting in death: ss 17 and 18;
  - (c) for incapacity for work: s 19 and other provisions in Division 3 of Part II;
  - (d) for permanent impairment: s 24(1) and s 27(1); and
  - (e) for household services and attendant care services: s 29 of the SRC Act.
- 9.132 According to the analysis adopted by the Full Federal Court in *Lees v Comcare* (see paragraph 9.133 below), the structure of the SRC Act requires that any question of liability under the various heads of compensation (see paragraph 9.131 above) must be the subject of a separate determination, reconsideration and a reviewable decision before the AAT can consider liability for that head of compensation.
- 9.133 In *Lees v Comcare*; *Comcare v Mathews* [1999] FCA 753; (1999) 56 ALD 84,<sup>406</sup> the Full Court of the Federal Court held that, where the AAT was reviewing one employee's eligibility for medical treatment under s 17 of the SRC Act and another employee's eligibility for compensation under s 14 of the SRC Act (after Comcare had made reviewable decisions denying liability to each employee), the AAT could not consider whether compensation was payable to each employee for permanent impairment under s 24 of the SRC Act because the latter question had not been the subject of reviewable decisions on reconsideration under s 62 of the SRC Act.
- 9.134 The Full Court said, at [39], that:
- (a) the AAT is authorised by s 64 of the SRC Act to review only reviewable decisions—that is, second-tier or reconsideration decisions made under s 62 of the SRC Act;
  - (b) those decisions are the result of reconsideration by a licensed determining authority of a determination, as defined by s 60 of the Act, concerning which a claimant will have received a notice in writing setting out the terms of the determination and the reasons for the determination, pursuant to s 61(1) of the SRC Act; and
  - (c) on review of a reviewable decision, the AAT will not be authorised to exercise any powers and discretions which would not have been available to the determining authority at the second-tier decision making stage, albeit that such powers and discretions might have been available to the determining authority at the first-tier decision making stage.

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406. This case involved two matters: the first was an appeal by Ms Lees from a decision of a single judge of the Federal Court that the AAT did not have jurisdiction to make a determination as to the amount of compensation, if any, payable to Ms Lees under s 24 of the SRC Act; and the second was an application in the Federal Court's original jurisdiction for orders restraining the AAT from proceeding to deal with the question whether Mr O'Donohue was entitled to compensation under s 24 of the SRC Act. (The AAT's decision in the second matter had been made by a panel including the President, a Federal Court judge—hence, Comcare's application to the Federal Court had to be made to the Full Court.)

- 9.135 The Full Court acknowledged, at [31], the practical difficulty of identifying the entire scope of a claim for compensation when a claim is made: “At the time that this initial claim is made it may be impossible for the employee to provide details of, for example, the fact or extent of any permanent impairment.” Despite that, the Full Court concluded, at [56]:
- In view of the structured decision making process established by the Act, and the plain language of s 64 of the Act, the powers of the AAT under s 64 do not, in our view, on an application to review a decision under [one provision of the SRC Act], extend to allowing it to reach a decision as to [an employee’s] entitlement, if any, to receive compensation under [another provision of the SRC Act].
- 9.136 In many cases, the three-level structure of decision making under the SRC Act serves a constructive purpose:
- (a) It ensures that issues of liability and entitlement are not brought to the AAT before those issues have been investigated by a determining authority and a resolution of those issues has been explored. In those cases, it makes sense to require the determining authority to make a determination on an issue before the AAT exercises jurisdiction in relation to that issue.
  - (b) For example, where an employee applies to the AAT for review of a decision that there is no liability under s 14 but then asks the AAT to consider a permanent impairment claim under s 24 that has not been considered by the determining authority or on reconsideration, it will very likely make sense for the AAT not to consider and determine the s 24 claim, because the AAT may not have the resources or the processes to undertake the examination and assessment that is required to resolve the s 24 issues.
- 9.137 However, there are cases where jurisdictional constraints such as those identified in *Lees v Comcare* simply add delay to the dispute resolution process without any appreciable benefit:
- (a) For example, it may be that entitlement to the additional head of compensation raised before the AAT does not present complex factual issues and raises a legal issue that needs to be resolved by an independent body such as the AAT.
  - (b) Another example of jurisdictional difficulties presented by the three-level structure of the decision making was raised in the AAT’s submission to the Review.<sup>407</sup> The AAT made the point that its review jurisdiction may become the subject of dispute if there is a change in the diagnosis of an employee’s injury after a claim for compensation was served on the employer. That type of change sometimes happens as a result of further investigation of the injury during the AAT’s conference process.
- 9.138 It may be that both the employee and the determining authority want the AAT to resolve the question of entitlement to an additional head of compensation. However, as the SRC Act currently stands, that cannot be done until the determining authority has made a primary determination and, on reconsideration, a reviewable decision. It may also be that both the employee and the determining authority want the AAT to decide whether the employee’s injury (whatever its diagnosis) is compensable under the SRC Act. According to the AAT’s submission to the Review,<sup>408</sup> questions have arisen as to whether it is necessary in that situation for the employee to make a new claim based on any new diagnosis.

## RECOMMENDATIONS

- 9.139 In order to address obstacles to the resolution of matters in dispute under the SRC Act, I recommend that the SRC Act be amended so as to permit the AAT to hear matters that have not been the subject of a reviewable decision, with the consent of the parties. That could be achieved by adding a subsection (3) to s 64 as follows:
- (3) Where an application has been made to the Administrative Appeals Tribunal for review of a reviewable decision, and the parties agree, the Administrative Appeals Tribunal may also review any determination that was made by the determining authority:
    - (a) in relation to the applicant; and
    - (b) in relation to the same injury the subject of the reviewable decision;whether or not that determination has been reconsidered by the determining authority.

### RECOMMENDATION 9.13

I recommend that the SRC Act be amended to permit the AAT to hear matters not the subject of a reviewable decision, with the consent of the parties.

407. AAT, Submission to the Review, p 8.

408. AAT, Submission to the Review, p 8.

## CONCURRENT APPOINTMENTS TO AAT AND STATE TRIBUNALS

- 9.140 In some cases, an employee's condition has been contributed to by employment with two or more employers, one of which is subject to the SRC Act and the other(s) to State or Territory workers compensation legislation. In other cases, an employee's incapacity for work or impairment may have been contributed to by injuries arising out of, or in the course of, employment with the same employer, but occurring at different times, initially when the employer was bound by the State or Territory workers compensation legislation and later when the employer became licensed under the SRC Act.<sup>409</sup>
- 9.141 The AAT has informed the Review that such cases present a problem to the injured employee, because he or she must make decisions about which employer to claim against, or whether to pursue a claim under the SRC Act or under the relevant State or Territory legislation or under both. The employee cannot advance all potentially relevant evidence in support of both potential claims and then leave it to the decision maker to resolve whether one or both employers are liable, or whether an earlier or later injury or both are responsible for the employee's condition.
- 9.142 If an employee chooses to proceed in one jurisdiction and fails, he or she notionally can, subject to time limits, then proceed in the other jurisdiction. However, the evidence is likely to be different, because the thrust of the employee's earlier case would have been to emphasise the consequences of events related to the employer against whom the first claim was made, and so the decision makers could arrive at different decisions.
- 9.143 The AAT submits<sup>410</sup> that the Review may wish to consider whether such difficulties could be overcome by the Commonwealth, States and Territories passing legislation providing for concurrent appointments to their respective review or appeal bodies: that is, legislation to the effect that a member of a particular review or appeal body could also, with the consent of the relevant ministers, be appointed as a decision maker of the corresponding dispute resolution bodies of the other States, Territories or the Commonwealth, and that such a person may, in an appropriate case, simultaneously exercise powers derived from all such appointments.
- 9.144 I appreciate that the issue raised by the AAT is a real issue; however, I consider that the issue is a matter for the Attorney-General, not this Review, which is considering changes to the SRC Act.

## MEDICAL AND SCIENTIFIC DISPUTES

- 9.145 As detailed in paragraph 9.84 above, all disputes arising under the Comcare scheme are dealt with, on review, by the AAT and thereafter the Federal Court or the Federal Magistrates Court. There is currently no capacity under the SRC Act for a medical or scientific issue to be referred to a specialised medical panel or tribunal. Where disputes about those medical or scientific matters are not resolved on reconsideration, they are resolved by the AAT.
- 9.146 In some Australian jurisdictions, medical issues are referred to specialised medical panels or medical tribunals for determination (as detailed in **Table 18**). The use of medical panels and tribunals can enhance the effectiveness of dispute resolution by permitting distinctly medical issues to be determined directly by expert medical decision makers. For example, the Victorian Act allows the Victorian WorkCover Authority, a self-insurer, a conciliation officer and the County Court to refer a medical question (a term that is defined in s 6(1) of that Act) to a medical panel for its opinion; and s 68(4) of the Victorian Act provides that the opinion of a medical panel on a medical question referred to the medical panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive on a medical question.

**TABLE 18: JURISDICTIONAL ANALYSIS—USE OF MEDICAL TRIBUNALS AND/OR PANELS<sup>411</sup>**

Use of medical tribunals and panels	
<b>Australian Capital Territory</b>	Medical referees may be requested throughout the dispute resolution process to prepare a report to help parties reach an agreement: Part 7, Regulations.
<b>New South Wales</b>	Approved medical specialists are appointed to assess medical disputes.
<b>Queensland</b>	Referral to Medical Assessment Tribunal ( <b>MAT</b> ) by an insurer to decide a worker's capacity for work or permanent impairment: s 500. No appeal against a decision by MAT unless fresh medical evidence is submitted to MAT within 12 months of the MAT decision: s 512.

409. This applies to a number of the corporations now licensed under the SRC Act that would previously have been subject to the State and Territory legislation.

410. AAT, Submission to the Review, p 14.

411. CPM Report, p 29.

## Use of medical tribunals and panels

<b>South Australia</b>	A compensating authority or the tribunal may require a worker who claims compensation under the Act or who is in receipt of weekly payments to submit to an examination by a medical panel or to answer questions (or both) on a date and at a place arranged by the Convenor of Medical Panels so that the medical panel can determine any specified medical question: s 98F(2). That power may be exercised by a compensating authority both before and after the matter has been referred to the tribunal for judicial determination: <i>Campbell v Employers Mutual Ltd; Yaghoubi v Employers Mutual Ltd</i> [2011] SASCF 58. Medical questions are defined in s 98E.  The opinion of a medical panel on a medical question is final and binding on the parties, subject to the opinion not being based on an error of fact or law, but is not binding on the tribunal. It remains for the tribunal to determine what weight is given to an opinion. The tribunal should satisfy itself that the opinion of the panel is based on evidence and made within its expertise: s 98H(4) and <i>Campbell v Employers Mutual Ltd; Yaghoubi v Employers Mutual Ltd</i> [2011] SASCF 58.
<b>Tasmania</b>	The tribunal may refer a medical question to a medical panel when there is conflicting medical opinion and one of the parties wishes to continue with proceedings. The determination of the medical panel is binding on the tribunal: s 51 and s 63(1).
<b>Victoria</b>	"Medical questions" as defined in s 5(1) may be referred to the medical panels. Disputed impairment benefits assessments under s 104B and any medical question arising in a conciliation dispute relating to a worker's entitlement to weekly payments for reduced work capacity after 130 weeks under s 93CD must be referred to medical panels. Medical panels must form binding opinions on medical questions referred: s 68.

9.147 Although the Victorian medical panels (to take them as an example) are permitted to resolve medical questions, they have no authority to resolve other factual questions, such as disputed aspects of an employee's history, or legal questions, such as the proper construction of legislation. The medical panels have not always observed that limitation, and several of their opinions have been quashed for that reason by the Victorian Supreme Court (through the process of judicial review, which depends on showing jurisdictional error).

9.148 Many of the cases that are heard in the AAT under the SRC Act involve disputes over medical issues, including the diagnosis and causation of injuries and diseases and the assessment of incapacity for work or impairment. Frequently, those medical issues intersect with broader factual disputes (including disputes about an employee's pre-employment history or disputes about what actually happened during the employee's employment) or with legal disputes about the construction of the SRC Act or the Approved Guide. I accept the point made by the AAT in its Submission to the Review:<sup>412</sup>

Workers compensation cases invariably involve a combination of factual, medical and legal issues. In general, it is difficult to deal with the factual and medical issues separately. Medical opinions are based on underlying facts which are often contested.

9.149 The AAT has a diverse membership, including many members with medical qualifications, and processes, such as neutral evaluation and the use of concurrent evidence, that are tailored to dealing with medical issues. The AAT also has legal members, who are qualified to resolve legal disputes, and it has more than 35 years' experience in resolving broad factual issues of the kind that frequently intersect with medical disputes. Its capacity to bring to bear a range of expertise on questions that very often do not fall into precisely defined and separate categories (factual, legal and medical) is one of the AAT's strengths.

9.150 However, it has been noted that there is no guarantee that a medical question will be heard by a medically qualified member and that, more importantly, medical members of the AAT are not current practising medical practitioners and might not be competent to adjudicate on current medical management issues in a rapidly evolving area of medical practice.<sup>413</sup>

### SUBMISSIONS RECEIVED

9.151 In general, there was no support from those consulted in the course of the Review for the establishment of a medical panel or tribunal.

412. AAT, Submission to the Review, p 12.

413. Addendum to submission 23 (name withheld), Submission to the Review, p 2.

9.152 John Holland submits:<sup>414</sup>

John Holland does not consider that disputes regarding medical issues need to be referred to a medical panel. Unlike the court systems in many state schemes, the Administrative Appeals Tribunal has medical members available to assist the Tribunal with making decisions before it.

9.153 The view of John Holland is echoed by Maurice Blackburn:<sup>415</sup>

The AAT has access to medical members. This has been a reasonable way to ensure that the fact finding exercise is performed by someone who has knowledge in the field of medicine. We therefore strongly advocate against the insertion of a Medical Tribunal into the SRC Act scheme.

9.154 The Law Council of Australia's submission concurs with the views outlined above:<sup>416</sup>

The Law Council does not support the use of medical panels to determine eligibility for compensation. In particular, a difficulty will arise if a medical panel is required to determine an issue that also involves a legal test under the SRC Act. If medical panels are to be used under the SRC Act, they should be utilised only to determine medical issues and not to determine issues that involve matters of legal interpretation. It would be appropriate to have a right of appeal from the determination of a medical panel.

9.155 Ryan Carlisle Thomas have provided their experience:<sup>417</sup>

The experience in jurisdictions where there can be no judicial review or very limited judicial review of binding decisions of medical panels has not been a positive one for either workers or employers.

## RECOMMENDATIONS

9.156 For the reasons outlined in the submissions identified in paragraphs 9.148 and 9.151–9.155 above, and because of the practical difficulties in framing a purely medical question (especially in situations where there remains or is likely to be a factual dispute), it is difficult to see the benefit in providing for the referral of matters to a medical tribunal. Therefore, I do not recommend any change to the way in which medical and scientific disputes are dealt with under the SRC Act.

## DECISIONS MADE BY THE FAIR WORK COMMISSION

9.157 In some situations, an incident that gives rise to a claim for compensation may also be the subject of proceedings or a dispute before the Fair Work Commission.<sup>418</sup>

9.158 The Fair Work Commission is the national workplace relations tribunal. It is an independent body established by the *Fair Work Act 2009* (the **Fair Work Act**) with power to carry out a range of functions relating to:<sup>419</sup>

- (a) the safety net of minimum wages and employment conditions;
- (b) enterprise bargaining;
- (c) industrial action;
- (d) dispute resolution;
- (e) termination of employment; and
- (f) other workplace matters.

9.159 Many psychological injuries sustained in the workplace are, in their genesis, human resource management issues (resulting, for example, from interpersonal conflict and performance management matters), rather than medical issues. That raises the question whether there should be a role for the Fair Work Commission in relation to psychological injuries that result in workers compensation claims.

9.160 During the Review's consultations, it was said that claims involving action taken by an employer that claimed the action to be reasonable administrative action often raised issues that had been agitated before the Fair Work Commission.

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414. John Holland Group, Submission to the Review, p 11 .

415. Maurice Blackburn, Submission to the Review, p 24.

416. Law Council of Australia, Submission to the Review, p 13.

417. Ryan Carlisle Thomas, Submission to the Review, p 18.

418. Until 1 January 2013, the Fair Work Commission was known as Fair Work Australia.

419. See Fair Work Commission, *Future Directions for Australia's National Workplace Relations Tribunal*, January 2013. Available at: <http://www.fwa.gov.au/>

- 9.161 It is possible that a dispute about actions that might amount to “reasonable administrative actions” under the SRC Act could be brought to the Fair Work Commission—for example:
- (a) in a claim that an employer had failed to apply or had wrongly applied a disciplinary process in an enterprise bargaining agreement that included such a process, where the dispute resolution clause in the agreement permitted the Fair Work Commission to arbitrate the matter: s 739 of the Fair Work Act;
  - (b) if an employee claimed to have been unfairly dismissed for making a workers compensation claim or as a result of the employer following an unfair or unreasonable process;
  - (c) in a dispute about an adverse action claim involving dismissal (for example, based on some workplace right or discriminatory ground);
  - (d) in a dispute about an adverse action claim not involving dismissal (based on some workplace right or discriminatory ground); or
  - (e) in a dispute about unlawful termination (on discriminatory grounds).
- 9.162 Depending on the nature of the application, the Fair Work Commission might make a determination, resolve a dispute or certify whether the dispute could not be resolved.
- 9.163 In a claim that an employer had failed to apply or had wrongly applied a disciplinary process in an enterprise bargaining agreement that included such a process (see paragraph 9.161(a) above), the Fair Work Commission could make a determination about whether the employer had failed to apply or had wrongly applied the process if such a determination was permitted by the relevant dispute resolution clause: s 739 of the Fair Work Act. There might but would not necessarily be a determination by the Commission.
- 9.164 In an unfair dismissal claim (see paragraph 9.161(b) above), if the matter proceeded beyond conciliation to arbitration, the Fair Work Commission would make a determination as to whether the dismissal was harsh, unjust or unreasonable having regard to factors including those in s 387 of the Fair Work Act. If the matter went to arbitration, the Fair Work Commission might make a determination.
- 9.165 However, in disputes about adverse actions involving dismissals (see paragraph 9.161(c) above), the Fair Work Commission’s role is essentially limited to conciliation and to certifying whether all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful: ss 365–371 of the Fair Work Act. In those cases, the Commission does not make any determination about the actions taken by the employer.
- 9.166 Similarly, in disputes about unlawful termination (based on discriminatory grounds—see paragraph 9.161(e) above), the Fair Work Commission’s role is also limited to certifying whether all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful: ss 773–779 of the Fair Work Act. Again, there would not be any “determination” made by the Commission.
- 9.167 In disputes about adverse actions not involving dismissals (see paragraph 9.161(d) above), the Fair Work Commission’s role is limited to conciliation and to advising the parties whether an adverse action court application would not have reasonable prospects of success: ss 372–375 of the Fair Work Act. There would not be any “determination” made by the Commission.
- 9.168 There is a great deal to be said for the proposition that employers and employees should not be permitted or required to re-litigate issues in the AAT if those issues have also been brought before and resolved by the Fair Work Commission. However, whether the Fair Work Commission makes a determination or resolves a matter in such a way that the outcome could be relied on in the AAT depends on a number of factors.
- 9.169 Although the issue was raised with the Review during consultations, no cases or specific examples were identified. Given the Fair Work Commission’s high rate of conciliation resolution, it is not surprising that there are few “decisions” that would evidence the overlap.
- 9.170 If relevant determinations made by the Fair Work Commission could be identified (for example, where the Commission is satisfied that an employee was unfairly dismissed: ss 385 and 390 of the Fair Work Act), the employer and the employee should be entitled to rely on that finding when a decision maker is determining whether the conduct amounts to reasonable administrative action for the purposes of s 5A(1) of the SRC Act.
- 9.171 That would limit the number of times a particular set of facts could be the subject of litigation and would mean that disputes about workplace matters—in particular, whether a particular administrative action by an employer was reasonable—can be determined by a body specialising in workplace relations matters.
- 9.172 That would only affect the question whether the employer’s action was reasonable. It would not have any impact on **Recommendation 5.5**, that the reasonable administrative action exclusion in s 5A(1) operate only where the reasonable administrative action taken in a reasonable manner in respect of the employee’s employment has contributed, to a significant degree, to the disease, injury or aggravation.

## RECOMMENDATIONS

9.173 I recommend that immediate consideration be given to identifying those determinations made by the Fair Work Commission that consider and determine the reasonableness or otherwise of an employer's action that could be a reasonable administrative action; and that, if determinations of that kind can be identified, the employer and the employee should be entitled to rely on that determination when a decision maker (a determining authority or the AAT) is determining whether the employer's conduct amounted to reasonable administrative action for the purposes of s 5A(1) of the SRC Act.

### RECOMMENDATION 9.14

I recommend that:

- (a) immediate consideration be given to identifying those determinations made by the Fair Work Commission that consider and determine the reasonableness or otherwise of an employer's action that could be a reasonable administrative action within s 5A(1) of the SRC Act; and
- (b) if determinations of that kind can be identified, the employer and the employee should be entitled to rely on that determination when a determining authority or the AAT is determining whether the employer's conduct amounted to reasonable administrative action for the purposes of s 5A(1) of the SRC Act.

## A NEW ROLE FOR THE FAIR WORK COMMISSION

9.174 In addition to allowing decisions of the Fair Work Commission to determine what is a reasonable administrative action, the Review has considered the possibility of a wider dispute-resolving role for the Commission. To evaluate that possibility, it is necessary to consider the work of the Fair Work Commission and whether disputes under the SRC Act would be a good "fit". It is also necessary to consider which disputes under the SRC Act could be dealt with by the Fair Work Commission.

### THE WORK OF THE FAIR WORK COMMISSION

9.175 In accordance with s 577 of the Fair Work Act, the Fair Work Commission is required to perform its functions and exercise its powers in a way that:

- (a) is fair and just;
- (b) is quick, informal and avoids unnecessary technicalities;
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

9.176 The recent record of the Fair Work Commission reveals that it has met or exceeded all of its key performance indicators, as **Table 19** shows.

**TABLE 19: FAIR WORK COMMISSION KEY PERFORMANCE INDICATORS FOR 2011–12**<sup>420</sup>

Key performance indicator	Budget target	Actual results	Number
Improve or maintain the time elapsed from lodging applications to finalising conciliations in unfair dismissal applications	Median time of 34 days	Median time taken was 28 days	10,073 finalised conciliations
Improve or maintain average time taken to list applications relating to industrial action	Median time of three days	Median time taken was three days	889 applications listed
Improve or maintain the average agreement approval time	Median time of 32 days	Median time taken was 17 days	8,149 agreements approved
Completion of annual wage review	By 30 June 2012	1 June 2012	

420. *Fair Work Australia Annual Report 2011–12*, p 10. Available at: [http://www.fwa.gov.au/documents/annual\\_reports/ar2012/FWA\\_Annual\\_Report\\_2011-12.pdf](http://www.fwa.gov.au/documents/annual_reports/ar2012/FWA_Annual_Report_2011-12.pdf)

9.177 The Fair Work Commission deals with a range of different cases, with its work generally increasing over the last financial year, as shown in **Table 20**.

**TABLE 20: FAIR WORK COMMISSION CASES**<sup>421</sup>

Type of case	Number of cases lodged			Timeliness	
	2011–12	2010–11	Change	Median	90th percentile
Award variations	29	196	-85.2 %	–	–
Agreements	8,565	7,209	18.8 %	17 days	54 days
Orders relating to good faith bargaining	530	464	14.2 %	–	–
Dispute notifications	2,627	1,974	33.1 %	17 days	41 days
Orders relating to industrial action	1,446	1,159	24.8 %	3 days	–
General protections applications (s 365 and s 773)	2,303	2,045	12.6 %	26 days	48 days
Unfair dismissal applications (s 394)	14,027	12,840	9.2 %	28 days	38 days
Unfair dismissal applications (s 394)—finalised by dealing with an objection to the application	226	201	12.4 %	–	–
Unfair dismissal applications (s 394)—finalised by substantive arbitration	325	316	2.8 %	–	–
Appeals	184	175	5.1 %	81 days	213 days

9.178 As a comparison between **Table 17** and **Table 19** shows, the Fair Work Commission is resolving matters at a faster pace than the AAT. A point of difference could lie in the nature of the disputes; however, it appears from that comparison that the Fair Work Commission is highly efficient in resolving workplace disputes.

9.179 If the disputes under the SRC Act that are properly described as disputes about workplace matters can be identified, there would be obvious advantages in having the Fair Work Commission resolve those disputes: essentially, the faster resolution of disputes would contribute to better outcomes for injured workers by removing a factor (prolonged disputation) that impedes recovery and rehabilitation.

### THE NATURE OF DISPUTES UNDER THE SRC ACT

9.180 The determinations that give rise to disputes under the SRC Act can be placed in two broad categories: those that relate to workplace matters and those that relate to questions of eligibility under the SRC Act.

9.181 Some questions arising under the SRC Act require an understanding and knowledge of a particular workplace, or workplaces, and can be placed in the first category:

- (a) For example, in order to calculate an employee's incapacity payments under s 19 of the SRC Act, the decision maker must understand the particular remuneration arrangements in place in that employee's workplace.
- (b) Again, when determining whether employment that has been offered is suitable to the employee (as required by s 40 of the SRC Act), the decision maker will need to understand what work is on offer in that particular workplace.

9.182 Other issues relate to questions of eligibility under the SRC Act and can be placed in the second category:

- (a) For example, the decision whether an injury is compensable under s 14 of the SRC Act may require the decision maker to consider medical–scientific evidence about diagnosis and causation of the relevant injury or disease.
- (b) Again, when deciding on the level of compensation payable for a permanent impairment, pursuant to ss 24 and 27 of the SRC Act, the decision maker will need to consider medical–scientific evidence about diagnosis of the relevant injury or disease and the measurement of the effects of that injury or disease on the individual.

421. *Fair Work Australia Annual Report 2011–12*, p 10 (references omitted). Available at: [http://www.fwa.gov.au/documents/annual\\_reports/ar2012/FWA\\_Annual\\_Report\\_2011-12.pdf](http://www.fwa.gov.au/documents/annual_reports/ar2012/FWA_Annual_Report_2011-12.pdf)

- 9.183 Of course, there will be other issues arising under the SRC Act that do not fall neatly into either category:
- (a) For example, a decision as to whether an employee is entitled to compensation under s 19 of the SRC Act will require the decision maker to consider the incapacitating effects of the relevant injury or disease as well as the remuneration arrangements in place in the employee's workplace.
  - (b) Again, a decision as to the amount of compensation payable to an employee who is being maintained in a hospital pursuant to s 22 of the SRC Act will require the decision maker to consider the present and probable future needs and expenses of the employee as well as the remuneration arrangements in place in the employee's workplace.
  - (c) I have discussed the reasonable administrative action exclusion in paragraphs 9.157–9.173 above. Although questions about whether particular administrative action by an employer is reasonable or not are closely related to workplace matters, the question of the employee's eligibility for compensation in respect of her or his injury will raise other issues, including the contribution of any reasonable administrative action to the employee's injury.
- 9.184 Although it might be possible to draw a distinction between issues that relate to the workplace and issues that relate to eligibility under the SRC Act, it cannot be assumed that those issues will be raised in a neat, compartmentalised fashion.
- 9.185 If particular types of disputes were to be referred to the Fair Work Commission for resolution because they involved issues related to the workplace, there would need to be some mechanism for the Fair Work Commission either to deal with issues that related to eligibility for compensation or to refer those matters where there were multiple issues to the AAT.
- 9.186 There is no constitutional impediment to referring part of the AAT's current review jurisdiction to the Fair Work Commission. That review jurisdiction is administrative, not judicial, in character; the administrative review of decisions made under the SRC Act can legitimately be vested in an administrative body such as the AAT or the Fair Work Commission.<sup>422</sup>

## OPTIONS FOR CHANGE

- 9.187 Before any significant changes are made to the dispute resolution mechanism in the SRC Act, there are a number of questions that need to be answered. They include:
- (a) which disputes could be heard by the Fair Work Commission;
  - (b) which disputes would remain within the review jurisdiction of the AAT;
  - (c) would employees have a choice to lodge their applications for review in the Fair Work Commission or the AAT or would lodging applications in the Commission be the only option for disputes that could be heard by the Commission;
  - (d) would determining authorities have any role in choosing the relevant review body;
  - (e) would the Fair Work Commission only have jurisdiction over disputes involving workplace-related matters or could it hear disputes about other matters;
  - (f) how would disputes that involve both workplace-related issues and other issues be resolved; and
  - (g) what would be the appeal pathway from decisions of the Fair Work Commission?
- 9.188 Although it may be relatively simple to distinguish between disputes that involve workplace issues and disputes that involve eligibility issues, deciding the other questions will require careful consideration.
- 9.189 Pending the resolution of those questions, one option would be for the Fair Work Commission to resolve disputes about rehabilitation; that is, disputes arising under Division 3 of Part II of the SRC Act. Those disputes involve workplace issues; and, where rehabilitation is in issue, any delay will have a significant impact on the recovery of the employee. Ensuring the prompt resolution of those disputes would provide greater support to employees and employers, who will benefit from having the employee return to the workplace.

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422. Under the Commonwealth Constitution, Commonwealth legislation can only give functions that are classified as judicial functions (essentially, resolving disputes between parties by giving a binding and conclusive determination about existing rights and liabilities) to courts: see, for example, *Brandy v Human Rights & Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245. However, the function given to the AAT, of reviewing administrative decisions under Commonwealth legislation, is not a judicial function; that function involves an exercise of the administrative power of the Commonwealth and not of the judicial power of the Commonwealth: see *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 634; 46 FLR 409; 24 ALR 577.

## RECOMMENDATIONS

- 9.190 Although the AAT has played an important part in resolving disputes under the SRC Act, the extended time taken by the AAT's processes should be of great concern, if only because of its negative effect on employees' recovery from injury and on their rehabilitation. It is apparent that the AAT has made some improvement in the time taken to resolve disputes, but the AAT's performance is well behind the performance of the dispute resolution systems in other Australian workers compensation schemes. The extended time taken by the AAT's processes is thrown into sharp relief when compared to the performance of the Fair Work Commission, which should be given a significant role to play in the resolution of disputes under the SRC Act with the objective of delivering faster resolution of the disputes that are transferred to the Commission and demonstrating, through its processes, ways in which the AAT can further improve its performance.
- 9.191 Immediate consideration should be given to answering the questions identified in paragraph 9.187 above with a view to defining a review jurisdiction for the Fair Work Commission under the SRC Act and defining the relationship between that review jurisdiction and the AAT's review jurisdiction under the SRC Act.
- 9.192 Priority should be given, in that consideration, to defining a review jurisdiction for the Fair Work Commission under Division 3 of Part II of the SRC Act with a view to giving the Fair Work Commission jurisdiction to review all reviewable decisions relating to rehabilitation programs.

### RECOMMENDATION 9.15

I recommend that immediate consideration be given to defining a jurisdiction for the Fair Work Commission to review reviewable decisions under the SRC Act that involve workplace issues, with a view to transferring that part of the AAT's review jurisdiction under the SRC Act to the Fair Work Commission and defining the relationship between the Fair Work Commission's review jurisdiction and the AAT's review jurisdiction under the SRC Act.

### RECOMMENDATION 9.16

I recommend that priority be given to defining a review jurisdiction for the Fair Work Commission under Division 3 of Part II of the SRC Act, with a view to giving the Fair Work Commission jurisdiction to review all reviewable decisions relating to rehabilitation programs.

## INFORMATION-GATHERING POWERS

- 9.193 To support early and quick decisions, it is important that decision makers have sufficient power to gather the information required to make a decision.
- 9.194 The SRC Act includes several provisions to facilitate the collection of evidence used in decision making:
- Where notice of injury has been provided under s 53 or an employee has made a claim under s 54, the relevant authority (Comcare or the relevant determining authority) has the power to require the employee to undergo a medical examination by "one legally qualified medical practitioner": s 57(1). If the employee unreasonably fails to undergo an examination or obstructs an examination, the employee's rights to compensation under the Act, and to institute or continue any proceedings under the Act in relation to compensation, are suspended until the examination takes place: s 57(2) and (5).
  - Following receipt of a claim, the relevant authority has the power to request the provision of information from an employee if it is satisfied the employee has the information or documentation in her or his possession or is able to obtain such information or documentation without unreasonable expense or inconvenience: s 58(1).
  - When a request is made under s 58, the employee must supply the information within 28 days after the date of the notice or within such a further period as the relevant authority has allowed: s 58(2). If the employee unreasonably fails to comply with the notice, the relevant authority may refuse to deal with the claim until that information is provided: s 58(3).
  - Comcare may, by notice in writing, require the principal officer of an entity, a Commonwealth authority or a licensed corporation to give Comcare, within the period specified in the notice, such documents or information in the possession, custody or control of the entity or authority that are relevant to a claim made by, or in relation to, an employee of the entity or authority or that relate to the performance of functions or the exercise of powers by the principal officer under Part III: s 71(1).<sup>423</sup> The principal officer to whom the notice is given must comply with the notice without delay: s 71(2).

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423. Because s 71 is in Part VII of the SRC Act, the power that it confers on Comcare is not conferred on a licensee: see s 4(10A) of the SRC Act.

- 9.195 Sections 58 and 71 of the SRC Act both relate to claims for compensation and only apply up to the time when liability is determined in favour of accepting a claim. They can be used to gather information in relation to undetermined claims and in relation to claims that are subject to requests for reconsideration. Both provisions require compliance within a specified timeframe: 28 days for a request under s 58; and within the period specified in a s 71 notice.
- 9.196 There is no power for Comcare or a licensee to request information or documents that relate to the administration of compensation being paid under the SRC Act after liability has been determined.
- 9.197 Other than Comcare’s power to issue a s 71 notice, there is no power for a determining authority to request relevant information or documents from third parties either before determining liability or in relation to the administration of any accepted liability.
- 9.198 As discussed in paragraphs 7.72–7.76, the main issue with deeming an employee able to earn, for the purpose of s 19(2) and (3) of the SRC Act, is the inability of determining authorities to obtain information relevant to the task. That information may be held by the employee, employer or relevant rehabilitation authority.
- 9.199 In *Re Sommers and Telstra Corporation Ltd* [2006] AATA 758, the AAT was asked to consider whether particular documents sought by Telstra from Ms Sommers were “relevant to the claim” within s 58(1)(a) of the SRC Act. Ms Sommers had made a claim for a psychiatric injury, which Telstra said was not caused by her employment. Telstra sought Ms Sommers’ medical records for the previous 15 years. In deciding that those documents were relevant, Senior Member McCabe applied the reasoning of Spender J of the Federal Court in *Cosco Holdings Pty Ltd v FCT* [1997] FCA 1504; (1997) 37 ATR 432. The test is whether the material sought has “apparent relevance” in the sense that the information “could possibly throw light on the issues in the ... case”; but the word “possibly” is not used in any speculative sense: a request for information or documents that is “essentially speculative in nature” will not be supported by s 58.

## INFORMATION-GATHERING POWERS IN OTHER SCHEMES

- 9.200 Several of the State and Territory schemes prescribe time limits for complying with requests for information.

**TABLE 21: PRESCRIBED TIME LIMITS FOR THE PROVISION OF INFORMATION<sup>424</sup>**

Scheme	Employer/worker is to supply further information to insurer or authority on request
Commonwealth	28 days—s 58(2)
Australian Capital Territory	7 days—s 126(2)
New South Wales	7 days—1998 Act, s 69(1)(b)
Northern Territory	Not specified
Queensland	10 business days of receiving notice—s 167(2)
South Australia	Not specified
Tasmania	Not specified
Victoria	No time limit except decision must be made on claim for weekly payments or deemed accepted
Western Australia	Not specified

- 9.201 Although information-gathering powers are relevant to all stages of a claim, they are primarily relevant to determining initial liability under s 14 and when deciding reconsideration requests. The SRC Act places an onus on all determining authorities to determine claims accurately and quickly: s 69(a) requires it of Comcare, and s 108E(b) requires it of the licensees.
- 9.202 As discussed at paragraphs 9.8–9.10 and 9.12–9.14 above, although the timeframes for the determination of new claims and resolving requests for reconsideration are not currently subject to regulation, they are monitored by the SRCC and are considered to be a KPI for determining authorities. In order to meet the DAKPI timeframes and make determinations “accurately and quickly”, a determining authority needs the power to request information, and expect to receive it, within a timeframe that allows the determining authority to meet its statutory obligations while also providing stakeholders with natural justice.

424. Extracted from Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand*, April 2012, p 35, Table 2.7: Prescribed time periods for claim submission. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.docx>

- 9.203 Two issues arise with the use of s 58 when gathering information to support a determination of liability under s 14 or to decide a request for reconsideration: the 28-day timeframe and implementing the refusal to deal with the claim. Due to the DAKPI timeframe of 20 calendar days for new injuries, s 58 is essentially unusable. In addition, providing an employee with 28 days to produce documentation or information severely limits the timeframe in which a determining authority has to consider that information, particularly for reconsideration requests.
- 9.204 Arguably, if an employee wants her or his claim accepted, the employee will provide the determining authority with whatever information the determining authority requests, whether that request is made under the SRC Act or not. However, if the information requested might be detrimental to the employee's prospects, there is considerably less impetus for the employee to provide that information. This may result in the determining authority making a decision to accept a claim when, if all the facts had been available at the time, the correct decision would have been to reject liability.
- 9.205 In respect of the second issue—refusing to deal with a claim—it is impractical for the determining authority to refuse to deal with either an undetermined s 14 claim or a request for reconsideration given the timeframes that the authority is required to meet. Accordingly, if a determining authority does not receive the information requested from the employee, the employee's claim is likely to be disallowed.
- 9.206 For those reasons, when determining liability pursuant to s 14 of the SRC Act, Comcare (as a relevant authority) does not currently use s 58.
- 9.207 Like s 58, s 71 of the SRC Act can only be used when determining s 14 liability and deciding requests for reconsideration. Unlike s 58, there are no consequences if, following receipt of a s 71 notice, the Commonwealth department, agency or authority, or the licensed corporation, fails to provide the documents or information requested by the determining authority.
- 9.208 In order to determine liability, it may be necessary to establish the facts of a particular matter. Failure to provide requested information could have a detrimental effect on an employee's claim and may result in a claim being disallowed. Where that occurs, it is the employee who suffers, not the employer.
- 9.209 Various submissions were received, and comments made, during consultations with the Review that Comcare, as a determining authority, needs to be more responsive to its clients, namely employees and the premium payers. I consider it appropriate that there be return of service obligations.<sup>425</sup>
- 9.210 To a large degree, when determining liability for a claim or deciding a reconsideration, the decision will turn on the medical evidence available to the determining authority. I acknowledge that treating practitioners are often busy and have limited time available in which to provide reports or respond to requests for medical details. However, the fact remains that a determining authority is reliant on that evidence. Failure to provide a response to a determining authority is likely to result in a claim being denied due to a lack of medical evidence to support the claim.
- 9.211 The legally qualified medical practitioner who is treating an employee is a key participant in any rehabilitation program and, indeed, in the claims process. I therefore consider it appropriate that the information-gathering powers available to determining authorities should also be applicable to third parties—for example, legally qualified medical practitioners.

## SUBMISSIONS RECEIVED

- 9.212 Comcare submits:<sup>426</sup>
- Comcare and other determining authorities need greater powers to obtain information to properly and quickly assess claims.
- 9.213 At paragraph 9.36 above, I recommend that timeframes be legislated for the determination of claims and, at paragraph 9.71 above, I recommend that timeframes be legislated for decisions on reconsideration. In order to allow those timeframes to work, a determining authority must be able to specify the period within which information requested under s 58 is to be provided. The effective operation of those timeframes will be frustrated if a determining authority, which has 30 days in which to make a determination or a decision on reconsideration, must allow the claimant 28 days for the provision of information (the period currently specified in s 58(2) and (3) of the SRC Act).

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425. See, for example: Australian Broadcasting Commission, Submission to the Review, p 5; Mr Colin Dunstan, Submission to the Review, p 1; and Mr John Ross, Submission to the Review, p 4.

426. Comcare, Submission to the Review, p 35.

## RECOMMENDATIONS

9.214 I recommend that the SRC Act be amended so that:

- (a) information requested under s 58 be provided within the period specified in the request (as with a notice issued under s 71);
- (b) penalties are prescribed for a failure to comply with a s 71 notice;
- (c) determining authorities have the power to request information relevant to a claim from parties other than the employer and the employee (for example, the employee's medical practitioners, a previous employer or an insurer); and
- (d) determining authorities have the power to request information relevant to the administration of liabilities under the SRC Act (for example, information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).

9.215 Those recommendations could be achieved by amending ss 58 and 71 and introducing a new section in relation to obtaining information from parties other than the employer and employee. Section 58 could be amended by changing the current reference to "28 days" to a reference to "the period specified in the notice" and inserting new subsections (3A), (3B), (3C), (3D) and (3E), giving power to require the provision of information relevant to the administration of a claim and setting out the consequences for non-compliance. An amended s 58 would read:

### **58 Power to request the provision of information**

- (1) Where a relevant authority has received a claim and is satisfied that the claimant:
  - (a) has information or a document that is relevant to the claim; or
  - (b) may obtain such information or a copy of such a document without unreasonable expense or inconvenience;the relevant authority may, by notice in writing given to the claimant, request the claimant to give that information or a copy of that document to the relevant authority within ~~28 days after the date of such period~~ as is specified in the notice or within such further period (if any) as the relevant authority, on the request of the claimant, allows.
- (2) A claimant who has received a notice under subsection (1) shall be taken to have complied with the notice if the claimant gives the relevant authority the information or document specified in the notice within ~~28 days after the date of such period as is specified in the notice or within such further period (if any) as the relevant authority has allowed.~~
- (3) Where a claimant refuses or fails, without reasonable excuse, to comply with a notice under subsection (1), the relevant authority may refuse to deal with the claim until the claimant gives the relevant authority the information, or a copy of the document, specified in the notice.
- (3A) Where a relevant authority has determined that it is liable to pay compensation in respect of an injury suffered by an employee and is satisfied that the employee:
  - (a) has information or a document that is relevant to the administration of the claim; or
  - (b) may obtain such information or a copy of such a document without unreasonable expense or inconvenience;the relevant authority may, by notice in writing given to the employee, request the employee to give that information or a copy of that document to the relevant authority within such period as is specified in the notice or within such further period (if any) as the relevant authority, on the request of the employee, allows.
- (3B) An employee to whom a relevant authority has given a notice under subsection (3A) must comply with the notice within such period as is specified in the notice or within such further period (if any) as the relevant authority, on the request of the employee, allows.

Penalty: 5 penalty units
- (3C) Subsection (3B) is an offence of strict liability.
- (3D) Where an employee refuses or fails, without reasonable excuse, to comply with a notice under subsection (3A), the employee's rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the employee gives the relevant authority the information, or a copy of the document, specified in the notice.
- (3E) Where an employee's right to compensation is suspended under subsection (3D), compensation is not payable in respect of the period of the suspension.

9.216 I do not consider it necessary to amend the consequences attached to failure to comply with a request pursuant to s 58(1) of the SRC Act. For employees wishing to establish liability, I consider it is enough that the determining authority may refuse to deal with the claim and, as a result, not pay any compensation on the basis of the failure to provide the requested information. However, if liability has been determined and there is a failure to provide information in compliance with a request under s 58(3A), in order to ensure compliance the determining authority should have the power to suspend payment of compensation until there is compliance.

9.217 Section 71(1) of the SRC Act could be amended by changing the structure to create a series of paragraphs that identify the type of information that can be requested and in doing so adding a new category in the form of paragraph (b) which would read:

- (1) Without limiting the generality of section 70, Comcare may, by notice in writing, require the principal officer of an Entity, a Commonwealth authority or a licensed corporation to give Comcare, within such period as is specified in the notice, such documents or information (or both) as are specified in the notice, being documents or information in the possession, custody or control of the Entity or authority:
  - (a) that are relevant to a claim made by, or in relation to, an employee of the Entity or authority; or
  - (b) that are relevant to the administration of liabilities under this Act in relation to an employee of the Entity or authority; or
  - (c) that relate to the performance of functions or the exercise of powers by the principal officer under Part III.

9.218 A new s 71A could be inserted to provide the power to obtain information or documents from parties other than employees or employers, in the following terms:

**71A Power to obtain information**

- (1) Without limiting the generality of section 70, a relevant authority may, by notice in writing, require any person to give to the relevant authority, within such period as is specified in the notice, such documents or information (or both) as are specified in the notice, being documents or information in the possession, custody or control of the person that are relevant to:
  - (a) a claim for compensation under this Act; or
  - (b) the administration of liabilities under this Act.
- (2) A person to whom a relevant authority has given a notice under subsection (3A) must comply with the notice within such period as is specified in the notice or within such further period (if any) as the relevant authority, on the request of the person, allows.  
Penalty: 5 penalty units.
- (3) Subsection (2) is an offence of strict liability.

9.219 Proposed s 71A establishes a general information-gathering power. I do not propose to recommend any detailed prescriptions for that power, in particular relating to costs incurred in providing information. Determining authorities will need to use the power sensibly and develop protocols with the recipients of requests for information.

**RECOMMENDATION 9.17**

I recommend that the SRC Act be amended so that:

- (a) information requested under s 58 be provided within the period specified in the request (as with a notice issued under s 71);
- (b) penalties are prescribed for a failure to comply with a s 71 notice;
- (c) determining authorities have the power to request information relevant to a claim from parties other than the employer and the employee (for example, the employee's legal practitioners, a previous employer or an insurer); and
- (d) determining authorities have the power to request information relevant to the administration of liabilities under the SRC Act (for example, information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).

## FRAUD CONTROL

- 9.220 Very few claims are fraudulent. However, it is also important that, when fraud arises, it can be dealt with effectively.
- 9.221 In his foreword to the *Commonwealth Fraud Control Guidelines 2011* (the **2011 guidelines**),<sup>427</sup> the then Minister for Home Affairs and Minister for Justice, Brendan O'Connor, said that the Government recognises that the threat of fraud is becoming more complex. The 2011 guidelines retain the core elements of the previous fraud control framework and the obligations to investigate thoroughly and, where appropriate, prosecute cases where fraud is detected.
- 9.222 The Minister concluded by stating that the Government takes the matter of fraud extremely seriously and is determined that all measures are taken to ensure that public funds are spent properly and accountably. Ultimately, the Minister said, this will benefit all Australians by ensuring that government funds are used fairly, equitably and for their intended purposes.
- 9.223 Comcare receives over 100 allegations of fraud a year in relation to claims made under the SRC Act. Only a very small proportion of those allegations are referred to the Commonwealth Director of Public Prosecution, and on average there have been 1.6 prosecutions per year over the past 12 financial years.<sup>428</sup>
- 9.224 The "long-tail" nature of the Comcare scheme means that payments for an individual claim can exceed \$1 million and sometimes exceed \$2 million, depending on the number of years over which compensation is paid (possibly until 65 years of age) and the employee's salary level. This creates a significant risk for a substantial level of fraud against the Comcare scheme that may not exist in other workers compensation schemes.
- 9.225 There are already a number of offences in the SRC Act (for example, ss 46, 47, 48(2) and 120(4)); however, they relate to failures to provide specific types of information.
- 9.226 For fraud offences, Comcare fraud investigators currently rely on offences against Part 7.3 (fraudulent conduct) and Part 7.4 (false or misleading statements) of the *Criminal Code Act 1995* (the **Criminal Code**).
- 9.227 Any offence against the Criminal Code is dependent on a fraudulent, false or misleading representation or the making or use of a false document. A mere failure to declare other income, unless that information has been validly requested (for example, under s 58<sup>429</sup>) does not constitute an element of any criminal offence, whether under the SRC Act or the Criminal Code.
- 9.228 Section 135.2 of the Criminal Code provides that a person is guilty of an offence if the person engages in any conduct to obtain a financial advantage; and s 4.1(2) of the Criminal Code provides:
- In this Code:
- conduct** means an act, an omission to perform an act or a state of affairs.
- 9.229 Prosecutions under s 135.2 of the Criminal Code may be available where an injured employee fails to provide information following a request for information under s 58<sup>430</sup> and has the relevant fraudulent intent.
- 9.230 Section 4.3 of the Criminal Code provides:
- An omission to perform an act can only be a physical element if:
- (a) the law creating the offence makes it so; or
- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.
- 9.231 Therefore, in accordance with s 4.3, an omission to provide information can constitute the physical element of a crime where there is a legal duty to provide that information. Thus, the SRC Act does not itself have to create a separate offence of fraud, but the SRC Act does need to create a legal duty to provide the relevant information.
- 9.232 In *Commonwealth Director of Public Prosecutions v Poniatowska* [2011] HCA 43; (2011) 244 CLR 408, a majority of the High Court considered charges of obtaining a financial advantage contrary to s 135.2(1) of the Criminal Code, based on Ms Poniatowska's failure to provide information to Centrelink (which resulted in an overpayment). It was not alleged that Ms Poniatowska was under a duty to provide the information<sup>431</sup> and the overpayment arose not from Ms Poniatowska's omission to report her income but from the fact of the income itself.<sup>432</sup>

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427. *Commonwealth Fraud Control Guidelines 2011*, p iii. Available at: <https://fraud.govspace.gov.au/files/2011/03/Commonwealth-Fraud-Control-Guidelines-MARCH-2011.pdf>

428. As supplied by Comcare.

429. The s 58 power is only available in the period up to acceptance of a claim; it would not support a request for information relevant to an employee's ongoing entitlements under the SRC Act.

430. Noting the limited nature of the s 58 power.

431. *Commonwealth Director of Public Prosecutions v Poniatowska* [2011] HCA 43; (2011) 244 CLR 408 at [2].

432. [2011] HCA 43; (2011) 244 CLR 408 at [14].

- 9.233 The majority held, at [29], that:  
 ... criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform.
- 9.234 The SRC Act places very few legal duties on employees, or indeed any other party, to disclose or provide information to Comcare or the relevant determining authority. The current obligations on employees are:
- (a) to give notice of common law claims made against a third party: s 46 of the SRC Act or the employer: s 47 of the SRC Act;
  - (b) to give notice of the recovery of any damages and the amount of those damages: s 48(2) of the SRC Act;
  - (c) to comply with a request for information made under s 58 of the SRC Act;
  - (d) to notify retirement: s 114A of the SRC Act;<sup>433</sup> and
  - (e) to notify any departure from Australia and, if absent overseas for not less than three months, to provide an overseas address: s 120 of the SRC Act.<sup>434</sup>
- 9.235 Because those sections create legal obligations to provide information, any omission that was motivated by a fraudulent intent is capable of constituting an offence under s 135.2 of the Criminal Code.
- 9.236 For example, where a request for information has been made under s 58 of the SRC Act pending acceptance of a claim,<sup>435</sup> an employee has a legal duty to inform the requesting determining authority that the employee has gained new employment (including self-employment) or received income that may affect the employee's incapacity entitlements. However, there is no positive obligation to provide that information absent a request under s 58.
- 9.237 A request under s 58 is only valid and effective if it is signed and given to the claimant personally or by post. Schedule 1 (Item 127) of the *Electronic Transactions Regulations 2000* excludes the application of the *Electronic Applications Act 1999* to requests under s 58 of the SRC Act. Therefore, a claimant does not have any legal duty to comply with a s 58 request communicated by email, telephone or facsimile.

## SUBMISSIONS RECEIVED

- 9.238 Comcare submits:<sup>436</sup>

Section 13A of the SRC Act provides that the *Criminal Code* applies to all offences against this [SRC] Act. Fraud investigators currently rely on fraud offences as prescribed under the Commonwealth *Criminal Code Act 1995*—mostly Part 7.3 fraudulent conduct and Part 7.4 false or misleading statements.

**Comcare recommends amendments are made to the SRC Act to specifically define particular actions or the absence of actions in certain circumstances as constituting offences under the Criminal Code.** An example would be an employee failing to provide Comcare with information of a change in circumstances.

The suggested amendments are in response to the case of *Poniatowska* where the High Court found that criminal liability does not attach to an omission unless there is a legal obligation to perform an act.

**Comcare considers legislative authority for information gathering powers for authorised fraud investigators including production notices and ability to execute search warrants etc. be considered.**

## RECOMMENDATIONS

- 9.239 Where a legal duty exists to provide information, an omission to provide that information which results in the overpayment of compensation will constitute an offence against the Criminal Code. For that reason, I am not persuaded that specific fraud offences are required in the SRC Act. There are clear obligations on claimants to provide information on request, and if **Recommendation 9.17** is adopted (to add subsections (3A), (3B), (3C), (3D) and (3E) to s 58), that obligation can be extended for the period during which compensation is payable.
- 9.240 There is currently no positive obligation on an employee to notify Comcare of any change of circumstance that would affect the employee's eligibility for compensation—for example, if the employee obtains employment with an employer other than the liable employer. I recommend that the SRC Act be amended to impose a positive obligation on employees to notify Comcare of changes of circumstance that would affect the employee's eligibility for compensation.

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433. I have recommended the repeal of ss 20, 21 and 21A (at paragraph 7.126), and consequently this provision should also be repealed.

434. This obligation only applies to employees who have been receiving incapacity benefits for not less than three months. I have recommended the amendment of s 120 at paragraphs 7.232 and 7.233.

435. Note the limited nature of the s 58 power: see paragraph 9.195 above.

436. Comcare, Submission to the Review, "Final Comments", p 38 (original emphasis).

9.241 That could be done by enacting a new s 58A in the following terms:

#### **58A Notice of change of circumstance**

- (1) Where compensation is payable under this Act to an employee, the employee must notify Comcare of any event or change of circumstances that occurs that is relevant to the employee's entitlement to compensation, including if:
  - (a) the employee begins employment, whether full time or part time, other than:
    - (i) employment by the Commonwealth or a licensed corporation; or
    - (ii) employment undertaken by the employee as suitable employment for the purposes of this Act;
  - (b) any change in the level of remuneration from the employee's employment.
- (2) Notice of any event identified in subsection (1) must be given as soon as practicable but in any event not later than 7 days after the day on which the employee first becomes aware of the event.  
Penalty: 5 penalty units
- (3) Subsection (2) is an offence of strict liability.

#### **RECOMMENDATION 9.18**

I recommend that the SRC Act be amended to include an obligation, reinforced by a penalty, to provide information of a change in circumstances.

## **RECOVERY OF INCAPACITY PAYMENTS**

9.242 Where a person has received compensation:

- (a) that has been paid because of a false or misleading statement or representation; or
- (b) that has been paid because of a failure or omission to comply with a provision of the SRC Act; or
- (c) that should not have been paid;

Comcare has the power to recover that compensation from the person: s 114 of the SRC Act.

9.243 The right created by s 114(1)(a) of the SRC Act to recover compensation paid because of a false or misleading statement or representation does not depend on conviction of any offence or on any finding of deliberate or knowing deception.<sup>437</sup> Further, the right created by s 114(1)(b) of the SRC Act to recover compensation that should not have been paid does not depend on any finding of the kind required by s 114(1)(a): that right simply depends on a finding that an amount of compensation was paid to a person but should not have been paid. In short, the SRC Act currently provides wide powers to recover payments of compensation from persons to whom those payments have been paid.

9.244 However, there is no power of recovery in relation to another form of payment made under the SRC Act.

- (a) Where an employee is entitled to compensation, and has received payments of salary or wages from her or his employer (generally in the form of sick leave) in relation to the compensable injury (see ss 23A(1) and 112A(1) of the SRC Act), those payments are set off against any compensation that is payable to the employee: ss 23A(2) and (3).
- (b) Comcare must pay the employer an amount equal to the amount of compensation that has been set off: ss 23A(5) and 112A(2); and any leave that was used by an employee must be restored: s 23A(9).
- (c) Employers therefore recover from Comcare any payments of salary or wages made to employees in relation to compensable injuries.
- (d) However, Comcare has no right of recovery from the employer if the payment made by Comcare to the employer pursuant to ss 23A and 112A turns out to be an overpayment.

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437. See *McAuliffe v Secretary, Department of Social Security* [1991] FCA 268; (1991) 23 ALD 284 (upheld on appeal: *McAuliffe v Secretary, Department of Social Security* [1992] FCA 483; (1992) 28 ALD 609), where a similar provision in the *Social Security Act 1947* was applied on the basis that a statement or representation which is untrue in fact, is "false", whether or not the statement or representation was deliberately or intentionally untrue.

## SUBMISSIONS RECEIVED

9.245 Comcare submits that:<sup>438</sup>

There should be an ability to recover incapacity overpayments from employers. The Act was amended to facilitate payments to injured employees through employers (creation of s 23A and s 112A). However, no amendments were made to allow for recovery.

## RECOMMENDATIONS

9.246 I recommend that the SRC Act be amended to allow Comcare to recover overpayments of compensation that have been made to an employer by Comcare. That could be achieved by inserting a new subsection into s 114, immediately after subsection (1A), as follows:

(1B) If:

- (a) an advised payment is made by Comcare to an employer pursuant to subsection 112A(2) in consequence of a false or misleading statement or representation or in consequence of a failure or omission to comply with a provision of this Act; or
  - (b) an advised payment made by Comcare to an employer that should not have been paid;
- the amount concerned is recoverable by Comcare from the employer in a court of competent jurisdiction as a debt due to Comcare.

9.247 A consequential amendment should also be made to s 114(2) of the SRC Act.

### RECOMMENDATION 9.19

I recommend that the SRC Act be amended to allow Comcare to recover overpayments of compensation that have been made to an employer by Comcare to recompense the employer for payments of salary or wages.

## COMCARE'S ABILITY TO MAKE PAYMENTS REDRESSING LOSS WHEN ERRORS HAVE OCCURRED

9.248 In March 2010, the Commonwealth Ombudsman released a report on discretionary payments of compensation.<sup>439</sup> In that report, the Ombudsman recommended that Comcare and the Department of Finance and Deregulation develop a proposal for establishing a scheme, similar to the Compensation for Detriment caused by Defective Administration scheme (the **CDDA scheme**), whereby employees adversely affected by poor administration of the SRC Act can seek compensation.

9.249 The Ombudsman's recommendation arose out of complaints that he received about the underpayment of entitlements by Comcare to two injured employees. After Comcare paid the outstanding amounts, the claimants sought further payment for the loss of use of the money that they should have received initially—in effect, a claim for lost interest.

9.250 The Ombudsman's investigation found that neither Comcare nor the Department of Finance and Deregulation had any direct mechanism for dealing with claims related to the actions of Comcare.

9.251 The CDDA scheme and act of grace payments under the FMA Act allow for compensation to be paid where there has been defective administration by agencies covered by the FMA Act.

9.252 The CDDA scheme was established by the Australian Government in 1995. It applies to detriment suffered as a direct result of defective administration by an Australian Government agency, where that agency is subject to the FMA Act. The purpose of the CDDA scheme is twofold:

- (a) to enable Commonwealth agencies to compensate persons who have suffered detriment as a result of an agency's "defective" actions or inaction, and who have no other avenues of redress;<sup>440</sup> and

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438. Comcare, Submission to the Review, "Final Comments", p 37.

439. Available at: [http://www.ombudsman.gov.au/files/comcare\\_dofd\\_discretionary\\_compensation\\_payments.pdf](http://www.ombudsman.gov.au/files/comcare_dofd_discretionary_compensation_payments.pdf)

440. Commonwealth Department of Finance and Deregulation, *Finance Circular 2009/09—Discretionary Compensation and Waiver of Debt Mechanisms (Finance Circular 2009/09)*, p 7. Available at: <http://www.finance.gov.au/publications/finance-circulars/2009/09.html>

(b) to alert agencies to potential problem areas and opportunities for improving their administrative systems, even in cases where an agency has decided not to grant compensation. Agencies need to ensure that processes are in place to report to their senior executives on trends and issues arising in CDDA claims and to draw problems to the attention of relevant business areas.<sup>441</sup>

9.253 The operation of the CDDA scheme, including extending the operation of the CDDA, is a topic that has been examined in detail by the Commonwealth Ombudsman, in addition to Report No 4 of 2010 noted at paragraph 9.248 above, and various Senate Committees.

9.254 In August 2009, the Commonwealth Ombudsman published its report *Putting things right: Compensating for defective administration*.<sup>442</sup> That report focused on the operation of the CDDA scheme and made recommendations for its improvement.

9.255 In December 2010, the Senate Legal and Constitutional Affairs References Committee reported on the *Review of Government Compensation Payments*, stating that:<sup>443</sup>

The committee acknowledges the actions of the Department of Finance and Deregulation in responding to many of the recommendations of the Commonwealth Ombudsman's report into the CDDA scheme, *Putting Things Right*. The committee considers that the CDDA scheme provides a useful mechanism for addressing harm caused by defective administration; however, from the evidence received, it appears that the CDDA scheme has not "kept pace" with changes in Commonwealth public administration. In particular, the application of the CDDA scheme to FMA Act agencies only appears to create anomalous outcomes. If a person suffers loss or damage due to defective administration they should be entitled to appropriate restitution, regardless of whether the loss or damage was caused by a FMA Act agency, a CAC Act body or a third party contracted to provide a Commonwealth service.

9.256 Recommendation 7 of the *Review of Government Compensation Payments* reads:

Recommendation 7:

that the Department of Finance and Deregulation investigate the extension, in appropriate circumstances, of the Compensation for Detriment caused by Defective Administration scheme to *Commonwealth Authorities and Corporations Act 1997* agencies and to third party providers performing functions or providing services on behalf of the Commonwealth.

9.257 On 29 November 2011, the Government tabled its response, noting Recommendation 7 and confirming that the Department of Finance and Deregulation is investigating the extension of the CDDA scheme to CAC Act agencies and to third party providers performing functions or providing services on behalf of the Commonwealth.<sup>444</sup>

9.258 In addition, on 12 May 2011 Senator Xenophon introduced the *Public Service Amendment (Payments in Special Circumstances) Bill 2011*. That Bill is intended to address the lack of a proper compensation scheme for claimants who have been disadvantaged as a result of administrative errors by Government agencies not included under the CDDA scheme. The Bill proposes removal of the \$100,000 limit contained in s 73 of the 1999 Act. Section 73 of the 1999 Act provides that the Public Service Minister may authorise the making of payments in special circumstances that arise out of, or relate to, a person's employment by the Commonwealth.

9.259 After its introduction in the Senate, the Bill was referred to a Senate Committee. The Senate Committee reported in August 2011,<sup>445</sup> and recommended that the \$100,000 limit in s 73 of the 1999 Act be increased to \$250,000. Both Comcare<sup>446</sup> and the Department of Finance<sup>447</sup> had provided submissions to the Senate Inquiry outlining the unsuitability of the Bill for its intended purpose. Further, the Senate Committee recommended that:

... consultations taking place among the Department of Finance and Deregulation, Comcare and the Department of Education, Employment and Workplace Relations to implement recommendation 1 contained in the Commonwealth Ombudsman's Report No. 4 of 2010 be concluded as a matter of priority.

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441. Commonwealth Ombudsman, *Compensation for detriment caused by defective administration*, Fact Sheet 9, February 2010, p 2. Available at: [http://www.ombudsman.gov.au/docs/fact-sheets/FactSheet9\\_CDDA.pdf](http://www.ombudsman.gov.au/docs/fact-sheets/FactSheet9_CDDA.pdf)

442. Available at: [http://www.ombudsman.gov.au/files/investigation\\_2009\\_11.pdf](http://www.ombudsman.gov.au/files/investigation_2009_11.pdf)

443. Senate Legal and Constitutional Affairs References Committee, *Review of Government Compensation Payments*, Inquiry Report, 2010, p 77. Available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/completed\\_inquiries/2010-13/govt\\_comp/report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2010-13/govt_comp/report/report.pdf)

444. Senate Legal and Constitutional Affairs References Committee, *Review of Government Compensation Payments*, Australian Government Response, 2010, p 5. Available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/completed\\_inquiries/2010-13/govt\\_comp/govt\\_response.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2010-13/govt_comp/govt_response.pdf)

445. Available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=fapa\\_ctte/completed\\_inquiries/2010-13/public\\_service\\_amendment/report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=fapa_ctte/completed_inquiries/2010-13/public_service_amendment/report/report.pdf)

446. Available at: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=d33cdec1-598b-4eb8-a6e5-09ab7d45383e>

447. Available at: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=1feb694d-b9db-404a-9527-fd34cd519dde>

- 9.260 Since 2009, Comcare has been working with DEEWR and the Department of Finance in order to establish a Comcare CDDA scheme. As outlined above, there are numerous inquiries and reports that have recommended the establishment of this scheme; additionally, the issue has been raised at Senate Estimates over the past three years. However, for various reasons, there has been little progress in establishing a CDDA scheme for Comcare.
- 9.261 Comcare is covered by the CAC Act and does not have access to the CDDA scheme or act of grace payments. Currently, injured employees who are adversely affected by poor administration of the SRC Act have no avenue for compensation (over and above any entitlements that were actually payable).
- 9.262 Comcare's ability to pay compensation to injured employees adversely affected by poor administration of the SRC Act is not certain. Comcare does not have any express function or power to make discretionary payments of the kind currently under consideration. Section 69(a) of the SRC Act confers on Comcare the function of making "determinations accurately and quickly in relation to claims" and s 70 of the SRC Act invests in Comcare a general power "to do all things necessary or convenient to be done for, or in connection with, the performance of its functions". Although there may be arguments to suggest that Comcare could make discretionary payments for loss suffered as a result of Comcare's poor administration, there is a possibility that a court would take a different view—namely, that the function and powers of Comcare set out in ss 69 and 70 of the SRC Act do not allow Comcare to make such discretionary payments.
- 9.263 Comcare must pay interest to an employee if an amount of compensation payable under s 24 or s 25 is not paid with 30 days after the date of assessment of the amount: s 26 of the SRC Act. That obligation could be taken to restrict the instances in which Comcare can make interest and other payments to rectify poor administration. (It should be noted that s 26 relates only to compensation for permanent impairment (ss 24 and 25) and not other forms of compensation.)
- 9.264 In contrast, where there is defective administration of claims managed by the MRCC pursuant to Part XI of the SRC Act, those claimants can access the CDDA scheme—because the DVA is an FMA Act agency and the SRC Act does not constrain the MRCC's ability to spend funds in the same way that s 91(3) of the SRC Act constrains Comcare. There is no equivalent to s 91(3) that relates to the MRCC.

### SUBMISSIONS RECEIVED

- 9.265 Mr Allan Emmerson submits that the Review should resolve the question of whether Comcare is authorised to pay interest on amounts owing to employees.<sup>448</sup>
- 9.266 The Superannuated Commonwealth Officers' Association submits that the SRC Act should be amended to allow Comcare to make payments for detriment caused by defective administration.<sup>449</sup>
- 9.267 Comcare submits:<sup>450</sup>
- Comcare supports the review extending CDDA arrangements to all administrative and legislative activities undertaken by Comcare.

### COMCARE AS AN FMA ACT AGENCY

- 9.268 If Comcare were to cease to be a CAC Act agency and become an FMA Act agency, as recommended by the Hawke Review (Recommendation 26), it could then invoke the general authority given in *Finance Circular 2009/09—Discretionary Compensation and Waiver of Debt Mechanisms (Finance Circular 2009/09)*<sup>451</sup> to make an act of grace payment (supported by s 33 of the FMA Act).
- 9.269 However, there are several potential issues with Comcare relying on s 33 of the FMA Act to make act of grace payments:
- (a) the stated policy position as to the purpose and use of act of grace payments;
  - (b) the practical approval process for act of grace payments;
  - (c) the mechanisms available to Comcare in order to fund any act of grace payment; and
  - (d) s 69 of the SRC Act.

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448. Mr Allan Emmerson, Submission to the Review, p 9.

449. Superannuated Commonwealth Officers' Association, Submission to the Review, p 8.

450. Comcare, Submission to the Review, p 32.

451. Detailed at footnote 438 above.

- 9.270 Section 33 of the FMA Act does not detail the circumstances that might be considered appropriate for an act of grace payment. That information is instead provided in Finance Circular 2009/09. Paragraph 3 of that circular states that general principles, rather than prescriptive rules, underlie act of grace payments. Those principles aim to achieve consistency and impartiality in evaluating the merits of cases in different circumstances. Finance Circular 2009/09 also states:<sup>452</sup>
- The act of grace power is available to provide a remedy in respect of all FMA Act agencies. However, it is generally a remedy of last resort and used only where there is no other viable remedy available to provide redress in the circumstances giving rise to the application. This means that an applicant would generally need to exhaust all viable alternative avenues of redress prior to requesting an act of grace payment. As a matter of practice, the act of grace mechanism is generally not available:
- ...
- to applications under the Scheme for Compensation for Detriment caused by Defective Administration ...
- 9.271 Accepting that one of the purposes of the CDDA scheme is to alert agencies to potential problem areas and opportunities for improving their administrative systems, it is imperative that any mechanism established to redress defective administration support that goal. The principles established for act of grace payments are not necessarily appropriate for that purpose.
- 9.272 Only the Chief Executive of Department of Finance and Deregulation has the power to decide to make an act of grace payment (that power has been delegated by the Finance Minister). Many, if not most, Comcare CDDA payments will be for quite small amounts (under \$1,000): that is supported by Comcare's analysis of recent complaints where defective administration may be a factor, as well as the experience of DVA in making CDDA payments. It seems to be a significant administrative burden, and an unnecessary cost to the taxpayer, to require decisions of such a small value to be authorised by the chief executive of another department. That authorisation is not required for FMA Act agencies making CDDA decisions, because that power has been delegated to the relevant agency heads.
- 9.273 Although act of grace payments must be authorised by the Finance Minister or a delegate, payments are generally funded from a departmental appropriation to the agency to which the act of grace request relates.
- 9.274 At present, Comcare as a CAC Act agency does not have access to appropriated funds; therefore, DEEWR would need to make any act of grace payment of the kind covered by s 33 of the FMA Act. Although that may change if Comcare is made an FMA Act agency, it is difficult to envisage Comcare receiving an appropriation for anything outside the management of pre-premium claims and asbestos-related claims. Without speculating on how the finances of Comcare will work once Comcare is an FMA Act agency, it is difficult to conclude that:
- (a) Comcare would be able to make a s 33 payment out of money appropriated for Comcare directly; and
  - (b) the s 33 payment would be made in a manner that encourages Comcare to address potential problem areas and opportunities for improving administrative systems.
- 9.275 There would continue to be a legal question as to whether Comcare would have access to the CDDA scheme, even if it became an FMA Act agency, on the grounds that the abovementioned provisions of the SRC Act have displaced the executive power to make CDDA payments for defective administration.

## POSSIBLE SOLUTIONS

- 9.276 Comcare has considered in some detail how a CDDA scheme might be implemented under the SRC Act. While there are several models that could be implemented, Comcare has publicly recommended the following model:<sup>453</sup>

### Step 1

Amendment to the SRC Act, specifically section 69 of the SRC Act that sets out Comcare's functions. This section should be amended to confer on Comcare an additional function authorising it to provide compensation to claimants for financial detriment caused by defective administration.

### Step 2

The Minister for Education, Employment and Workplace Relations issue directions and guidelines to the whole of the Comcare jurisdiction in applying the CDDA requirements.

452. Finance Circular 2009/09, Paragraph 21, Attachment B.

453. Comcare, Submission to the Standing Committee on Finance and Public Administration, *Inquiry into the Public Service Amendment (Payments in Special Circumstances) Bill 2011*, 21 July 2011, p 4.

- 9.277 I understand that it is Comcare's intention to adapt the CDDA principles contained in Finance Circular 2009/09 for a direction that the Minister for Employment and Workplace Relations can issue in accordance with s 73 of the SRC Act.
- 9.278 There appear to be significant policy and practical barriers to the use of s 33 of the FMA Act as a mechanism for Comcare to address losses as a result of its defective administration. An amendment to s 69 of the SRC Act would remove the doubt surrounding Comcare's ability to make defective administration payments and allow Comcare to set up a scheme consistent with that established under Finance Circular 2009/09.
- 9.279 There are two possible solutions to the issue:
- (a) It could be said, noting that the Hawke Review's recommendation that Comcare become an FMA Act agency will be sufficient to enable Comcare to have access to act of grace payments under s 33 of the FMA Act to make payments for loss caused by defective administration, that there is no need to recommend any amendment to the SRC Act so as to authorise Comcare to make such payments through the CDDA scheme.
  - (b) Alternatively, it could be proposed that the SRC Act, specifically s 69, be amended to confer on Comcare an additional function authorising it to compensate claimants for financial detriment caused by defective administration. In support of that function, the Minister could issue guidelines on how the function should be carried out. Comcare would fund those defective administration payments out of annual operating costs and not out of premium funds.

## RECOMMENDATIONS

- 9.280 Because of the longstanding and complex history of Comcare and the CDDA scheme, I recommend that s 69 of the SRC Act be amended to confer on Comcare an additional function authorising Comcare to provide compensation to claimants for financial detriment caused by defective administration. In support of that function, the Minister should issue guidelines as to how the function should be carried out. Comcare should fund defective administration payments out of funds available to meet annual operating costs and not out of premium funds.
- 9.281 That could be achieved by inserting a new paragraph (fc) into s 69 as follows:
- (fc) in accordance with guidelines issued pursuant to section 73, to provide compensation to claimants for financial detriment caused by defective administration out of Comcare's annual operating costs;

### RECOMMENDATION 9.20

I recommend that s 69 of the SRC Act be amended to confer on Comcare an additional function authorising Comcare to provide compensation to claimants for financial detriment caused by defective administration. In support of that function, the Minister should issue guidelines on how the function is to be carried out. Comcare should fund defective administration payments out of moneys available to meet its annual operating costs and not out of premium funds.

# 10. LIABILITIES ARISING APART FROM THE SRC ACT

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## COMMON LAW

- 10.1 Common law damages for employment-related injuries are not available in every Australian workers compensation jurisdiction. Since the mid-1980s, all jurisdictions except the Australian Capital Territory have restricted the availability of damages at common law, and some jurisdictions have completely removed access to common law damages, for employment-related injuries.
- 10.2 Under the SRC Act, the right of an employee to sue the employer for damages for an employment-related injury sustained in the course of employment, or for property damage resulting from such an injury, has been abolished (apart from the limited rights available under s 45: see paragraph 10.3 below): s 44(1) and (2). That abolition does not affect cases where an employee's injury results in death: in those cases, the employee's dependants can sue for common law damages: s 44(3). Nor does it preclude a claim in relation to a disease that is sustained after the end of employment—that is, a disease that cannot be said to be “an injury sustained by an employee in the course of his or her employment”—because, although the disease is an “injury” as defined in s 5A(1) of the SRC Act, it will be taken to be sustained after the end of, and therefore not in the course of, employment.<sup>454</sup>
- 10.3 There is a limited option for an employee to elect to sue for non-economic loss, as an alternative to receiving compensation under ss 24, 25 and 27. However, that option must be exercised before any compensation is paid under ss 24, 25 and 27, and exercising the option puts an end to any rights to compensation under ss 24, 25 and 27: s 45(1) and (2)(b). The amount of common law damages that can be recovered is capped by the SRC Act at a non-indexed maximum of \$110,000: s 45(4).
- 10.4 The current cap effectively limits the access to common law damages in relation to injuries sustained during the course of employment. The cap has an effective value in 2013 that is 50 % lower than its value in 1988 (when the SRC Act commenced). On the other hand, the indexed benefits payable on a no-fault basis for permanent impairment (ss 24 and 25) and non-economic loss (s 27) have retained their original value.
- 10.5 Schemes with little or no common law access, for example the Comcare and the South Australian schemes, tend to have statutory benefits that cater for the ongoing needs of permanently incapacitated workers. They are “long-tail” schemes, anticipating the payment of compensation and benefits for the life of the injury or disease.
- 10.6 Schemes with relatively unrestricted access to common law damages, for example Queensland and Tasmania, tend to be focused on workers with short-term injuries or diseases. Those schemes look to the common law to meet the needs of the more seriously injured. Neither of those schemes is a long-tail scheme: statutory benefits in Queensland and Tasmania cut out after five years and nine years respectively.<sup>455</sup>
- 10.7 All schemes that allow recovery of common law damages include provisions to prevent recovery of both workers compensation and common law damages.<sup>456</sup> Most jurisdictions allow a claimant to retain the right to no-fault compensation up to the point at which negligence is proved. Any compensation received under the no-fault scheme must then be repaid and the claimant will then be prevented from accessing further statutory benefits.<sup>457</sup>

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454. See *Commonwealth v Holland* (1991) 24 NSWLR 198. Section 7(4) of the SRC Act is relevant here: it fixes the date when an employee is taken to have sustained an injury, being a disease, by reference to the date when the employee first sought medical treatment or the disease resulted in death, incapacity for work or impairment; and that date may be (in the case of diseases with delayed onset, such as mesothelioma or post-traumatic stress disorder) well after the employee has ceased employment.

455. Similarly, the Victorian scheme provides relatively generous (although complicated) access to common law damages (see s 134AB of the Victorian Act) but, for most workers, caps weekly payments of compensation at 117 weeks (the end of the “second entitlement period”) unless the worker is assessed as having an indefinite lack of, or only limited, work capacity: see ss 93C and 93D of the Victorian Act.

456. Safe Work Australia, *Comparison of Workers Compensation Arrangements in Australia and New Zealand*, February 2010, pp 181–186. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

457. For example, s 48(3) of the SRC Act obliges an employee, or a dependant, who has received compensation under the Act and then recovers common law damages in respect of the same injury or death to pay to Comcare an amount equal to the compensation or damages, whichever is less; and s 48(4) of the SRC Act provides that compensation is not payable to an employee or a dependant under the Act in respect of an injury or death after the date when the employee or the dependant recovers common law damages in respect of that injury or death. Subsections (4A)–(6) of s 48 provide specific exceptions to those provisions.

- 10.8 Since the mid-1990s, no-fault schemes have generally evolved as employees' rights to sue for damages have been exchanged for guaranteed, but possibly lower, levels of compensation.

### THE BENEFITS OF STATUTORY COMPENSATION SCHEMES

- 10.9 To succeed in recovering common law damages against an employer, the employee would need to show fault (generally, negligence) on the part of the employer (in particular, that the employer breached a duty of care owed to the employee) and that, as a result of that fault, the employee suffered damage.

- 10.10 The common law says that employers have a general duty to provide their employees with a safe system of work. That general duty includes a duty to:

- (a) employ reasonably competent staff;
- (b) take reasonable care to ensure a safe place of work; and
- (c) provide, inspect and maintain safe plant and equipment.

Where an employer breaches the duty of care and an employee suffers damage as a result, the employee may recover damages, provided that the right to pursue common law damages has not been removed by legislation.

- 10.11 Under statutory workers compensation schemes, employees do not need to establish fault in order to receive compensation. It is generally only necessary to show that an injury (other than a disease) arose "out of, or in the course of, the employee's employment": s 5A(1) of the SRC Act; or that a disease "was contributed to, to a significant degree, by the employee's employment": s 5B(1) of the SRC Act.

### THE PROBLEMS WITH COMMON LAW DAMAGES

- 10.12 Pursuing common law damages may undermine early intervention, rehabilitation and the return to work of injured employees. Common law proceedings can take many months (or years) to resolve and therefore deny the injured employee access to timely compensation. Common law proceedings can also delay rehabilitation and effective injury management because damages are determined by the severity of the injury sustained, which creates a disincentive for an injured worker to rehabilitate before the proceedings are heard.
- 10.13 In addition, common law proceedings can involve significant legal costs, which may reduce the amount of net damages available to an injured employee and her or his dependants.
- 10.14 The recovery of damages is not guaranteed under common law (because recovery depends on establishing fault on the part of the employer), which can leave an injured employee without adequate income support.
- 10.15 Common law damages are provided as lump sums (rather than periodic payments), and they can be dissipated by the injured employee or prove inadequate to meet the injured employee's longer term needs.
- 10.16 Pursuing common law legal action can also affect the amount of medical costs incurred by an employee. Extensive diagnostic tests may be required to establish the extent of an injury in order to establish the level of damages. Medical practitioners are placed in the situation of not only treating the injury but also providing medical evidence about the extent of the harm for legal purposes. In addition, evidence might also be sought from competing practitioners as to the extent of the injury.
- 10.17 In view of the legal costs associated with common law claims and the possibility of increased medical costs, any increased access to the common law for employment-related injuries is likely to lead to increased scheme outlays.

### THE BENEFITS OF COMMON LAW DAMAGES

- 10.18 Arguments could be made in support of retaining or increasing access to common law damages for injured employees because access to the common law is seen as a "fundamental right" that is intended to provide fair and just compensation for those harmed by the negligence of others.<sup>458</sup>
- 10.19 It could also be said that removing the right of access to common law damages for employment-related injuries, diseases and fatalities discriminates against those harmed in the workplace through the negligence of others, compared to those who are harmed outside the workplace.<sup>459</sup>
- 10.20 In addition, some have argued that common law damages awards examine the causes of injury and expose negligent and harmful practices, and the prospect of damages is an important driver for employers to improve work health and safety standards.<sup>460</sup>

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458. Law Council of Australia, Submission to the Review, pp 9–11.

459. Law Council of Australia, Submission to the Review, pp 9–11.

460. Slater and Gordon, Submission to the Review, p 3.

- 10.21 A further argument that has been made is that the award of an amount of common law damages provides finality for the injured employee and for the employer: the employee receives a final payment, which allows the employee to make a psychological break with the injury and may assist in the recovery process.<sup>461</sup>
- 10.22 A number of submissions received by the Review from legal groups (including the Law Council of Australia,<sup>462</sup> Maurice Blackburn,<sup>463</sup> Ryan Carlisle Thomas,<sup>464</sup> and Slater and Gordon<sup>465</sup>) supported lifting some of the current restrictions on access to the common law, including increasing and indexing the cap on non-economic benefits imposed by s 45(4) of the SRC Act. Submissions received by trade union bodies (including the Australian Council of Trade Unions,<sup>466</sup> the Australian Manufacturing Workers Union<sup>467</sup> and the Communications Electrical and Plumbing Union<sup>468</sup>) also supported that position.

## THE EFFECT OF s 44

- 10.23 As noted in paragraph 10.2 above, s 44 of the SRC Act does not preclude an employee bringing an action for damages in relation to a disease that was not sustained in the course of her or his employment. That aspect of the drafting of s 44 was highlighted in 1991 by the New South Wales Court of Appeal in *Commonwealth v Holland* (1991) 24 NSWLR 198.
- 10.24 *Commonwealth v Holland* was applied by the Dust Diseases Tribunal in *Agresta v Sydney Water Corporation* [2004] NSWDDT 8; (2004) 1 DDCR 450. There, the Dust Diseases Tribunal refused to prohibit the claim on the basis of s 44 of the SRC Act.<sup>469</sup> The same approach was taken in *James Hardie & Co Pty Ltd v Cameron* [1995] NSWDDT 5; (1995) 12 NSWCCR 286. However, reservations were expressed about the correctness of *Commonwealth v Holland* by the NSW Compensation Court in *West v Workers Compensation (Dust Diseases) Board* [1999] NSWCC 3, although Neilson J did not decide the case on that point.<sup>470</sup>
- 10.25 In *Mendez v Telstra Corporation Limited* [1998] NSWSC 504, the New South Wales Court of Appeal held that an injury sustained during home to work travel was not sustained “in the course of employment” and the bar in s 44 did not prohibit Ms Mendez (an employee of Australia Post) from claiming against Telstra for an injury sustained on her way to work when a manhole cover installed by Telstra collapsed under her.
- 10.26 The effect of s 44 is not absolute, and the gap revealed by the New South Wales Court of Appeal in *Commonwealth v Holland* could be described as an anomaly, particularly in light of the fact that only diseases sustained after the end of an employee’s employment can found a common law cause of action not affected by s 44. However, the fact that successive Governments since 1991 have chosen not to change the effect of s 44 or to overcome the Court of Appeal’s judgment in *Commonwealth v Holland* suggests that the anomaly is deliberate.

## RECOMMENDATIONS

- 10.27 The benefits associated with statutory compensation schemes (namely the no-fault nature of liability, the timeliness of compensation, support for early intervention, reduced legal costs, greater certainty and reduced medical expenses) provide compelling reasons in favour of retaining statutory compensation for employment-related injuries and diseases.
- 10.28 While common law damages for employment-related injuries may be argued by some to be a “fundamental right”, a statutory compensation scheme does not disregard that right; it simply provides a different mechanism for compensating employees for work-related injury and disease. For the same reason, statutory compensation payments do not discriminate against those harmed in the workplace compared to those harmed outside the workplace. Indeed, a person injured at work may be in a better position, because he or she does not have to prove either negligence or a duty and a breach of that duty in order to recover compensation for the injury.
- 10.29 The one distinct advantage of common law damages (allowing closure by resolving a claim completely) can be achieved through the redemption of workers compensation benefits in a lump sum payment. As detailed in paragraphs 7.253–7.262 above, I recommend changes to permit the redemption of compensation payments more generally.

461. Maurice Blackburn, Submission to the Review, p 15.

462. Law Council of Australia, Submission to the Review, pp 9–11.

463. Maurice Blackburn, Submission to the Review, pp 15–16.

464. Ryan Carlisle Thomas, Submission to the Review, pp 15–16.

465. Slater and Gordon, Submission to the Review, p 3.

466. Australian Council of Trade Unions, Submission to the Review, p 13.

467. Australian Manufacturing Workers Union, Submission to the Review, p 16.

468. Communications Electrical and Plumbing Union (Communications Workers Division), Submission to the Review, p 3.

469. [2004] NSWDDT 8 at [35].

470. [1999] NSWCC 3 at [17]–[19].

10.30 For those reasons, I recommend that the current restrictions on access to common law damages in the SRC Act, including the current non-indexed cap on damages for non-economic loss in s 45(4) of the SRC Act, be retained.

## THE RELATIONSHIP BETWEEN COMPENSATION AND DAMAGES AGAINST THIRD PARTIES

10.31 During the consultations, several issues were raised about the relationship between compensation under the SRC Act and the liability of third parties for the same event or occurrence. In particular, participants in the consultations<sup>471</sup> raised the lack of a statutory cause of action akin to s 138 of the Victorian Act, and various issues with the operation of s 50 of the SRC Act.

### THE LACK OF A STATUTORY CAUSE OF ACTION

10.32 Part IV of the SRC Act contains a number of provisions, including ss 48, 50 and 51, designed to protect the financial position of Comcare and a licensee when:

- (a) Comcare or a licensee has made payments of compensation under the SRC Act in respect of an injury or other harm suffered by an employee; and
- (b) a third party is liable for damages in respect of the injury or other harm sustained by the employee.

10.33 Comcare or the licensee, as the case may be, has the power to make a claim or take over an existing claim (not yet finalised) against a third party in the name of the injured employee or dependant in relation to an injury in respect of which compensation is payable under the SRC Act: s 50(1) of the SRC Act. Any award of damages must be paid to Comcare or the licensee, which must then deduct the value of *all* compensation paid to the injured employee, together with Comcare's or the licensee's costs, and pay the balance to the employee: s 50(7) of the SRC Act.

10.34 Alternatively, Comcare or the licensee may issue a notice requiring a third party who:

- (a) appears to be liable to pay;
- (b) has agreed to pay; or
- (c) has been ordered to pay

damages to an employee or a dependant in respect of an injury, damage or death, in respect of which compensation has been paid under the SRC Act, to pay Comcare or the licensee the amount the employee would be liable to pay Comcare or the licensee under ss 48 or 49: s 51 of the SRC Act.

10.35 Section 48 of the SRC Act requires an employee and a dependant to whom compensation is payable under the SRC Act to notify Comcare or the licensee of any damages that the employee or dependant has recovered, and makes the employee or dependant liable to pay Comcare or the licensee an amount equal to the compensation the employee or dependant has received. (Section 49 contains provisions for recovery of amounts by Comcare or the licensee from damages recovered by dependants who have not claimed compensation under the SRC Act.)

10.36 Absent an agreement to pay damages or an award of damages to an employee or a dependant, Comcare and a licensee have no statutory right of recovery from any liable third party.<sup>472</sup>

10.37 Many of the State workers compensation schemes contain a statutory right of recovery against a third party who is liable to an injured worker, which allows compensation payers to be indemnified by the liable third party even though no proceeding by the injured worker is on foot.<sup>473</sup>

10.38 Pursuant to s 138 of the Victorian Act, a person liable to pay compensation under that Act has a statutory right to recover damages from a liable third party. Section 138(1) relevantly provides:

Where an injury or a death for which compensation has been paid, or is or may be payable ... was caused under circumstances creating a liability in a third party to pay damages ... the Authority, self-insurer or employer is entitled to be indemnified by the third party in accordance with this section.

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471. Victorian legal practitioners and Comcare.

472. As noted by Callinan J in *Austral Pacific Group Ltd (in liq) v Airservices Australia* [2000] HCA 39; (2000) 203 CLR 136 at [97], [102].

473. See: s 183 of the ACT Act; s 151Z of the 1987 NSW Act; s 207B of the Queensland Act; s 54 of the SA Act; s 138 of the Victorian Act; and s 93 of the WA Act.

- 10.39 Similarly, s 151Z of the 1987 NSW Act provides for injured employees to obtain damages from liable third parties, and gives a compensation payer a right of recovery either from the employee or from the third party. Section 151Z provides, relevantly:
- (1) If the injury for which compensation is payable under this Act was caused under circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury, the following provisions have effect:
    - (a) the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for payment of that compensation, but is not entitled to retain both damages and compensation,
    - ...
    - (d) if the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages (being an indemnity limited to the amount of those damages) ...
- 10.40 Neither the 1987 NSW Act nor the Victorian Act requires proceedings to be instituted by (or in the name of) the injured worker against a liable third party before the compensation payer may recoup any compensation paid from the liable third party; those Acts give the compensation payer a statutory right of indemnity.
- 10.41 In addition, in Victoria for transport accidents arising in the course of employment, s 38 of the TA Act provides that, if compensation has been paid by the Victorian WorkCover Authority (or an authorised insurer or self-insurer), the Transport Accident Commission must reimburse the compensation payer for the amount of compensation paid. That obligation is not limited to the circumstances in which an injured person may apply for compensation under the TA Act (see s 93(2), which permits the recovery of damages in respect of serious injuries only).
- 10.42 There is no equivalent obligation on the Transport Accident Commission to reimburse Comcare or licensees for any amount of compensation paid to an employee injured in a transport accident. The right of recovery conferred on Comcare and licensees is (currently) limited to the circumstances in ss 48–51 of the SRC Act. Comcare and licensees can only recover where the injured employee (or a dependant) can recover; it is the employee's (or dependant's) right to recover which defines the right of recovery of Comcare and licensees; and there is no separate statutory right of recovery.
- 10.43 Providing a right for Comcare (and licensees) to recover compensation paid in respect of injury (including a disease) directly from a liable third party would simplify the process of recovering any compensation that has been paid.

## RECOMMENDATIONS

- 10.44 Having reviewed both the Victorian and New South Wales provisions, I have come to the view that s 151Z of the 1987 NSW Act appears to include all the features of a direct right of recovery that are necessary. For example, the 1987 NSW Act provides that:
- (a) an employee cannot retain both damages from a third party and compensation under the 1987 NSW Act: s 151Z(a), (b) and (c); and
  - (b) if compensation is payable under the 1987 NSW Act, the compensation payer is entitled to be indemnified by a liable third party for any compensation that has been paid (limited to the amount of any damages for which the third party is liable): s 151Z(d).
- 10.45 In addition, if a third party has made a payment pursuant to an indemnity, and the employee is yet to obtain judgment against the third party, the payment made, to the extent of its amount, is a defence to the proceedings brought against the third party by the employee: s 151Z(1)(e).

### RECOMMENDATION 10.1

I recommend that the SRC Act be amended to give Comcare and licensees a statutory right of recovery, similar to the right in s 151Z of the 1987 NSW Act

## SECTION 50 OF THE SRC ACT

10.46 In addition, three specific issues were identified with s 50 of the SRC Act:

- (a) whether s 50 permits Comcare (or licensees) to take preliminary steps that are required before making a claim for common law damages;
- (b) whether s 50(7) of the SRC Act produces an unfair result; and
- (c) whether s 50(9) of the SRC Act unfairly limits an employee's right to recover damages from a liable third party.

### THE SCOPE OF s 50

- 10.47 If no statutory right of recovery is enacted, as recommended in paragraphs 10.44–10.45 above, s 50 of the SRC Act will remain the only avenue for compensation payers to recover from negligent third parties.
- 10.48 As noted in paragraph 10.33 above, where an employee is not pursuing a claim for damages or not pursuing it properly, s 50 of the SRC Act effectively gives Comcare or a licensee the ability to stand in the shoes of the employee to pursue damages from a liable third party.
- 10.49 In some States and Territories, there are preliminary steps that must be taken before a claim for damages can be commenced. Mr Damian Clarke<sup>474</sup> expressed the concern that the s 50 statutory right of subrogation may not permit Comcare or a licensee to pursue any preliminary steps, or conditions precedent, prior to commencing any claim because those preliminary steps are not “a claim for damages”.
- 10.50 Section 70 of the SRC Act confirms that Comcare has the power to do all things necessary to be done for, or in connection with, the performance of its functions. That must include the power to do all things necessary to recover damages pursuant to s 50.

### RECOMMENDATIONS

- 10.51 Adoption of a provision equivalent to s 151Z(1) of the 1987 NSW Act, as recommended in paragraphs 10.44–10.45 above, would confirm the right of Comcare and licensees to be indemnified. However, if **Recommendation 10.1** is not implemented, the problem could be addressed by including the phrase “and taking all steps necessary ...” at an appropriate point in s 50.

#### RECOMMENDATION 10.2

I recommend that the SRC Act be amended to confirm that s 50 includes the power to do all things necessary for the making of a claim, including the taking of any preliminary steps.

### THE EFFECT OF s 50(7)

- 10.52 In Victoria, an injured employee's right to obtain damages under the TA Act does not include the right to recover damages for pecuniary loss suffered in the first 18 months after the accident. Section 93(10) of the TA Act relevantly provides:
- (10) Damages awarded to a person under this section shall not include damages in respect of—
    - (a) in the case of an award of pecuniary loss damages under subsection (7), any pecuniary loss suffered in the period of 18 months after the transport accident ...
- 10.53 Thus, an injured employee may only recover damages for pecuniary loss that accrues more than 18 months after the injury.<sup>475</sup>
- 10.54 Comcare's right to recover compensation from damages paid to an injured employee is contained in s 48 of the SRC Act. Relevantly, s 48(3) provides:
- (3) If, before the recovery of the damages by, or for the benefit of, the employee or dependant, any compensation under this Act was paid ... the employee ... is liable to pay to Comcare an amount equal to:
    - (a) the amount of that compensation; or
    - (b) the amount of the damages;whichever is less.

474. Of ClarkeLegal.

475. This issue was raised by Ms Jacinta Lewin of Maurice Blackburn.

10.55 Section 50(7) of the SRC Act relevantly provides:

- (7) Any damages obtained as a result of a claim made or taken over by Comcare under this section (including damages payable as a result of the settlement of such a claim) must be paid to Comcare and Comcare must deduct from the amount of those damages:
- (a) an amount equal to the total of all amounts of compensation paid to, or for the benefit of, the employee or dependant under this Act in respect of the injury, loss, damage or death to which the claim relates; and
  - (b) the amount of any costs incidental to the claim paid by Comcare.
- Comcare must pay the balance (if any) to the employee or dependant.

10.56 If compensation has been paid under s 19 of the SRC Act for incapacity for work for (say) two years, and damages are then recovered by the employee under the TA Act, including for pecuniary (that is, economic) loss, the amount recovered by Comcare under s 48(3) of the SRC Act in respect of that compensation will exceed the damages paid for economic loss and inevitably eat into the damages paid to the employee for other heads of loss.

10.57 In a similar situation, where Comcare invokes s 50 of the SRC Act and brings a claim in the name of an injured employee or a dependant under the TA Act, the application of s 50(7) of the SRC Act to the damages recovered by Comcare under the TA Act will leave a very much diminished “balance” to be paid to the employee or dependant.

## RECOMMENDATIONS

10.58 I recommend that s 50 be amended by introducing the introductory words to s 50(7) “Subject to subsection (7A);” and by inserting a new s 50(7A), as follows:

- (7A) Provided that the amount deducted by Comcare pursuant to paragraph (7)(a) for compensation paid pursuant to section 19 is not to exceed the amount of damages for economic loss obtained by Comcare in the claim.

### RECOMMENDATION 10.3

I recommend that the SRC Act be amended to ensure that any damages recovered by Comcare pursuant to s 50 are limited to the damages recoverable by the employee.

## THE EFFECT OF S 50(9)

10.59 In the course of the Review’s consultations, Mr Damian Clarke suggested that, where an employee covered by the Comcare scheme is injured in a motor vehicle accident, and the negligent driver of the other vehicle is an employee of either a Commonwealth authority or a licensee, there may be only a very restricted right to sue being for general damages only, capped at \$110,000. The compensation payer (Comcare or a licensee) has no opportunity to recover from the employer of the negligent driver and/or (more likely) the negligent employee notwithstanding the driver/vehicle owner would probably be indemnified under the third party policy of insurance applicable to the vehicle being driven by the negligent driver.

10.60 I very much doubt that the employee’s right to sue would be limited (by ss 44(1) and 45(4) of the SRC Act) to \$110,000. *Sutherland v Federal Airports Corporation* (1998) 72 SASR 359 deals with that situation. The Full Court of the South Australian Supreme Court said, at 359 (in holding that an employee of a Commonwealth authority could sue another Commonwealth authority for damages in respect of an injury suffered in the course of the employee’s employment):

When viewed as a whole, the [SRC] Act operates only where the injured employee is employed by the very Commonwealth authority against whom the employee brings his action. The Act does not evince an intention to operate where the injured employee brings an action against a Commonwealth authority other than his employer. That is consistent with the fact that the Act does not seek to prevent persons who are employed by persons other than the Commonwealth, a Commonwealth authority or a licensed corporation from bringing an action against any of those bodies in respect of injuries sustained in the course of employment. For that reason, I do not think that the operation of ss 44 and 45 prevents the plaintiff from bringing this action or from recovering damages for past and future economic loss.

10.61 In any event, s 50(9) of the SRC Act (which prevents one scheme member recovering under s 50 from another scheme member) is typical of arrangements found in many agreements between insurers (called “knock for knock” agreements) that leave the loss to lie with the insurer of the injured or damaged party—on the principle that, over time, the liabilities incurred by each insurer will be the same or similar.

10.62 I am not persuaded that any change is required to s 50(9).

# APPENDIX A

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## **SAFETY, REHABILITATION AND COMPENSATION ACT 1988 (SRC ACT) REVIEW**

### **TERMS OF REFERENCE**

The Australian Government aims to build a stronger, fairer Australia through improved productivity, national security, increased social inclusion and building community resilience.

The impact of workplace harm on workers and their families is significant. For this reason, the Government is committed to ensuring that the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) provides fair and appropriate workers' compensation arrangements for all workers covered by that legislation.

The Government believes that the Comcare scheme should be exemplary in its scheme-design as well as in its service delivery. To ensure the federal workers' compensation arrangements reflect contemporary social models and best practice, the review will take into account arrangements within Australian and overseas accident compensation schemes. Issues such as the national disability reforms and reducing red tape will also be considered.

The review will inquire and report on:

1. Any legislative anomalies and updates that need to be addressed, including:
  - 1.1 identifying and resolving anomalies in the legislation and in the operation of the scheme
  - 1.2 the framework to achieve the objectives of providing an equitable and cost-effective compensation system, with a particular emphasis on the improved rehabilitation of injured workers
  - 1.3 ensuring fair and equitable financial, medical and rehabilitation support for injured workers and their families
  - 1.4 a framework to resolve disputes quickly, fairly and at a low cost
  - 1.5 ensuring the application of workers' compensation legislation does not disadvantage workers over the age of 65 and there is no gap between the workers' compensation age limit and the foreshadowed increase to the age pension eligibility age to 67 by 2023.
2. The performance of the Comcare scheme and ways to improve its operation, including:
  - 2.1 an examination of the different outcomes achieved by private and public sector employers concerning the recovery and return to work of injured workers
  - 2.2 improved delivery of recovery and support services by Comcare.
3. The financial framework of the Comcare scheme, including:
  - 3.1 the financial sustainability of the scheme
  - 3.2 a premium framework that improves and rewards scheme performance
  - 3.3 the governance arrangements for Comcare
  - 3.4 ensuring that the financial framework is consistent with contemporary prudential management practice.

The review will be finalised by 1 February 2013. It is the Government's intention that the review will not consider any reduction in existing benefits afforded to workers covered by the Comcare scheme.

# APPENDIX B

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## WRITTEN SUBMISSIONS, MEETINGS AND WORKSHOPS

### WRITTEN SUBMISSIONS

Submitted by	Date received
Australian Broadcasting Corporation	24 October 2012
Australian Council of Trade Unions	25 October 2012
Administrative Appeals Tribunal	26 October 2012
AI Group	25 October 2012
Australian Manufacturing Workers Union	2 November 2012
Australian Psychological Society	2 November 2012
Australian Peacekeeper & Peacemaker Veteran's Association	11 November 2012
Australian Human Rights Commission	19 October 2012
Australian Rail Track Corporation	25 October 2012
Beasley Legal	25 October 2012
Communications Electrical Plumbing Union (Communications Division)	30 October 2012
Communications Electrical Plumbing Union (Victorian Postal and Telecommunications Branch)	25 October 2012
Colin Dunstan	29 October 2012
Comcare	30 October 2012
Community and Public Sector Union	29 October 2012
Department of Defence	25 October 2012
Alan Emmerson	1 November 2012
Department of Families, Housing, Community Services and Indigenous Affairs	26 October 2012
Genevieve Grant	26 October 2012
John Holland Group	31 October 2012
John Vogt	25 October 2012
Law Council of Australia	5 November 2012
Leo Grey	30 October 2012
Maurice Blackburn	5 November 2012
Military Rehabilitation and Compensation Commission	9 November 2012
Royal Australasian College of Physicians	30 October 2012
RSI and Overuse Injury Association (Australian Capital Territory)	25 October 2012
Ryan Carlisle Thomas	24 October 2012
Superannuated Commonwealth Officers Association	25 October 2012
Slater and Gordon	30 October 2012
Suncorp	26 October 2012
Telstra	25 October 2012

## WORKSHOPS, MEETINGS AND OTHER CONSULTATIONS

Workshops/Consultation	Attendees	Date
Comcare	Steve Kibble and Melissa Ryan	26 July 2012
Comcare	Paul O'Connor and Steve Kibble	30 July 2012
Telstra	Linda Hutchen and Ray Ternes	20 August 2012
Department of Veterans' Affairs	Glenda Mann, Sean Farrelly and Mark Harrigan	20 August 2012
Customs	Vivianne Browne and Rosemary Holland	20 August 2012
Australian Capital Territory Government	Meg Brighton and Gary King	20 August 2012
Department of Immigration and Citizenship	Keith Bender, Katrina Ashcroft and Wendy Hill	21 August 2012
Department of Defence	David Cooke and Leonie Graham	21 August 2012
National Australia Bank	Dean Stone and Paul Gilmer	23 August 2012
Linfox Armaguard	Steve Truman and Beti Veljanovska	23 August 2012
Australian Psychological Association	Bo Li, David Stokes and Kaye Frankcom	23 August 2012
John Holland Group	Dean Cipolla, Tamara Cracknell and Mary Klashovski	24 August 2012
Australian Council of Trade Unions	Michael Borowick, Jarrod Moran, Finian Scallan and Lucy Weber	27 August 2012
Department of Human Services	Barbara Bennett and Carl Princehorn	28 August 2012
Commonwealth Bank of Australia	Tim Clift and Tamara Keily	28 August 2012
Safety, Rehabilitation and Compensation Commission Chairperson	Peter Henneken	29 August 2012
Safety, Rehabilitation and Compensation Commission	Peter Henneken, Steve Somogyi, Sandra Lambert, Burt Blackburne, Sue Powell, Michael Borowick, Kylie Emery, Rex Hoy, Dominic Andreacchio, Andrea Shaw, Lindsay Kranz, Seyram Tawia, Blake Williams, Paul O'Connor, Steve Kibble, Melissa Ryan, Bruce Watson, Paul Sabo, Caroline Walsh and Kate Vandenberg.	13 September 2012
Military Rehabilitation and Compensation Commission	Major General Fogarty, Shane Carmody, Sean Harrigan and others	17 September 2012
Australian Faculty of Occupational and Environmental Medicine	Deborah Lockart, Dr Robin Chase, Dr David Crocker, Dr Graeme Edwards, Dr Steven Ng, Audrey Marg, Dr Mary Wyatt and Dr James Ross	21 September 2012
Australian Law Reform Commission	Amanda Alford and Rosalind Croucher	1 November 2012
Commonwealth Public Sector Union	Sue Powell, Michael Gleave, Natalie Hartman and Lisa Newman	1 November 2012
Legal practitioners	Rachael James (Slater & Gordon) and Kristina Miller (Sparke Helmore)	1 November 2012
Comcare	Joe White, Rhonda McNamara, Kate Watson, Peter Lehmann, Chloe Eaton, Alex O'Shea, Robyn Pender, Riemke Kampen, Belinda Johnston and Michelle Hamilton	5 November 2012
Premium payers	Roger Winzenberg (DVA) and Anne Morris (Defence)	5 November 2012
Legal practitioners	Brian Hatch (Brian Hatch Solicitors), Brett Ablong (HBA Legal), David Lander (Lander & Co), Luke Woolley (Sparke Helmore), Geoff Wilson (Maurice Blackburn) and Andrew Dillon (Australian Government Solicitors)	5 November 2012
Premium payers	Carl Princehorn (Human Services), Graeme Frazer (Human Services), Jane Miles (Finance), Keith Bender (Immigration) and Wendy Hill (ATO)	6 November 2012
Superannuated Commonwealth Officers Association	John Coleman and Ian Buchanan	6 November 2012

Workshops/Consultation	Attendees	Date
Claims management consultants	Dr Harcourt and Julie Harrick	8 November 2012
Legal practitioners	Angela Sdrinis (Ryan Carlisle Thomas), Lazarus Dobelsky (DLA Piper), Damian Clarke (Clarke Legal), Jacinta Lewin (Maurice Blackburn and Associates) and Gary Clark (Clark, Toop & Taylor)	8 November 2012
Employee organisations	Deb Vallance (AMWU), Carol Gee (CWU), Finian Scallon (ACTU), Jarrod Moran (ACTU) and Joan Doyle (CWU)	8 November 2012
Australian Faculty of Occupational and Environmental Medicine	Edward Slack, Audrey Maag, Dr Steven Ng, Graeme Edwards and Robin Chase	12 November 2012
Australian Society of Rehabilitation Counsellors	Michael Iacovino and Shannon McGuire	12 November 2012
Licensees	Linda Hutchen (Telstra), Tamara Cracknell (John Holland Group), Mary Klashovski (John Holland Group), Wayne Gunn (Australian Air Express), Beti Veljanovska (Linfox/Armaguard), Steve Truman (Linfox/Armaguard) and Michael O'Halloran (Australia Post)	12 November 2012
Safety, Rehabilitation and Compensation Commission	Peter Henneken, Sue Powell, Burt Blackburne	12 November 2012
Australian Medical Association	Steve Hambleton and Francis Sullivan	13 November 2012
Comcare	Alex O'Shea, Rhonda McNamara, Joe White, Peter Lehmann, Kate Watson, Evan Hancock, Leigh-Ann Hosking and Geraldine Seckerson	13 November 2012
Department of Veterans' Affairs	Mark Harrigan, Neil Bayles, Elaine Tse, Paul Weber and Martin Page	13 November 2012
Administrative Appeals Tribunal	Justice Duncan Kerr (President of the AAT) , Deputy President Dean Jarvis, Chris Matthies (Executive Director, Information & Development), Athena Harris Ingall (Manager, Learning & Development), Kimberlee Trent (Director, Legal & Policy) and Mayda Flanagan	15 November 2012
Licensees	Tim Clift (CBA), Mark Wilde (CBA) and Ross Tindiglia (Chubb)	15 November 2012
Safety, Rehabilitation and Compensation Commission	Kylie Emery, Dominic Andreacchio, Catherine Hudson and Lindsay Fraser	19 November 2012
Centre of Excellence in Mental Health and Wellbeing at Work	Dr Peter Cotton and Dr Mark Creamer	19 November 2012
Australian Capital Territory Government	Meg Brighton, Michael Young, Gary King, Sue Pearce, Heidi Robinson, Liz Beattie and Sean McDonnell	20 November 2012
Employee	Mr Daniel Heffernan	20 November 2012



## Actuarial Costings requested for Review of the Safety, Rehabilitation and Compensation Act 1988 Summary Report

8 February 2013

A handwritten signature in black ink, appearing to read 'A. M. Gould'.

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Fellow of the Actuaries Institute

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Comcare

SRC Act review costings summary report

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 Taylor Fry

# 1 INTRODUCTION

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## 1.1 Review of the SRC Act

On 24 July 2012 the Minister for Employment and Workplace Relations, Financial Services and Superannuation announced that:

- A review of the Safety, Rehabilitation and Compensation Act (“SRC Act”) would be undertaken, and
- The review would be undertaken by Mr Peter Hanks and Dr Allan Hawke AC (the “Reviewers”), supported by a Secretariat in the Department of Education, Employment and Workplace Relations.

The Secretariat requested that Taylor Fry Consulting Actuaries (“Taylor Fry”) analyse anticipated financial effects of various possible changes to the SRC Act which were considered as part of the review. This report was prepared for the Secretariat to assist the Secretariat in providing advice to the Reviewers. While Taylor Fry has a related role as consulting actuarial adviser to Comcare, it was agreed between the Secretariat, Comcare and Taylor Fry that in preparing this report Taylor Fry is providing advice to the Secretariat.

## 1.2 Summary nature of this report

Our advice to the Secretariat is documented in a more detailed report and appendices titled “Actuarial Costings requested for Review of the Safety, Compensation and Rehabilitation Act 1988”.

This report provides only a summary of our advice to the Secretariat. We understand that this summary report will be included as an appendix to the report prepared by the Reviewers. To obtain a fuller understanding of our advice, the context and the limitations and reliances of our advice, the reader should refer to our more detailed report and appendices.

## 1.3 Scope of analysis described in this report

### 1.3.1 Workers’ compensation coverage under the SRC Act

Workers’ compensation coverage is provided under the SRC Act for employees of:

- Commonwealth and ACT Government departments, statutory authorities and government business enterprises, referred to as “Commonwealth current customers” and “ACT customers” respectively, and
- Entities which are licensed to self-insure their workers’ compensation liabilities under the SRC Act, referred to as “licensees”. There are currently 30 licensees.

### 1.3.2 Effective date of possible changes to the SRC Act

For the possible changes to the SRC Act, the date on which it is envisaged that they would take effect is 1 January 2014. However:

- For some of the possible changes, it is expected that they would apply only to claims with a date of injury or disease on or after 1 January 2014, but
- For other changes, it is expected that they would also affect some claims with a date of injury or disease before 1 January 2014. For example, some changes to compensation for permanent impairment may apply to all claims for which the assessment of permanent impairment occurs on or after 1 January 2014.

### 1.3.3 Nature of estimates of financial effects

For each possible change to the SRC Act which Taylor Fry was asked to consider, up to six estimates of the financial effects have been provided, as follows;

- a. For Commonwealth current customers only, annual effect for a future injury year;
- b. For ACT customers only, annual effect for a future injury year;
- c. For all licensees combined, annual effect for a future injury year;
- d. For Commonwealth current and former customers, effect on estimate of existing outstanding claims liability;
- e. For ACT customers only, effect on estimate of existing outstanding claims liability, and
- f. For all licensees combined, effect on estimates of existing outstanding claims liabilities.

Items (a), (b) and (c) are relevant for each possible change to the SRC Act. Items (d), (e) and (f) are relevant only for possible changes which would affect some claims with a date of injury or disease before 1 January 2014.

It should be noted that, for possible changes which would affect some claims with a date of injury or disease before 1 January 2014:

- Items (d), (e) and (f) have been estimated, but
- The possible effect of increases or reductions in existing outstanding claims liabilities on future premiums payable, eg an increase in existing outstanding claims liabilities may result in a corresponding increase in future deficit reduction contributions payable by Commonwealth and ACT customers, has **not** been estimated.

### 1.3.4 Scope of estimates in this report excludes claims administered by the Military Rehabilitation and Compensation Commission ("MRCC")

Estimates of financial effects provided in this report **exclude** effects on claims which are administered by the MRCC. Separate advice concerning effects on such claims has been provided by the Commonwealth Department of Veterans Affairs ("DVA") and the Australian Government Actuary.

## 2 GENERAL APPROACH TO ESTIMATION OF FINANCIAL EFFECTS OF POSSIBLE CHANGES TO THE SRC ACT

### 2.1 Baseline financial projections for claims administered by Comcare

For claims administered by Comcare, Taylor Fry previously provided estimates of:

- Liabilities for outstanding claims as at 30 June 2012, and
- Aggregate premiums needed to meet the cost of claims attributable to injuries and diseases arising during the 2012/13 financial year.

It was agreed with the Secretariat that those estimates would provide the baseline against which estimates in this report of increases or reductions in claims costs due to possible changes in the SRC Act are measured for Commonwealth and ACT customers, ie for components (a), (b), (d) and (e) of the estimates in this report referred to in Section 1.3.3.

Table 2.1 provides a summary of estimates of outstanding claims liabilities as at 30 June 2012 and of aggregate premiums needed for the 2012/13 financial year.

**Table 2.1 Summary of baseline estimates for claims administered by Comcare**

Component of claims costs	Liabilities for outstanding claims as at 30 June 2012	Aggregate premiums for the 2012/13 financial year <sup>(iv)</sup>
	\$M	\$M
Commonwealth current customers	1,627	243
ACT customers	377	56
Commonwealth departed customers <sup>(i)</sup>	130	NA
Pre-Premiums claims <sup>(ii)</sup>	395	NA
Asbestos-related claims <sup>(iii)</sup>	81	NA
<b>Total</b>	<b>2,610</b>	<b>299</b>

Notes:

- Commonwealth departed customers are entities whose workers' compensation liabilities were previously covered by Comcare, but for which that is no longer the case, eg the Commonwealth Bank and Qantas due to privatisation. The liabilities shown are the remaining outstanding liabilities in respect of the periods during which the entities' liabilities were covered by Comcare. Aggregate premiums for the 2012/13 financial year are not shown for departed customers because these entities' liabilities for the 2012/13 financial year are not covered by Comcare.
- Refers to claims with a date of injury or disease before 1 July 1989.
- Outstanding liabilities for asbestos-related claims have been estimated separately, and are excluded from the components of claims costs shown above.
- Excluding GST.

## 2.2 Approach adopted to estimating financial effects on licensees

For licensees, the information available for this report is much more limited than that available for claims administered by Comcare, particularly given the time constraints on preparation of this report. Our general approach was to:

- Estimate changes in claims costs for the Commonwealth and ACT governments which would result from possible changes to the SRC Act, using the detailed claims data and other information available to us;
- Initially assume that our estimates of **percentage** changes in outstanding claims liabilities and future premiums needed for the Commonwealth and ACT governments would also apply for licensees in aggregate, but
- Where it appeared appropriate, then adjust our resulting initial estimates of financial effects on licensees to allow for known or suspected differences in overall claims characteristics between the governments and licensees.

It is important to appreciate the limitations of this approach and resulting increased margin of error in our estimates for licensees:

- Estimates of percentage changes in outstanding claims liabilities and future premiums needed for the Commonwealth and ACT Governments are themselves inherently uncertain;
- The assumption that those estimated percentage changes will be largely the same for licensees in aggregate is a crude assumption, necessarily adopted given time constraints on preparation of this report, and is unlikely to be wholly sound, and
- Even if that crude assumption is taken to be reasonable for licensees in aggregate, it is inevitable that percentage changes in outstanding claims liabilities and future claims costs would differ considerably between licensees.

**Table 2.2 Summary of baseline estimates for licensees**

Component of claims costs	Liabilities for outstanding claims as at 30 June 2012 <sup>(i)</sup>	Aggregate claims costs accruing during the 2012/13 financial year <sup>(ii)</sup>
Licensees	\$M 466	\$M 130

Notes:

- Provided by Comcare. Balance dates for some licensees were prior to 30 June 2012.
- Approximate estimate.

## 2.3 Anticipated implementation date of possible changes to the SRC Act

It is envisaged that possible changes to the SRC Act would take effect on 1 January 2014.

For the Commonwealth and ACT governments, our estimates of financial effects of possible changes:

- For future premiums, are based on our baseline estimates of premiums needed for the 2012/13 financial year. Using premiums for the 2012/13 financial year as the baseline for our estimates can be regarded as broadly equivalent to providing estimates in today's values, ie in real terms, of financial effects of possible changes with an implementation date of 1 January 2014 , and
- For outstanding claims liabilities, are based on our estimates of outstanding claims liabilities as at 30 June 2012, notionally assuming that the possible changes would take effect on 1 July 2012. This means that we have implicitly assumed that the amount and profile of outstanding claims liabilities will be similar as at 30 June 2012 and as at the 1 January 2014 anticipated implementation date of proposed changes.

A similar approach has been adopted in estimating financial effects on licensees.

#### 2.4 Costings are based on actuarial central estimates

The estimates of financial effects in this report are based on central estimates of outstanding claims liabilities and future premiums needed. Central estimates are intended to have approximately equal likelihood of ultimately turning out to be more or less than the quantity being estimated.

Provisions for outstanding claims liabilities in Comcare's financial statements are on a central estimate basis.

However, it should be borne in mind that:

- Comcare premiums include a margin added to the central estimate. Inclusion of a margin is intended both to increase to more than 50% the probability of premiums charged ultimately turning out to be sufficient, and to reduce progressively Comcare's current funding deficit, and
- Licensees' provisions for outstanding workers' compensation claims liabilities may consist of (actuarial central estimate of outstanding liabilities + risk margin).

#### 2.5 Claims administration expenses ("CAE")

The estimates of financial effects in this report include approximate allowance for increases or reductions in CAE expected to result from the possible legislative change concerned.

#### 2.6 Costings exclude GST

The estimates of financial effects in this report exclude GST, as:

- Estimates of outstanding claims liabilities are net of recoverable GST (which is payable for investigation, legal and some rehabilitation costs), and
- Although premiums charged by Comcare include GST, the GST can be reclaimed by all or most of the premium paying entities.

## 3 POSSIBLE CHANGES TO THE SRC ACT CONSIDERED

### 3.1 Summaries of possible changes to the SRC Act

Possible changes to the SRC Act for which Taylor Fry was asked to estimate financial effects are summarised in Sections 3.2 to 3.7 grouped as follows:

- Section 3.2 – Eligibility for compensation;
- Section 3.3 – Provisional liability, rehabilitation and related requirements;
- Section 3.4 – Incapacity and income replacement;
- Section 3.5 – Medical treatment;
- Section 3.6 – Permanent impairment, and
- Section 3.7 – Dispute resolution.

Brief comments on some of the possible changes are included in the relevant section. For further commentary and a description of our analyses, the reader should refer to our detailed report and appendices.

Table 4.1 in Section 4.1 provides a summary of our estimates of financial effects. We have excluded from the summary in Table 4.1 possible changes for which:

- In our opinion, it is not possible to calculate a reliable estimate of financial effects of the change given the information which is currently available to us, and/or
- We do not expect the financial effect to be material.

### 3.2 Eligibility for compensation

**Table 3.1 Options for changes to eligibility for compensation**

Option number	Description	Possible date of effect
3(a)	Manifestations of underlying diseases (eg heart attacks and strokes as a result of cardio-vascular diseases, spinal rupture as a result of skeletal degeneration and diseases) which occur while the employee is at work would be classified as “diseases” and therefore compensable only where employment contributes to the disease or to the manifestation “to a significant degree”.	Manifestations which occur on or after 1 January 2014.
3(b)	Injuries suffered while travelling from home to work where the employee is “on-call” would be compensable.	Injuries which occur on or after 1 January 2014.
3(c)	The definition of “reasonable administrative action” would be limited to those items currently listed in Section 5A(2) of the SRC Act, with “reasonable” defined to mean what is taken to be reasonable by Fair Work Australia.	Injuries which occur on or after 1 January 2014.

For option 3(a), after consulting with Comcare, Secretariat staff advised that they expect that claims affected by this possible change would mostly be those with the following Type of Occurrence Classification System (“TOOCS”) codes:

- Codes 422 to 489, which relate to back and neck conditions, and
- Codes 801 to 819, which relate to cardio-vascular diseases.

The Secretariat advised that it is anticipated that, if this possible change to the SRC Act had always been in force, approximately:

- 30% of past accepted claims with TOOCS codes 422 to 489 would not have been accepted, and
- 80% of past accepted claims with TOOCS codes 801 to 819 would not have been accepted.

Our estimates of financial effects of option 3(a) are based on these assumptions.

### 3.3 Provisional liability, rehabilitation and related requirements

**Table 3.2 Options for introduction of provisional liability, and changes to rehabilitation and related requirements**

Option number	Description	Possible date of effect
4(a)	Introduce provisional liability.	Claims received on or after 1 January 2014.
4(b)	Strengthen obligations on employers to provide suitable employment.	Requests for suitable employment on or after 1 January 2014.
4(c)	Introduce a job placement scheme, such as either WorkSafe Incentive Scheme for Employers (“WISE”) in Victoria or the Re-employment Incentive Scheme for Employers (“RISE”) in SA, providing financial incentives for employers to employ injured workers.	Date of job placement on or after 1 January 2014.
4(d)	Introduce a RTW inspectorate, similar to that in Victoria, with the power to issue improvement notices and require employers to enter into enforceable undertakings.	Injuries which occur on or after 1 January 2014.

#### 3.3.1 Option 4(a) – introduce provisional liability (“PL”)

The rationale for PL requirements is to increase early engagement of injured employees in rehabilitation, and reduce the number of cases in which a dispute about whether a claim should be accepted results in a delay in commencing rehabilitation and possibly a worse outcome than could have been achieved.

We have not attempted to provide an estimate of financial effects of this proposal. We would expect the proposal to result in both:

- Payment under PL of some compensation for incapacity and medical costs which would not have been paid in the absence of the PL requirements, but
- Some employee welfare and financial benefits from earlier engagement of employees in rehabilitation.

We believe that it is not possible to estimate reliably in advance the extent or net effect of these anticipated opposing financial effects of this proposal.

### 3.3.2 Option 4(b) – strengthen obligations on employers to provide suitable employment

It is not possible to predict reliably what improvement in sustained return to work (“RTW”) might result from this possible change. Based on discussions with Comcare staff and the Secretariat, an **illustrative only** indicative estimate of possible financial effects has been calculated for the Commonwealth and ACT governments by assuming that strengthening these obligations would result in a 5% reduction in the proportion of claimants who continue to receive compensation for incapacity more than one year after the date of injury or disease.

## 3.4 Incapacity and income replacement

**Table 3.3 Options for changes to incapacity and income replacement**

Option number	Description	Possible date of effect
5(a)(i)	Change the maximum age until which incapacity compensation is payable from the current age 65 to equal the qualifying age for the age pension. The latter will increase progressively from the current age 65 to age 65.5 on 1 July 2017 and then by a further 6 months every 2 years, reaching age 67 by 1 July 2023. An employee who suffers an injury or disease within 2 years of the increased qualifying age for the age pension would be eligible for incapacity compensation for a period of 2 years.	Incapacity payments on or after 1 July 2017.
5(a)(ii)	As for option 5(a)(i), except that an employee who suffers an injury or disease within 5 years of the qualifying age for the age pension at that time would be eligible for incapacity compensation for a period of 5 years.	Incapacity payments on or after 1 July 2017, but the eligibility for 5 years of incapacity compensation would apply only for injuries on or after 1 January 2014.
5(b)	Cease all compensation payments if a claimant relocates overseas (to be defined as remaining outside Australia for more than 60 consecutive days).	Claimants who relocate overseas on or after 1 January 2014.

5(c)	Change the definition of “maximum rate compensation week” in Section 19(2A) of the SRC Act so that an employee would be deemed to be totally incapacitated for any week in which they are participating in a RTW program or absent from work for any reason other than seeking medical treatment.	Injuries which occur on or after 1 January 2014.
5(d)(i), 5(d)(ii) & 5(d)(iii)	Change the step-down provisions (without changing the definition of “maximum rate compensation week”), from the current single step-down after 45 maximum rate compensation weeks, to compensation based on: <ul style="list-style-type: none"> <li>• Option 5(d)(i) - 100% of normal weekly earnings (“NWE”) for the first 13 weeks, 90% of NWE for the next 13 weeks and 80% of NWE thereafter;</li> <li>• Option 5(d)(ii) – 100% of NWE for the first 13 weeks, 90% of NWE for the next 13 weeks, 80% of NWE for the next 26 weeks and 75% of NWE thereafter, and</li> <li>• Option 5(d)(iii) - 100% of NWE for the first 13 weeks, 90% of NWE for the next 13 weeks, 80% of NWE for the next 26 weeks and 70% of NWE thereafter.</li> </ul>	Injuries which occur on or after 1 January 2014.
5(e)(i)	Repeal Sections 20, 21 and 21A of the SRC Act, which would result in the amount of incapacity compensation being determined in accordance with Section 19 for all claimants. This would abolish the current deductions from incapacity compensation in respect of superannuation pensions or lump sums received by claimants, and hence result in an increase in compensation payable.	Claimants who first receive a superannuation pension or lump sum on or after 1 January 2014.
5e(ii)	As for option 5(e)(i), but applicable for all incapacity compensation payments on or after 1 January 2014.	All incapacity compensation payments on or after 1 January 2014.
5(f)(i), 5(f)(ii) & 5(f)(iii)	<b>Combination of option 5(e)(i)</b> with options 5(d)(i), 5(d)(ii) or 5(d)(iii) respectively.	Changes in step-down rates applicable for injuries which occur on or after 1 January 2014. Repeal of Sections 20, 21 and 21A applicable for claimants who first receive a superannuation pension or lump sum after 1 January 2014.
5(f)(iv), 5(f)(v) & 5(f)(vi)	<b>Combination of option 5(e)(ii)</b> with options 5(d)(i), 5(d)(ii) or 5(d)(iii) respectively.	Changes in step-down rates applicable for injuries which occur on or after 1 January 2014. Repeal of Sections 20, 21 and 21A applicable for all incapacity compensation

5(g)(i)	Leave Sections 20, 21 and 21A of the SRC Act in force, but amend them to abolish the current (5% of NWE) deduction from the amount of compensation.	payments on or after 1 January 2014. Claimants who first receive a superannuation pension or lump sum on or after 1 January 2014.
5(g)(ii)	As for option 5(g)(i), but applicable for all incapacity compensation payments on or after 1 January 2014.	All incapacity compensation payments on or after 1 January 2014.
5(h)(i) & 5(h)(ii)	Change redemption provisions to allow less restricted access to redemptions subject to specified requirements. Two options are being considered: <ul style="list-style-type: none"> <li>• Option 5(h)(i) – compensation for incapacity, medical costs, attendant care and household services costs may all be redeemed, and</li> <li>• Option 5(h)(ii) – only compensation for incapacity compensation may be redeemed.</li> </ul>	1 January 2014, regardless of date of injury or disease.

In relation to options 5(d)(i), (ii) and (iii) and 5(f)(i) to 5(f)(vi), it should be noted that:

- Currently, after 45 maximum rate compensation weeks, incapacity compensation is based on:
  - 75% of NWE for claimants who are not working;
  - 80% of NWE for claimants working less than 25% of their pre-injury normal weekly hours (“NWH”);
  - 85% of NWE for claimants working between 25% and 50% of pre-injury NWH;
  - 90% of NWE for claimants working between 50% and 75% of pre-injury NWH;
  - 95% of NWE for claimants working between 75% and 100% of pre-injury NWH, and
  - 100% of NWE for claimants working 100% of pre-injury NWH (but earning less than pre-injury).
- It is envisaged that, under any of these options, this variation in percentages of NWE depending on the proportion of NWH being worked would no longer apply, ie the step-down percentages shown in Table 3.3 above would apply regardless of the proportion of NWH being worked.

#### 3.4.1 Option 5(a)(i) – change the maximum age until which incapacity compensation is payable to equal the qualifying age for the age pension

For recent actuarial valuations, the approach agreed with Comcare was that the anticipated change in the maximum age until which incapacity compensation is payable to equal the qualifying age for the age pension:

- Would **not** be allowed for in estimating outstanding claims liabilities, because the SRC Act had not yet been amended as envisaged under option 5(a)(i). However, the estimated effect of this anticipated change was quantified as part of the sensitivity analysis for our valuation of outstanding claims liabilities.
- **Would** be allowed for in estimating future premiums needed, given the expectation that the SRC Act would be amended in this way in due course.

Section 2.1 explains that the financial projections from the actuarial valuation data as at 30 June 2012 are the baseline against which estimated increases or reductions in claims costs are measured in this report. Therefore, for the Commonwealth and ACT Governments:

- The estimated effect of this change on outstanding claims liabilities was estimated as part of the sensitivity analysis for that valuation as an increase in outstanding claims liabilities (as at 30 June 2012) of:
  - For the Commonwealth Government - \$40m (2.5%) for current customers plus \$4m for departed customers, and
  - For the ACT Government - \$9m (again 2.5%).
- Estimates of future premiums needed **already include** allowance for the estimated effect of this change. Thus a **nil** increase in estimated future premiums needed is shown for this option 5(a)(i) in Table 4.1.

### 3.4.2 Options 5(c) to 5(g)

It is important to note that the cost estimates for these options do **not** allow for any effects of possible resulting future changes in claimant behaviour. Changes in claimant behaviour could result in changes in claims costs **considerably more** than the estimates summarised in Table 4.1, ie in:

- Greater reductions in future annual premiums than estimated for options 5(c), 5(d)(i), 5(d)(ii) or 5(d)(iii), but
- Larger increases in future annual premiums and outstanding claims liabilities than estimated for options 5(e)(i), 5(e)(ii), 5(f)(i) to 5(f)(vi), 5(g)(i) or 5(g)(ii).

If recommendation of these options is under serious consideration, we would recommend discussion with the Secretariat of what approximate adjustment for possible behavioural change effects might be appropriate.

### 3.4.3 Options 5(h)(i) or 5(h)(ii) – less restricted access to redemptions

Section 5.2.9 in our more detailed report provides commentary on various policy issues associated with making access to redemptions less restricted, and explains why we have not provided an estimate of financial effects of this potentially highly significant proposal.

## 3.5 Medical treatment and care

**Table 3.4 Options for changes to medical treatment and care**

Option number	Description	Possible date of effect
6(a)	Provide compensation for accommodation in a nursing home, where the accommodation is required due to the compensable condition.	Treatment on or after 1 January 2014.
6(b)	Household and attendant care services to be compensable from the date of injury, rather than only from 28 days after the date of injury.	Injuries which occur on or after 1 January 2014.

6(c)	Remove the current limit on the amount of compensation for attendant care services.	Attendant care provided on or after 1 January 2014.
6(d)	Change the definition of medical treatment so that only treatment provided by practitioners registered with the Australian Health Practitioner Regulation Authority (“AHPRA”) would be compensable.	Treatment provided on or after 1 January 2014.
6(e)	Comcare to determine “appropriate” rates specifying the maximum compensation payable for defined medical and other treatments.	Treatment provided on or after 1 January 2014.

For options 6(d) and 6(e), based on information provided by Comcare, we have estimated that these proposals would result in ongoing reductions of 5% and 3.2% respectively in total medical costs (excluding rehabilitation).

### 3.6 Permanent impairment (“PI”)

**Table 3.5 Options for changes to permanent impairment**

Option number	Description	Possible date of effect
7(a)	Combine assessments of multiple impairments arising from a single incident to produce an overall assessment of whole person impairment (“WPI”), with compensation for PI to be determined based on that overall assessment of WPI.	Injuries which occur on or after 1 January 2014.
7(b)	Adopt a “national” PI assessment guide, likely to be based on the NSW PI Guide, which is essentially AMA 5 with some modifications.	Claims for PI received on or after 1 January 2014.
7(c)	Increase the maximum amount payable due to PI, ie the total of the maximum amounts payable for PI and non-economic loss (“NEL”), to equal the lump sum payable on death. The increased amounts payable for PI would be determined using a non-linear scale (refer Section 3.6.2).	Date of PI assessment on or after 1 January 2014.
7(d)	Following payment of PI compensation, any worsening or secondary condition arising from the same incident must meet a threshold of a 5% increase in WPI for additional PI compensation to become payable.	Claims for PI received on or after 1 January 2014.

3.6.1 Option 7(a) – combine assessments of multiple impairments arising from a single incident to produce an overall assessment of WPI

Reliable analysis of anticipated financial effects of this proposal would be complex because the proposal would result in:

- Increases in claims costs for:
  - Claimants who have two or more impairments arising from a single incident, with WPI less than 10% for each impairment assessed in isolation, but for whom a combined assessment of WPI would be 10% or more. Such claimants currently receive no PI compensation but would become entitled to receive PI compensation under the proposal, and
  - Claimants who have two or more impairments arising from a single incident, with WPI 10% or more for one impairment but less than 10% for the remaining impairment(s). For such claimants the proposal would result in a combined WPI assessment greater than the current WPI assessment for the worst impairment considered in isolation, but
- Generally, a small reduction in total PI compensation for claimants who have two or more impairments for each of which the current WPI assessment is 10% or more. In most such cases, the combined WPI assessment would be less than the sum of the current separate WPI assessments for each impairment considered in isolation, and hence the total PI compensation would reduce.

Overall, the proposal is expected to result in an increase in claims costs.

3.6.2 Option 7(c) – increase the maximum amount payable due to PI to equal the lump sum payable on death

The current indexed maximum lump sum amounts payable are:

- \$475,963 in the event of death (Section 17 of the SRC Act);
- \$168,605 for PI (Section 24), and
- \$63,227 for NEL (Section 27).

Under this proposal:

- Payments for NEL would remain unchanged;
- The maximum payable for PI would be **increased substantially**, from the current \$168,605 to  $(\$475,963 - \$63,227) = \$412,736$ , so that the maximum total amount payable as compensation for PI and NEL would equal the lump sum payable on death, and
- The amount payable for PI would be determined based on the non-linear scale shown in Table 3.6.

**Table 3.6 Proposed (indexed) increased lump sum payable for PI**

WPI	Current lump sum <sup>(i)</sup>	Proposed increased lump sum <sup>(ii)</sup>	Proposed increase
%	\$	\$	\$
Less than 10	0 <sup>(iii)</sup>	0 <sup>(iii)</sup>	0 <sup>(iii)</sup>
10	16,860	17,500	640
15	25,291	27,500	2,209
20	33,721	40,000	6,279
25	42,151	52,500	10,349
30	50,582	70,000	19,418
35	59,012	90,000	30,988
40	67,442	120,000	52,558
45	75,872	155,000	79,128
50	84,302	200,000	115,698
55	92,733	250,000	157,267
60	101,163	300,000	198,837
65	109,593	350,000	240,407
70	118,024	400,000	281,976
75	126,454	412,736	286,282
80	134,884	412,736	277,852
85	143,314	412,736	269,422
90	151,744	412,736	260,992
95	160,175	412,736	252,561
100	168,605	412,736	244,131

Notes:

- (i) (WPI \* maximum lump sum currently payable for PI of \$168,605 (indexed).
- (ii) For WPI not shown in this table, the increased amount payable would be interpolated between the amounts shown based on the WPI.
- (iii) For WPI less than 10%, no compensation for PI is payable unless the impairment is hearing loss, loss or loss of use of a finger or toe, or loss of the sense of taste or smell.

It can be seen that under the proposal:

- The current 10% WPI threshold for access to any lump sum payment for PI would remain unchanged (with the exceptions referred to in footnote (iii) to Table 3.6 also being unchanged);
- For WPI in the range from 10% to around 20%, the increase in the current lump sum payable would be small, but
- The increase in the lump sum payable would be substantial at high WPI.

We understand that the rationale for this proposal is that:

- Because the 10% WPI threshold would be unchanged and there would be only a small increase in the current lump sum payable for WPI in the 10% to 20% range, there should be little increase in current numbers of PI assessments and associated costs;

- The main beneficiaries of the proposal would be claimants with severe PI and hence high WPI, and
- At very high levels of WPI, consistency with the lump sum payable on death.

The estimated increase in total claims costs due to this proposal is not large. The reason is that the proportion of claimants with WPI more than 30%, for whom the increase in PI lump sum would be substantial, is small. Further, for the Commonwealth and ACT Governments combined, currently the combined cost of all of these types of compensation payment is less than 5% of the total estimated cost of all compensation payments.

Our estimate of the increase in average cost is crucially dependent on an assumption that this proposal would **not** result in a material change in either the number of claimants who receive PI lump sums or the level of WPI assessments. Whilst this caveat is important, this assumption does not appear unreasonable given that the proposal would not change the 10% threshold for access to PI compensation, and would benefit mainly the small proportion of claimants with WPI more than 30%.

### 3.6.3 Option 7(d) - any worsening or secondary condition arising from the same incident must meet a threshold of a 5% increase in WPI for additional PI compensation to become payable

Under this option the current 10% threshold for access to compensation for PI would be retained. However, the threshold for payment of further PI compensation for a deterioration in the WPI percentage would be reduced from 10% to 5%. (Thresholds for the current exceptions for PI due to hearing loss, loss of or loss of use of a finger or toe, or loss of the sense of taste or smell would remain unchanged.)

Currently further PI compensation is payable to a claimant who can demonstrate at least a 10% deterioration in WPI percentage. Under this proposal, additional costs would arise only in respect of claimants who ultimately suffer a deterioration in WPI between 5% and 9%.

## 3.7 Dispute resolution

Table 3.7 Options for changes to dispute resolution

Option number	Description	Possible date of effect
8(a)	Provide for payment of claimants' costs, including legal and medical report costs subject to limits, for reconsiderations.	Reconsideration requests received on or after 1 January 2014.
8(b)	Permit the AAT to hear matters for which there has not been a reconsideration decision, with the consent of both parties involved.	From 1 January 2014.
8(c)	Permit Comcare to settle cases in the AAT on a commercial basis, by payment of an applicant's legal costs without an admission of liability.	From 1 January 2014.

Under option 8(a) it is proposed that claimants' legal and related costs for reconsideration requests would be paid by Comcare or the licensee concerned, subject to limits of:

- The reasonable cost of one expert's medical report, plus
- \$1,500 for legal costs.

The Secretariat advised that the policy intent of this proposal is that meeting part or all of claimants' costs for reconsiderations would result in better prepared requests for reconsiderations and a reduction in the number of claimants who decide to proceed to the Administrative Appeals Tribunal ("AAT") following a reconsideration decision which does not favour the claimant.

It is worth bearing in mind that, while our estimates of the additional legal and related costs which would result from this proposal are relatively modest (refer Table 4.1), its effect on overall claims costs is impossible to estimate reliably, and could conceivably vary from:

- If the policy intent were achieved, a favourable outcome of a reduction in numbers of matters which proceed to the AAT and associated costs of all parties, to
- An unfavourable outcome that availability of reimbursement of costs for reconsiderations results in more claimants deciding to obtain legal representation, increases in overall levels of disputation and in legal and related costs for both reconsiderations and AAT matters, and in reduced rates of RTW.

## 4 SUMMARY OF COST ESTIMATES

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### 4.1 Summary of selected cost estimates

Given the number of possible changes to the SRC Act under consideration, in Table 4.1 we have provided a summary of our cost estimates only for those proposals for which:

- The financial effect (whether an increase or reduction in claims costs) is expected to be material, and
- We have been able to provide an estimate of the financial effect in the time available for preparation of this report.

The option numbers shown in the left-hand column in Table 4.1 are the same as in each of Table 3.1 to Table 3.7.

This summary of cost estimates should be considered in conjunction with the brief descriptions of assumptions used in deriving these estimates and inherent uncertainties in Sections 3.2 to 3.7 and Section 5. More explanation of our assumptions and related issues is provided in our detailed report and appendices.

Table 4.1 Summary of selected cost estimates

Issue	Option number	Possible date of effect	Commonwealth Government, estimate of increase or (reduction) in:		ACT Government, estimate of increase or (reduction) in:		All licensees combined, estimate of increase or (reduction) in:	
			Future annual premiums	Outstanding claims liabilities	Future annual premiums	Outstanding claims liabilities	Future annual claims costs	Outstanding claims liabilities
			\$M	\$M	\$M	\$M	\$M	\$M
Eligibility for compensation	3(a)	Manifestation of condition on or after 01/01/14	-7.4	0	-1.1	0	-3.7	0
Rehabilitation and related requirements	4(a)	Requests for suitable employment on or after 01/01/14	-4.8	0	-1.2	0	0	0
Incapacity and income replacement	5(a)(i)	Incapacity payments on or after 01/01/17 (when the qualifying age for the age pension will start to increase)	0.0	44	0.0	9	2.9	12
	5(a)(ii)	As for 5(a)(i)	0.4	44	0.1	9	0.2	12
	5(c)	Injury or disease on or after 01/01/14	-3.2	0	-0.8	0	-1.7	0
	5(d)(i)	Injury or disease on or after 01/01/14	-4.5	0	-1.1	0	-2.5	0
	5(d)(ii)	Injury or disease on or after 01/01/14	-11.6	0	-2.8	0	-6.3	0
	5(d)(iii)	Injury or disease on or after 01/01/14	-18.7	0	-4.6	0	-10.2	0
	5(e)(i)	First receipt of any superannuation on or after 01/01/14	18.3	132	4.5	32	9.9	36
	5(e)(ii)	All incapacity compensation received on or after 01/01/14	18.3	274	4.5	67	9.9	74
	5(f)(i)	First receipt of any superannuation on or after 01/01/14	13.7	132	3.4	32	7.5	36
	5(f)(ii)	First receipt of any superannuation on or after 01/01/14	6.6	132	1.6	32	3.6	36
5(f)(iii)	First receipt of any superannuation on or after 01/01/14	-0.5	132	-0.1	32	-0.2	36	

Issue	Option number	Possible date of effect	Commonwealth Government, estimate of increase or (reduction) in:		ACT Government, estimate of increase or (reduction) in:		All licensees combined, estimate of increase or (reduction) in:	
			Future annual premiums	Outstanding claims liabilities	Future annual premiums	Outstanding claims liabilities	Future annual claims costs	Outstanding claims liabilities
	5(f)(iv)	All incapacity compensation received on or after 01/01/14	13.7	274	3.4	67	7.5	74
	5(f)(v)	All incapacity compensation received on or after 01/01/14	6.6	274	1.6	67	3.6	74
	5(f)(vi)	All incapacity compensation received on or after 01/01/14	-0.5	274	-0.1	67	-0.2	74
	5(g)(i)	First receipt of any superannuation on or after 01/01/14	2.7	20	0.7	5	1.5	5
	5(g)(ii)	All incapacity compensation received on or after 01/01/14	2.7	42	0.7	10	1.5	11
Medical treatment and care	6(c)	Attendant care on or after 01/01/14	0.5	3	0.1	2	0.3	1
	6(d)	Treatment on or after 01/01/14	-3.1	-26	-0.5	-4	-1.6	-6
	6(e)	Treatment on or after 01/01/14	-2.0	-16	-0.3	-3	-1.0	-4
Permanent impairment	7(a)	Injury or disease on or after 01/01/14	1.6	0	0.5	0	0.9	0
	7(c)	PI assessments on or after 01/01/14	1.4	10	0.5	3	0.8	3
	7(d)	PI claims received on or after 01/01/14	0.3	2	0.1	1	0.2	1
Dispute resolution	8(a)	Reconsideration requests received on or after 01/01/14	0.6	2	0.2	0	0.3	0

## 4.2 Effects of combining several proposed changes to the SRC Act

**It is important to note that the estimates of financial effects summarised in Table 4.1 are not necessarily additive.** For example, the estimated combined effect of both:

- Option 7(c) – increasing the maximum amount payable for PI, with amounts payable for PI to be determined using a non-linear scale, and
- Option 7(d) – any worsening or secondary condition arising from the same incident must meet a threshold of 5% (instead of 10%) increase in WPI for additional PI compensation to become payable

would **not** be the sum of the estimates of the effects of implementing each of these proposals in isolation. This is because option 7(c) would increase the average amount of PI compensation and option 7(d) would increase the number of claimants who receive additional PI compensation due to a worsening condition. Thus implementing both proposals could be expected to have a multiplicative effect.

The overall effect of a selected combination of proposed changes to the SRC Act will depend on the individual proposed changes and on how those changes interact with each other.

## 5 INHERENT UNCERTAINTY AND RELIANCES AND LIMITATIONS

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### 5.1 Inherent uncertainty

Estimates of outstanding claims liabilities and future premiums needed are always inherently uncertain for claims involving physical and/or mental injuries or diseases. This is because the ultimate liability for claims depends on the outcome of future events which cannot be forecast precisely. These include, but are not limited to, the likelihood of injured workers lodging claims, what proportions of claimants will return to work and when, average amounts of compensation paid, attitudes of claimants and their legal representatives towards settlement of their claims, AAT decisions, etc.

The extent of uncertainty is greater for estimates of financial effects of proposed legislative and/or policy changes. Such changes may be associated with subsequent changes in claims experience, and resulting costs of claims, which could not reasonably have been foreseen.

### 5.2 Reliances and limitations

The estimates summarised in this report are intended to provide an **approximate indicative** guide to estimated financial effects of some of the possible changes to the SRC Act which are being considered. Reliances on claims data and other information provided, and important assumptions made in estimating financial effects, are described in our detailed report and appendices. Should any of these items turn out to be inaccurate and/or misconceived, so will the estimates of financial effects which rely on these items.

In particular, estimates of financial effects of possible changes to the SRC Act described in this report:

- Are based on our understanding of the possible changes under consideration;
- Rely on information supplied by Comcare and by the Secretariat;
- Generally, do **not** allow for potential behavioural change effects. However, **such effects may turn out to be highly significant**, particularly for proposals which would affect materially the amount of incapacity compensation payable;
- For licensees, were derived using a crude approach of assuming that estimates of percentages changes in future premiums needed and outstanding claims liabilities, which were derived for the Commonwealth and ACT Governments, can also be applied for licensees. Limitations of the data available for licensees and time constraints for preparation of this report precluded use of a more robust approach to estimating financial effects on licensees;
- **Exclude** effects on claims administered by the MRCC, for which separate advice has been provided by the DVA and the Australian Government Actuary (refer Section 1.3.4), and

- Have been provided for each possible change to the SRC Act considered in isolation from other possible changes. The estimated financial effects of combining two or more changes are not necessarily additive (refer Section 4.2).

Judgements about the information, approach, assumptions and resulting estimates summarised in this report should be made only after also considering our detailed report and appendices.

### 5.3 Limitations on use

This summary report and our detailed report and appendices have been prepared for the specific purpose of assisting the Secretariat in providing advice to the Reviewers on possible changes to the SRC Act. No reliance should be placed on either report by any other party, or for any other purpose, without first confirming with Taylor Fry that it is appropriate to do so. Taylor Fry specifically disclaims any responsibility to any party which might claim to suffer any loss as a direct or indirect consequence of relying on either report for any purpose other than the specific purpose described in this paragraph.



**Australian Government**  
**Department of Veterans' Affairs**

**ACT OFFICE**

Mr Phil Hartley  
Director  
Workers Compensation Policy & Review Secretariat  
GPO Box 9880  
CANBERRA ACT 2601  
Location Code: C50MA1

Dear Phil,

I refer to the request of the Review Secretariat that the Australian Government Actuary (AGA) be engaged to assess the possible impacts of changes to the *Safety, Rehabilitation and Compensation Act 1988* (SRCA) as they relate to claims administered by the Military Rehabilitation & Compensation Commission under Part XI.

The attached advice from the AGA sets out the estimated impacts on the Part XI SRCA liability for five particular recommendations in the Review.

I would also take this opportunity to reinforce that any changes to the SRCA of this nature should be considered in light of possible flow-on effects to entitlements available under the *Military Rehabilitation & Compensation Act 2004* (MRCA). No liability or costs estimates have yet been developed to quantify these flow-ons, however claims under the MRCA and Part XI of the SRCA are budget-funded, rather than premium-funded and any changes to the SRCA should be made with this in mind.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mark Harrigan', with a long horizontal flourish extending to the right.

Mark Harrigan  
Assistant Secretary  
Rehabilitation and Entitlements Policy Branch

8 February 2013



Ref No.:

Telephone: 02 6263 4160  
Facsimile: 02 6263 2677  
E-mail: susan.antcliff@aga.gov.au

7 February 2013

Mr Luke Brown  
Director, New Initiatives Section  
Rehabilitation and Entitlements Policy Branch  
Department of Veterans' Affairs  
GPO Box 9998  
CANBERRA ACT 2601

Dear Mr Brown

#### **COSTING OF POSSIBLE CHANGES TO SRCA**

I refer to your request that AGA cost a number of possible changes that have been mooted in the Hanks review of the Safety, Rehabilitation and Compensation Act (SRCA). As we discussed at our meeting, these costings are necessarily somewhat rough since we do not hold all of the information that would be required to undertake a more accurate costing.

We have looked at the additional liability which might be incurred under five possible changes. I have briefly described the methodology we have used to arrive at an estimate in each case.

##### *Option 1: Repeal ss. 20, 21 and 21A and make all incapacity payments under s. 19*

This change would remove the offsetting provisions which provide for a dollar for dollar reduction in incapacity payments to take account of any superannuation benefits that are being received. Section 20 deals with superannuation benefits received entirely as a pension, section 21 with benefits received entirely as a lump sum and section 21A with benefits received as a combination of pension and lump sum.

To cost this change, I have extracted the records of those receiving incapacity payments under these sections and attempted to match them with superannuation records we hold to determine the likely size of the offsets that would be removed under this proposal. Of the 638 records shown as in receipt of pension as at 30 June 2011, we found 436 matching pension records and of this latter group, 390 had been valued as a long term incapacity recipient. We were able to determine an appropriate annuity factor to apply to the pension amount to estimate a present value of the additional incapacity that would be paid if the offset provisions were removed. For those records where we had a match, but the

individual had not been classified as a long term incapacity recipient, we assumed 75% would go on to become a long term recipient with the same average liability as those who already were and 25% would be short term recipients and only benefit to the extent of half their annual rate of pension.

Of the 202 records where we did not have a match to a superannuation record, 168 had been classified as long term incapacity recipients in the 2011 valuation. We assumed the average cost for the unmatched records would be the same as the average cost for the matched records for those being paid under ss. 20 and 21A and half this amount for those paid under s. 21.

Putting these costs together, gave us the increase in the liability for the current long termers. We then included an allowance for IBNR claims, that is, claims that we expect to give rise to long term incapacity payments in the future, based on the relationship between this additional liability and the liability for current long termers.

In total, we estimated an increase in the liability for incapacity payments of the order of \$150m. This compares to a liability as at 30 June 2011 of \$756m. The projected incapacity liability as at 1 January 2014 is roughly \$700m, suggesting that the additional liability from this measure at the date of implementation could be around \$140m.

*Option 2: Remove the 5% notional superannuation deduction from the formulae in ss. 20, 21 and 21A*

This change would affect the same group as Option 1 and I have calculated an average annuity factor for those who are in receipt of long term incapacity and applied this to an estimated average contribution. For the purposes of determining an average contribution, I have assumed that the average salary of those affected would be \$70,000.

This gives an additional liability of around \$20m.

*Option 3: Allow those in receipt of incapacity benefits for a period of at least two years access to a redemption benefit*

In broad terms, this option would provide for people to take a lump sum equivalent to three years of benefits in exchange for no further access to incapacity benefits (in respect of the claim for which the benefits were being paid). A second option of providing a lump sum to extinguish any obligation in relation to medical payments under s. 24 and attendant care services under s.27 is also being considered.

It should be noted at the outset that it is impossible to cost this option with any certainty since the quantum of any costs or savings would depend upon the behaviour of those affected. The actuarial value of the liability for almost all incapacity recipients who have been on benefits for two years or more would be more than three times their current annual

payment. As a result, if the redemption option were imposed on all current recipients with more than two years on benefits, there would be a reduction in the liability. We estimate this reduction at around \$250 million.

The actual saving (or potentially cost) would depend not just on the proportion of people taking up the option, but on the individual characteristics of those people. The assumptions used in valuing the MCS allow for around two thirds of the people in receipt of benefits after two years to still be receiving benefits three years later (at longer durations the proportion is much higher). If members of this group take up the redemption option then we would expect savings. On the other hand, if those falling into the third of the population that don't stay on benefits were able to access the redemption option, there would be a cost to Government. We have no way of knowing whether an individual recipient will be one of those who would benefit financially or not. Indeed, the recipients themselves do not have perfect foresight. They might also be expected to act in ways which, from a purely financial perspective, appear irrational. For example, most people have a revealed preference for an immediate payment which implies a personal discount rate considerably higher than the rate of 6% per annum which we are using to value the liabilities.

Thus, while we might expect some selection against the Government (that is, a higher rate of take-up among those who expect to cease receiving incapacity benefits within the following three years) there will be an offsetting effect from those who choose to exercise the option to their apparent financial disadvantage. The extent to which selection effects are important will depend in part upon the implementation of the measure and whether it is possible to accurately identify those who would otherwise stay on benefits for more than three years. I have no basis for making a judgement on this or the likely prevalence of "irrational" decisions to take up the option.

In these circumstances, it is simply not possible to arrive at a central estimate of the costs or savings resulting from implementation of this measure. It seems extremely unlikely that the savings would exceed the \$250 million that would flow from compulsory redemption for all recipients. It also seems unlikely that adverse selection would lead to costs of more than \$20 million, but it would be possible, particularly if the option to redeem were effectively devolved to clients and could be exercised at any time. I have no basis for identifying any one figure within this range as representing the most likely outcome.

For the medical component, I have calculated the cost of medical services provided to those in the redemption group over the 2010/11 year and applied an average annuity factor to this figure to give an extremely rough estimate of the lifetime cost of medical entitlements. Note that I have allowed for medical cost inflation of 6% per annum but not for the inflation which arises from the ageing of the population. This will almost certainly underestimate the future medical costs of this group. A comparison between this estimate (which amounts to \$130m across the affected population) and a payment of three times the annual costs (\$30m) shows that the redemption payment would be well under a quarter of the expected future medical and attendant care costs. As such, I think it is very unlikely that there would be

significant take-up of this option were it available. I therefore think it would be unwise to make any allowance for savings from this component.

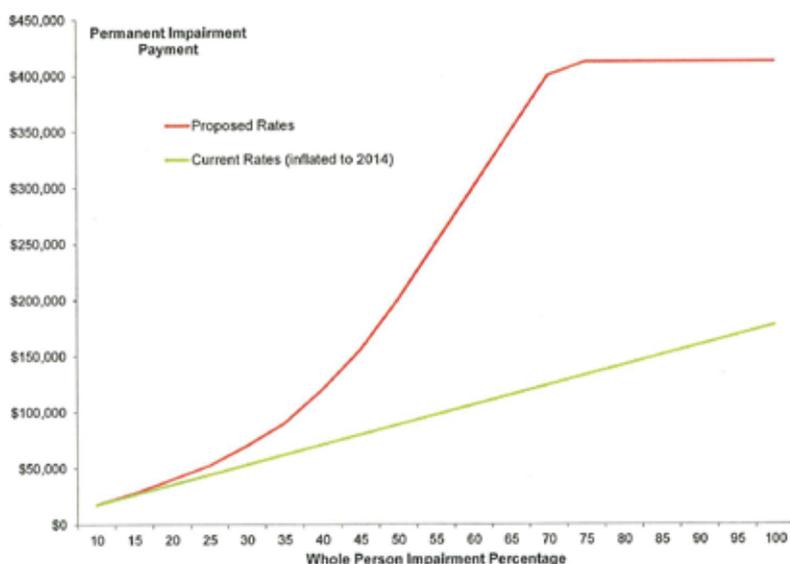
*Option 4: Pay incapacity benefits to age pension entitlement age rather than age 65*

Apart from a small group of SRCA beneficiaries who have access to lifetime incapacity benefits, incapacity benefits cease at age 65. The age at which eligibility for the age pension is attained is currently being gradually increased to 67, with full implementation achieved by 2024. As a simplifying assumption, we have ignored the impact on short term incapacity payments, but assumed that long term incapacity payments for those born after 30 June 1952 will be payable to age 67.

Applying this change to current and future long term recipients increases the liability by around \$35m as at 2011, which roughly translates to a \$30m increase in the liability as at the January 2014 start date.

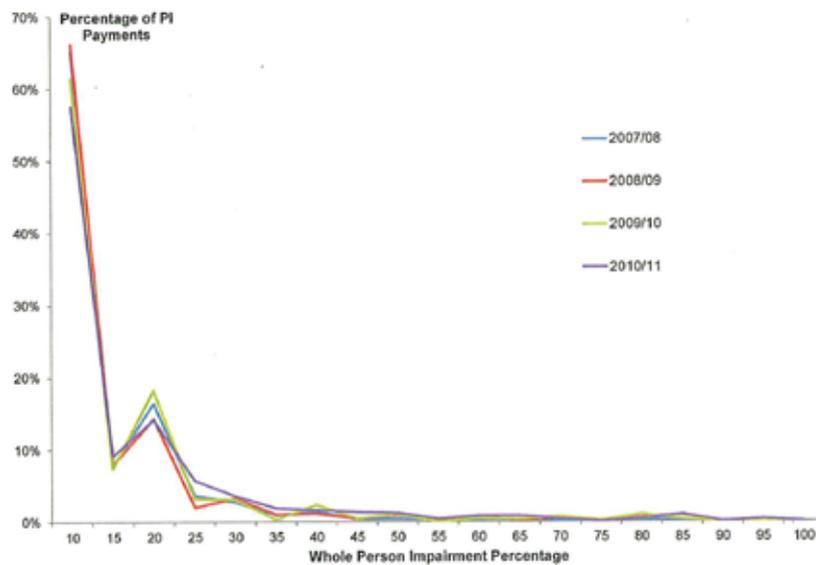
*Option 5: Introduce a revised schedule of PI payments*

This option would see the introduction of a payment scale for permanent impairment claims which pays roughly the same amount for those claims which involve a whole person impairment (WPI) percentage of 10 to 20%, but increasingly more as the WPI percentage increases. Non-economic loss payments would remain the same. The following chart shows the relationship between the current and proposed rates of payments.



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The data which we hold does not include the assessed WPI for a PI payment. However, it is possible to make a judgement based on the amount of the payment and the maximum payable in the relevant year. We have done this for claims over each of the four years from 2007/08 to 2010/11. It can be seen from the following chart that most claims are paid for a WPI of 20% or less. The change in payment rates will have little impact on the costs for these claims. However, for claims with a WPI of 50% or more, the additional costs will be significant.



The above chart also shows that there has been an apparent shift in the distribution from lower to higher WPI claims over the four year period covered. This increases the uncertainty around any estimates of the cost of this option. Using the distribution from the 2010/11 year would suggest an increase in costs of almost 50 per cent, while the 2007/08 distribution would roughly halve the additional cost.

Based on these distributions, we estimate that the additional liability arising from this option would be between \$50 million and \$100 million.

Note that all of these costings have been undertaken in a short time period and with little opportunity for checking apart from general reasonableness checks. They should therefore be treated as a broad guide to possible costs rather than an accurate quantification.

6

Please feel free to ring me on 6263 4160 or Peter Martin on 6263 4127 if you wish to discuss any of these matters.

Yours sincerely



Susan Antcliff

Actuary

Australian Government Actuary

# APPENDIX E

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## HAWKE REPORT RECOMMENDATIONS

### RECOMMENDATION 1

That the Minister for Employment and Workplace Relations confer with the Minister for Veterans' Affairs to appoint the CEO of Comcare as an ex-officio member of the Military Rehabilitation and Compensation Commission (MRCC) or a non-ADF member of the Department of Defence, with responsibilities to liaise with Comcare.

### RECOMMENDATION 2

The Department of Employment and Workplace Relations (DEEWR) should provide administrative support to the Safety Rehabilitation and Compensation Commission (SRCC) to provide a separation of powers from the body (Comcare) that the SRCC is regulating.

### RECOMMENDATION 3

The SRCC should establish a more robust regulatory framework to monitor the claims management performance of Comcare as a determining authority, using relevant aspects of the arrangements currently in place for licensees.

### RECOMMENDATION 4

4(a): The Minister appoint a member other than from DEEWR to represent the Australian Government premium payers on the SRCC.

4(b): DEEWR continue to be an SRCC member in its capacity as the policy "owner" of the SRC Act.

### RECOMMENDATION 5

The SRCC should establish a consistent year-to-year approach to the methodology it uses for setting the license fees for each tier status under the Licensee Improvement Program (LIP) and engage in an education campaign to explain this to the licensees.

### RECOMMENDATION 6

The *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) should be amended to allow the SRCC to grant group licenses to companies of licenced self-insurers with more than one entity, subject to satisfying all prudential requirements, in order to reduce administrative costs for scheme participation.

### RECOMMENDATION 7

The moratorium and competition test should be lifted, allowing national employers to join the Comcare scheme.

### RECOMMENDATION 8

The SRCC should establish a process to satisfy itself that each applicant for self insurance under the SRC Act meets the criteria associated with determining that they are a national employer.

### RECOMMENDATION 9

The SRC Act be amended to allow the ACT Government and other SRC Act premium payers to apply and be approved as a determining authority, subject to meeting the same audit and performance reporting requirements for licensees under the Comcare Scheme.

### RECOMMENDATION 10

Comcare and the Department of Finance and Deregulation collaborate to develop the appropriate financial framework to support recommendation 9.

### RECOMMENDATION 11

Comcare review its position following the *Hardin* decision and consider implementing a revised policy that recognises Comcare's role in supporting premium payers' rehabilitation processes, in an administrative capacity.

## **RECOMMENDATION 12**

Further consideration be given to clarifying Comcare's role in rehabilitation under the SRC Act, as part of the Hanks Review.

## **RECOMMENDATION 13**

In order to improve rehabilitation and return to work outcomes for the premium payers, Comcare should deploy an audit program to selected premium payers against the requirements of the rehabilitation management systems tool, and work with them to improve their rehabilitation management systems to a comparable level of the licensees, and report progress to the SRCC.

## **RECOMMENDATION 14**

The SRCC should modify the LIP and tier model to provide a framework so that the level of regulatory contribution paid by premium payers is linked to their rehabilitation performance. This would provide a direct incentive for improvements to rehabilitation performance.

## **RECOMMENDATION 15**

That the Minister for Employment and Workplace Relations consult his State and Territory counterparts about establishing a National Rehabilitation framework for injured workers aimed at optimising the return to work opportunities of injured workers throughout Australia.

## **RECOMMENDATION 16**

As the claims manager for the premium paying side of the scheme, Comcare should continue to take steps to proactively manage its claims. As a priority, Comcare should continue to implement strategies to reduce the likelihood and severity of workplace injuries in Comcare and share their learning with other Commonwealth agencies in line with Comcare's Strategy 2015 objectives to "improve return to work practices by sharing best practice and case studies".

## **RECOMMENDATION 17**

Comcare review initial claims acceptance rates in order to determine the reasons for the increase in injury claims acceptance rates.

## **RECOMMENDATION 18**

18(a): Comcare should establish a reporting and monitoring framework that assesses performance improvements to measure the ongoing effectiveness of its claims management outcomes and report to SRCC.

18(b): Comcare should provide a comprehensive training program for its Claims Service Officers (CSOs) to arm them with the necessary skills and support tools for their roles.

## **RECOMMENDATION 19**

Comcare collaborate with premium payers to develop a shared understanding of the processes to be adopted and the outcomes to be achieved by the High Risk Claims Management initiative.

## **RECOMMENDATION 20**

Comcare expand its Clinical Panel resources to enable more timely treatment reviews of all current and new claims.

The Hanks Review should consider reviewing the medical treatment provisions of the SRC Act to provide a stronger emphasis on the provision of evidence based treatment.

## **RECOMMENDATION 21**

As part of the enhanced regulatory framework for Comcare proposed in this Report, Audit Committee reports should be made available to the SRCC.

## **RECOMMENDATION 22**

22(a): All the KPI results reported to the SRCC should be made available to premium payers through publication on Customer Information System (CIS). This should include a comparison of performance of the premium payer side of the scheme and the licensees to enable premium payers to compare their individual performance with broader Comcare scheme trends.

22(b): Comcare should consider implementing a process to auto-generate key reports for selected premium payers and provide these reports to nominated staff in order to ensure senior management awareness of performance trends.

22(c): Reports should be developed to monitor and report on performance against the SRCC endorsed Key Performance Indicators (KPIs) and targets at an individual premium payer level. The KPI results for each premium payer and licensee should be made available to them through the CIS, along with a comparison with the premium payer side of the scheme and licensees.

22(d): The individual KPI outcomes should be communicated with premium payers and Comcare should work with premium payers to develop and implement plans to improve performance on a case by case basis.

### **RECOMMENDATION 23**

23(a): In order to improve claims management outcomes for the premium payer side of the scheme, SRCC should, as part of its improved regulatory framework for Comcare, develop and implement a detailed and structured program to regularly audit and improve the claims management systems tool and claims management systems.

23(b): Comcare implement a follow up claims management systems audit conducted by an external firm with experience in conducting similar audits with licensees.

### **RECOMMENDATION 24**

Comcare commission an independent performance audit of its ongoing claims management, focussing on:

- aggravations of pre-existing conditions; and
- secondary medical conditions and the like.

This audit should contain an examination of better practice in this area.

Comcare should develop KPIs that monitor performance in the ongoing management of claims.

### **RECOMMENDATION 25**

Comcare commission an independent performance audit of its calculation of incapacity payments, in particular:

- initial calculations;
- calculations made under Section 20, 21, 21A; and
- supporting processes such as Section 8 determinations and notifications under Section 114B.

This audit should also contain an examination of better practice in this area.

### **RECOMMENDATION 26**

- Comcare be converted to an FMA Act agency to resolve the complexities and inconsistencies around Comcare as a CAC Act body, while allowing Comcare to retain as little or as much independence to conduct its business as the Government deems appropriate.
- As part of converting Comcare to an FMA Act agency, consideration be given to establishing an advisory board, made up of industry experts, for the purposes of advising and supporting the Chief Executive.

### **RECOMMENDATION 27**

- The Commonwealth Government's role in providing supplementary funding to Comcare when its liabilities exceed its assets should be clearly established;
- Comcare should work with DEEWR to finalise the prudential management strategy;
- Consideration should be given to amending the SRC Act to enable Comcare to recognise the full value of the premium fund assets in the CRF in its financial statements;
- Comcare should report a 75 per cent probability of sufficiency for its liability reserving basis in its financial reports; and
- The SRC Act should be amended to make it clear to what extent the Government is able to provide supplementary funding to the Comcare premium-funded scheme (over and above the provisions in Section 90C(3)) in the event of a catastrophe.

### **RECOMMENDATION 28**

Comcare should establish two separate funds (one for the Commonwealth and one for the ACT) in the interests of transparency and to enhance the incentives and price signals.

### **RECOMMENDATION 29**

Comcare conduct an information campaign to ensure premium paying agencies have a better understanding of the Premium Framework, especially the inputs into and the methodology used to calculate premiums and the distribution of premiums across agencies.

**RECOMMENDATION 30**

In order to assist stakeholders with their budgeting processes, Comcare should develop an estimating tool for use by premium paying stakeholders throughout the financial year to help them understand their likely premium requirements for the upcoming financial year and also consider bringing forward the timing of the premium determination.

**RECOMMENDATION 31**

Comcare to review its current methodology for determining the yearly licensing fees for licensees and engage in a communication campaign to better educate self-insured licensees on the methodology used.

**RECOMMENDATION 32**

Comcare to introduce the practice of notifying self-insured licensees no later than 31 January of the current financial year of the licensing fees to be paid to enable the organisation to budget appropriately for their workers' compensation expenses.

**RECOMMENDATION 33**

Comcare should seek to have the Minister for Finance and Deregulation reconsider the current notional interest rates applied to the CRF in an effort improve their ability to keep pace with the increasing costs of claims liabilities.

