



Australian Government

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## **SENATE STANDING COMMITTEE ON ECONOMICS —INQUIRY INTO SCHEDULE 4 OF THE *FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (FURTHER ELECTION COMMITMENTS AND OTHER MEASURES) BILL 2011***

### **SUBMISSION BY COMCARE—JUNE 2011**

#### INTRODUCTION

Comcare contributes to a safer, fairer, more productive and socially inclusive Australia. The Comcare scheme is a national, integrated work health safety, rehabilitation and compensation system, with compensation claims determined and paid by Comcare or the relevant licensed self-insurer or its contracted claims manager.

Comcare is established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and has a number of powers and functions conferred under the SRC Act to ensure an early and safe return to work and access to compensation for injured workers.

Comcare administers the Commonwealth workers' compensation scheme for all Commonwealth departments and most Commonwealth authorities, providing safety, rehabilitation and compensation services. Self-insurers, licensed by the SRCC, provide the same services to their employees. The system administered by Comcare, and the licensed self-insurers, provides access to compensation for employees who are injured or ill as a result of their employment.

This submission has been written from two perspectives:

- > as a compensation payer—as administrator of the Commonwealth workers' compensation scheme, in which Comcare is the compensation payer for injured workers of the Commonwealth and the ACT Government ('premium paying agencies')
- > from a broader policy perspective—as the regulator of the SRC Act, which also includes regulation of the licensed self-insurers who pay compensation under the SRC Act to their own injured workers. (However, this submission is not made on behalf of the licensed self-insurers who may make separate submissions.)

## HOW COMCARE CLAIM PAYMENTS ARE MADE?

When a worker of a premium paying agency is injured at work, a claim for compensation can be lodged with Comcare.

### **Step 1—Comcare determines the claim**

While Comcare is determining the claim, a worker can access accrued paid leave from their employer to achieve continuity of income.

Where a worker does not have any accrued leave, the worker may approach Centrelink for some type of benefit to be paid until their claim is accepted.

### **Step 2—Comcare pays compensation benefits**

Once a claim is accepted, Comcare pays compensation benefits.

Compensation for time off work is usually paid by Comcare to the employer. The employer will deduct the value of any paid leave and re-credit the employee with that leave, paying any balance to the employee.

In situations where a worker has separated from the Commonwealth, as is often the case with long-term injured workers, compensation for time off work is paid directly to the worker.

There are a number of other benefits payable to workers under the SRC Act for work related injury or illness. These are:

- > permanent impairment—lump sum
- > non-economic loss
- > damages (common law for non-economic loss)
- > redemption of weekly compensation payments
- > death—lump sum
- > death—dependent child weekly sum
- > funeral expenses
- > medical expenses
- > household services
- > attendant care services
- > rehabilitation assessment
- > rehabilitation program
- > medical examination
- > loss of or damage to property
- > aids, appliances and modifications
- > travel.

Further information about benefits payable under the SRC Act is contained at **Attachment A**.

## CURRENT COMCARE/CENTRELINK INTERACTION

Currently, Comcare interacts with Centrelink in relation to social security payments in a number of different ways. The interactions are driven by a notice sent by Centrelink to Comcare, based on disclosure of compensation claim details to Centrelink by the injured worker.

The most common interaction relates to situations where access to weekly benefits to a worker is delayed—for example, where claim liability is in dispute. Where Comcare is put on notice by Centrelink, Comcare must seek details of any **payback** to Centrelink prior to releasing any compensation payment.

Because of the nature of the Comcare scheme, very little interaction between Comcare and Centrelink is driven by lump sum payments.

## THE BILL

The *Streamlining Notification Processes for Compensation Recipients* budget measure was announced in the 2010–11 Budget. As a result, the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further Election Commitments and Other Measures) Bill 2011* (the Bill) was introduced into the House of Representatives on 23 March 2011.

The Bill seeks to amend social security legislation to make it a legal requirement that compensation payers, such as insurance companies and statutory authorities, notify Centrelink at least 14 days before any personal injury compensation payments are made, or the rate of compensation changed.

In summary, schedule 4 of the Bill requires compensation payers to notify Centrelink at least 14 days prior to:

- > payment of a lump sum of **recompense**
- > first payment of periodic payments
- > payment of arrears of periodic payments
- > changing the amount of periodic payments
- > changing the period of periodic payments
- > a final periodic payment.

A recent amendment to the Bill noted that the provisions outlined above do not have to be adhered to where a person/insurer has entered into a notification agreement with the Secretary of FAHCSIA.

The policy intent of the Bill is to reduce the risk of individuals incurring unnecessary debt to the Commonwealth and receiving income support payments to which they or their partner are not entitled. Comcare strongly supports the policy intent of the Bill. There are some challenges that Comcare has identified in the way that this policy intent has been put into practice via the Bill. Comcare welcomes the opportunity to work with FAHCSIA to resolve these challenges so that the policy intent of the Bill can be fully realised.

The Comcare CEO is a member of the Heads of Workers' Compensation Authorities (HWCA). HWCA is a group comprising the Chief Executives (or their representatives) of the peak bodies responsible for the regulation of workers compensation in Australia and New Zealand. This includes Australia's ten workers' compensation authorities (six States, two Territories and two

Commonwealth), the Department of Veterans' Affairs and the New Zealand Accident Compensation Corporation.

The issues raised by Schedule 4 of this Bill have been canvassed by HWCA as well as other accident compensation agencies.

## CHALLENGES

### **1167A(1)(a) Payment of a lump sum of 'recompense'**

Confirmation of the definition of the term 'lump sum of recompense' is urgently required in the Bill. The definition of recompense contained in s17(7) appears to include all types of compensation payments such as medical expenses, household services and attendant care services where payment is usually made to a third party or service provider not to the injured worker. Is it the intention of the Bill that Centrelink is notified 14 days prior to payment being made for this type of compensation? If so, the likely impact is that payments to health providers will be delayed. The potential ramifications of this delay could lead to:

- > health providers less likely to want to treat compensation recipients
- > prices for health services to compensation recipients may rise to compensate for delayed payment
- > health providers may be less likely to bill insurers directly, requiring direct payment from injured workers who will suffer from delayed reimbursement.

### **1167A(1)(b) First payment of periodic payments**

Comcare received 3990 claims in the 2010 calendar year. Licensed self-insurers received 6684 claims.

At a jurisdiction wide level, 10674 claims were received in the 2010 calendar year, and 5428 initial incapacity payments made.

In many cases, the initial compensation payment was made within 14 days of the claim being received by the **compensation payer**<sup>1</sup>

The potential ramification of this requirement is a delay in compensation payments being made to injured workers (or to their employer in reimbursement of paid leave taken pending payment).

Urgent clarification is required surrounding the usual practice of employers continuing to pay injured workers post lodgement of compensation claim out of their accrued leave. How does this practice interact with the s1167A(1)(b)? If this practice were to be upset by the operation of s1167A(1)(b), there are very real and immediate financial impacts upon the injured worker at a time where financial stability is essential.

### **1167A(1)(c) Payment of arrears of periodic recompense**

Urgent clarification of the meaning of **arrears of periodic recompense** is required in the Bill. It is difficult to assess how this provision will work in practice due to the very broad definition of **recompense** coupled with no clarification around the term **arrears**. For example, in a situation where periodic payments are made for home help, and this payment is delayed for four weeks,

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<sup>1</sup>In the Comcare scheme, a compensation payer is either Comcare or a licensee (self insurer) under the SRC Act.

and then four weeks payment made at one time, does this payment invoke the notification provisions?

### **1167A(2)(a) Changing the amount of periodic payments and 1167A(2)(b) Changing the period of periodic payments**

The focus of the SRC Act is an early and safe return to work and access to compensation for injured workers.

In the early stages of a workers' compensation claim, many workers will be on what is known as a **graduated return to work**. A graduated return to work allows an injured employee to return to work on reduced hours or duties when they are unable to return to their full pre-injury hours or duties initially.

What this means is that while many workers—particularly during the first 45 weeks of incapacity—may not notice any difference in their pay packet, in fact, behind the scenes, the ratio between salary (for hours actually worked) and compensation (the difference between salary amount and pre-injury earnings) changes frequently. While a graduated return to work is unique to each individual work, a common scenario would be for the compensation amount to change on a weekly basis over a 12-week period.

The SRC Act also provides long-term income support. If a workers' full recovery from injury is delayed, workers' compensation under the SRC Act can be paid until age 65. At a minimum, the amount of periodic payment to each of these long-term injured workers will change once a year through annual indexation.

Comcare estimates that, based on data from the 2010 calendar year, approximately 30 000 notifications would need to be provided to Centrelink annually under s1167A(2)(a) and s1167A(2)(b).

Potential ramifications include:

- › Impact upon return to work rates—if compensation payments to injured workers are delayed because of notification provisions, this could impact the motivation of an injured worker to return to work—there is in fact an incentive to not increase hours at work so that the notification provisions are not invoked.
- › Significant compliance costs for compensation payers under the SRC Act.
- › For Centrelink—there is a real question as to how they will be able to reconcile the volume of notifications received with the details of Centrelink payees, given that a Centrelink reference number will not be provided.

### **1167A(3) A final periodic payment**

For some workers the first compensation payment is also the last payment, for many it is not. Periodic payments may cease for various reasons and may recommence after having ceased. With the exception of a small subset whose payments continue up to age 65 and must cease at that age, it is very difficult to predict or identify a final periodic payment.

### **1167A(3B) Notification agreements**

A recent amendment to the Bill provides that if a suitable agreement is entered into with the Secretary of FAHCSIA, then this will supersede the notification provisions of schedule 4. It is anticipated that a suitable agreement would involve providing Centrelink with a periodic data download of compensation payments made.

One of the problems identified with this option is that **post payment** notifications would require Centrelink to continue to recover overpayments of income support, undermining the policy objective of the Bill to reduce the risk of compensation recipients incurring an income support debt due to receipt of unreported compensation payments. This is a particular problem in cases where a significant back-payment is made, for example following a lengthy AAT or Court process.

At this stage, FAHCSIA and/or Centrelink have not confirmed:

- > the form of the agreement
- > whether there will be a template agreement, or whether each agreement will be individually tailored
- > who the agreement would be between, i.e. in Comcare's case would the agreement be at the jurisdiction level, or with each individual licensed self-insurer?

## THE WAY FORWARD

As mentioned above, Comcare is strongly supportive of the policy intent of the Bill. While the Bill in its current iteration presents significant compliance costs and challenges for practical implementation, Comcare would welcome the opportunity to work with FAHCSIA to develop a solution that meets the policy objective while reducing the regulatory burden. Some examples of potential solutions are provided below.

### **Potential solution one—HOSC Act/Centrelink solution**

The compensation notification obligations under section 23 of the *Health and Other Services Compensation Act 1995* (HOSC Act) have long presented a administrative challenge for compensation payers.

Section 23 of the HOSC Act requires Comcare to notify Medicare Australia in writing of any judgment or settlement made in respect of a workers compensation claim. The notification is required to allow Medicare to issue a Notice of Charge, setting out an amount that Comcare will be obliged to reimburse Medicare in respect of medical treatment received by the worker in relation to his or her compensable injury, which have been paid by Medicare.

If the Bill were amended to remove schedule 4, an opportunity presents to innovate and present a package of notification measures that meets the needs of the HOSC Act as well as Centrelink.

Comcare has expertise and experience as a compensation payer, and would be pleased to work with FAHCSIA to build a notification package that balances the policy objectives of Government together with administrative efficiency (including reduced compliance costs).

### **Potential solution two—Comcare claim form solution**

Comcare has the expertise to assist FAHCSIA in developing other more specific solutions as well.

As indicated in the section above titled *How Comcare claim payments are made*, when a worker is injured at work, a claim can be lodged with Comcare. Once a claim is accepted, Comcare pays compensation benefits.

While Comcare is determining the claim, a worker can access accrued paid leave from their employer to achieve continuity of income. Where a worker does not have any accrued leave, the worker may approach Centrelink for some type of benefit to be paid until their claim is accepted.

Alternatively, Centrelink may ask applicants to lodge a claim with Comcare where their requirements for benefits may be due to the effects of a potentially compensable condition.

Through these circumstances, an employee may apply and receive Centrelink benefits while waiting for liability to be determined for their compensation claim.

- › If an employee receives Centrelink benefits prior to liability being accepted and Comcare subsequently accepts liability, Comcare is required to repay monies claimed by Centrelink for any period after the date of injury.
- › Comcare is not liable to repay monies received before the date of injury.

Centrelink can seek to recover monies from an employee's incapacity payments or from a lump sum redemption payment using existing provisions under the *Social Security Act 1991* or the *Social Security (Administration) Act 1999*. The number of employees who receive both Centrelink and Comcare payments are small (dual recipients).

Comcare does have in place existing procedures that can be modified to potentially identify all dual recipients for Centrelink which would obviate the need for the proposed amendments (s1167A of the Bill).

Section 54 of the SRC Act provides that compensation is not payable to a person under the SRC Act unless a claim for compensation is made and that the claim should (ordinarily) be a written claim in accordance with the form approved by Comcare.

It is through an amendment to the claim form that Comcare can provide Centrelink with timely, accurate data on the identity of dual recipients of both compensation payments and Centrelink payments.

By amending the current claim form to include a section whereby compensation claimants are required to declare the actual or intended receipt of **other government payments** Comcare would be in a position to regularly provide details of actual or potential dual recipients to Centrelink (subject to not offending any Privacy Act principles). This could be formalised in a Memorandum of Understanding between Comcare and Centrelink. This targeting of actual and dual payment recipients may be a more efficient way of providing Centrelink with timely, relevant data.

Moreover, Comcare currently collects this specific information, that is payments received from other Government agencies, through a *Periodic Review Form* that is completed by all workers' compensation recipients on a 12 month basis. By adding this requirement to Comcare's claim form all dual payment recipients could be identified in an efficient manner.

## CONCLUSION

The effects of the Bill as currently drafted will not fully be known until clarification of some of the challenges identified by Comcare is achieved. It is possible that the cost of compliance with the Bill will increase Comcare's administration costs and this would flow through to increased workers' compensation premiums under the SRC Act—payable by Commonwealth agencies and the ACT Government.

As mentioned above, Comcare strongly supports the policy intent of the Bill and is committed to helping the Government achieve the policy intent.

## ATTACHMENT

Attachment A—Benefits payable under the SRC Act

# ATTACHMENT A

## BENEFITS PAYABLE UNDER THE SAFETY, REHABILITATION AND COMPENSATION ACT 1988

### Incapacity benefits

Injured workers may be entitled to receive weekly income support (usually paid fortnightly), known as incapacity benefits, while they are unable to work as a result of an accepted work-related injury or illness. The incapacity benefit is not a pension. It is aimed at compensating workers for the loss of income until they are able to return to work and/or recover from the work-related injury or illness.

The period when a worker is away from work and eligible to receive incapacity benefits is known as compensation leave. When a worker is on compensation leave, compensation is payable at a rate equal to 100% of their normal weekly earnings (NWE), less any amount they are actually earning or able to earn in suitable employment (AE), for up to a total of 45 weeks.

If as a result of a work-related injury or illness the worker requires a period of compensation leave longer than a total of 45 weeks, compensation is calculated based on the percentage of normal weekly hours they worked during the week, less AE.

These percentages are:

% Normal weekly hours worked	% Normal Weekly Earnings (NWE)	Compensation payable
Not working	75%	75% NWE
25% or less	80%	80% NWE - Actual Earnings (AE)
More than 25% but not more than 50%	85%	85% NWE - AE
More than 50% but not more than 75%	90%	90% NWE - AE
More than 75% but less than 100%	95%	95% NWE - AE
100%	100%	100% NWE - AE

A worker's access to fortnightly payments cease when they reach 65 years of age, unless the following applies:

- > the worker was injured after 1 October 2001 and was aged 63 years or over at the date of injury or
- > the worker was injured before 1 October 2001, was aged 63 years or over at the date of injury and was receiving fortnightly payments at 1 October 2001.



Workers who meet the above criteria are able to access a maximum of 104 weeks of incapacity benefits, irrespective of turning 65 years of age.

Turning 65 years of age will not affect other benefits a worker may be entitled to under the SRC Act, such as medical treatment and attendant care.

A workers incapacity benefits will change in response to any change in their NWE, AE and, after the first 45 weeks of payment, changes in the hours worked.

### **Permanent impairment—lump sum**

If a worker's work-related injury or illness results in a permanent impairment (i.e. an impairment that is likely to continue indefinitely), they may claim for a lump sum payment for their physical loss.

The permanent impairment lump sum is intended to compensate for the physical loss of any body part, system or function as a consequence of the work-related injury or illness. A separate **non-economic loss** lump sum is provided for the impact of the injury or illness on an individual's lifestyle.

The sum of permanent impairment compensation a worker is eligible to receive is determined by the medical assessment of the worker according to Comcare's Guide to the Assessment of the Degree of Permanent Impairment (the guide). The guide informs a doctor about how to make an assessment and what different impairments are available for the full range of bodily systems and functions.

By using the guide, a doctor is able to make a determination on the **degree of permanent impairment** suffered by the worker—a ranking which is expressed as a percentage. This percentage represents the quantum of compensation the worker is able to access from the maximum lump sum for permanent impairment. (See Attachment A for the current maximum lump sum for permanent impairment).

In most cases, to be eligible for a lump sum payment, a doctor must assess the worker as having a permanent impairment of at least 10%.

A permanent impairment payment does not affect other benefits a worker may be entitled to under the SRC Act.

### **Non-economic loss**

To have access to non-economic loss compensation, a worker must first have access to the permanent impairment lump sum.

Non-economic loss may be characterised as the **lifestyle effects** of a physical impairment. **Lifestyle effects** are a measure of an individual's mobility and enjoyment of, and participation in, social relationships, and recreation and leisure activities.

Consequently, while workers may have equal ratings of physical loss it would not be unusual for them to receive different ratings for non-economic loss because of their different lifestyles.

The compensation payable for non-economic loss is divided into two equal amounts. The formula to calculate the total payable in an individual case is:

$$\text{\$ Total lump sum} = \text{A} + \text{B}$$

In the above formula, component A is the percentage of total permanent impairment (or **the degree of permanent impairment**) suffered by the worker, multiplied by the first half of the maximum rate.

Component B is a certain percentage of the second half of the maximum rate, having regard to the non-economic loss suffered by the worker. This percentage is arrived at through the completion of a questionnaire on the effects of the injury on the worker's lifestyle.

### **Damages (common law for non-economic loss)**

There is also an alternative to claiming compensation for permanent impairment and non-economic loss. Pursuant to section 45 of the SRC Act, it is possible for a worker to bring an action or proceeding against an employer or another worker for damages. However, such an election is irrevocable and if successful, damages are limited to a maximum of \$110 000.

### **Redemption**

If a worker is in receipt of a fortnightly payment, and if that payment is less than the **threshold amount**, the determining authority must convert the fortnightly payments into a lump sum—known as a redemption payment. The redemption **threshold amount** is updated each year in line with other statutory rates.

A determining authority will only approve a redemption payment if the level of the worker's inability to work is unlikely to change. After the payment of a redemption lump sum the worker will no longer receive fortnightly payments, although they might again become eligible to receive fortnightly payments if they are not able to engage in work indefinitely.

A redemption payment does not affect other benefits a worker may be entitled to under the SRC Act.

### **Death—lump sum**

If a worker under the Comcare scheme dies as a direct result of a work-related injury or illness, a once off lump sum payment may be claimed by dependants of the deceased person.

Where there is more than one dependent, the lump sum payment must be apportioned between the individual dependents.

The death lump sum is updated annually.

### **Death—dependent child**

If the deceased person had dependent children at the date of death, each child under the age of 16, or aged between 16 and 25 and receiving full-time education and not working, may access fortnightly payments of compensation. The weekly payment rate for dependent children is updated annually.

### **Funeral expenses**

Assistance with funeral expenses may be accessed by any person or business responsible for the deceased's funeral arrangements—e.g. a funeral service provider. The payment rate for funeral expenses is updated annually.

## **Medical expenses**

A determining authority may reimburse all reasonable medical, hospital, pharmaceutical and other treatment costs incurred by a worker, where there is an accepted claim for a work-related injury or illness.

In most cases, this will be medical treatment provided by a legally qualified medical practitioner. However, it could also include treatment by registered physiotherapists, osteopaths, chiropractors or masseurs for the purpose of easing the effects of a work-related injury or illness.

The determining authority has no role in deciding what treatment workers should or should not receive. Its role is only to decide whether payment for such treatment is reasonable as part of the compensation claim.

## **Household services**

If a worker's compensable injury or illness creates a need for assistance with home duties, the determining authority may pay for the provision of household services. Household services are services of a domestic nature needed for the proper running and maintenance of a household (e.g. cooking, house cleaning, laundry and gardening services).

A determining authority will not normally pay for services that could be reasonably expected from other members of a worker's family. Payment for household services is subject to two further limits. The first is a weekly maximum limit. This limit is updated annually. The second is a maximum hourly rate payable to providers of the service.

## **Attendant care services**

A determining authority may also approve attendant care services for a worker, if they are required as a result of the worker's compensable injury or illness. These are services of a personal nature and include things like help with washing and dressing.

Payment for attendant care is subject to a weekly maximum limit, which limit is updated annually.

## **Rehabilitation assessment**

Under the Comcare scheme, the overall management of occupational rehabilitation following a work-related injury or illness to a worker is the responsibility of their current employer. If the worker is no longer employed, their previous employer or its successor is responsible for supporting their return-to-work.

Following the notification of a work-related injury or illness, the employer may at any time require the worker to undergo a rehabilitation assessment to determine if they are capable of undertaking a rehabilitation program. Depending on the complexity of the injury or illness, this assessment may be undertaken by a Comcare approved rehabilitation provider who specialises in occupational rehabilitation.

An injured person may also voluntarily request a rehabilitation assessment from their employer. If an assessment is requested, the employer is obliged to arrange for one.

## **Rehabilitation program**

Based on the rehabilitation assessment, the employer may be required to develop a rehabilitation program for the injured worker and provide them with advice about the rehabilitation program they will be required to undertake following that assessment. Depending

on the complexity of the injury or illness, an approved rehabilitation provider may be engaged to develop the program.

### **Medical examination**

After receiving a claim for workers compensation, a determining authority may require a worker to undergo a medical examination by a doctor nominated by the determining authority. If a worker is required to undergo a medical examination, the travel expenses incurred by that person for having this examination performed may be reimbursed by the determining authority.

### **Loss of or damage to property**

In the SRC Act, **property** is defined as an artificial limb (or other artificial substitute), or a medical, surgical or other similar aid or appliance, used by the worker.

If a worker is involved in a work-related accident which does not cause injury to the worker, but results in the loss of or damage to property used by the worker; the determining authority may be liable to pay for the repair or replacement of that property. This includes any medical consultation fees or charges incurred by the employee.

### **Aids, appliances and modifications**

A determining authority may also approve the provision of any aid or appliance that a worker may reasonably require as a result of a compensable injury or illness.

This may include such items as backrests, telephones for the visually impaired, door openers and angled writing boards.

A determining authority may also provide financial help for essential home, workplace and car modifications that are required as a result of the injury or illness.

To have access to these benefits, a worker must be undertaking, have completed, or have been assessed as not capable of undertaking a rehabilitation program.

### **Reimbursement for travel**

A determining authority may reimburse expenses related to travel to attend **medical treatment** in the following cases:

- > the condition reasonably requires use of an ambulance or public transport, including a taxi
- > a private motor vehicle is used for travel to attend medical treatment and the distance travelled for any one-off treatment session is more than 50 kilometres for the round-trip.

If a private motor vehicle is used, the determining authority will pay a specific rate per kilometre travelled (this rate is updated as appropriate). If public transport is used, the determining authority will reimburse all reasonable costs associated with that transport.

If a **rehabilitation assessment** is undertaken, Comcare must reimburse all actual and reasonable expenses related to travel and accommodation necessary for the purpose of attending the assessment.

Likewise, if a **medical examination** is undertaken, Comcare must reimburse all actual and reasonable expenses related to travel and accommodation necessary for the purposes of attending the examination.