



**Comcare**

AUSTRALIA'S *support* WORKPLACES

Office of the Chief Executive Officer

GPO Box 9905 Canberra ACT 2601

Tel 02 6275 0001

Ms Cheryl Scarlet  
Secretary  
Standing Committee on Employment and  
Workplace Relations  
Australian Parliament House  
CANBERRA ACT 2600

Dear Ms Scarlet

The attached paper is intended to clarify certain issues raised by the Community and Public Sector Union when they appeared before the Standing Committee on Employment and Workplace Relations on 26 November 2002.

The paper is intended to supplement Comcare's submission and may be published on the Committee's website.

If I can assist with any further information, please do not hesitate to contact me.

Yours sincerely

Noel Swails  
Acting Chief Executive Officer

15 January 2003

*'Comcare itself, in its submission to the committee, has highlighted the fact that a good system includes union representation.'* (Transcript p. 364)

Comcare's submission noted that the literature has identified a variety of factors as 'contributing' (both positively and negatively) to different safety records across industries—and that these factors may be categorised as institutional, structural, physical, organisational (including union involvement), individual and social (p.32). The submission did not draw any conclusions about union representation.

While some of the literature sees organised labour as the key to safeguarding the worker, others have stressed the importance of employee participation more broadly. For example, in its 1995 report, the Industry Commission found that employee involvement 'is crucial to successful solutions to OHS problems', but recommended that the forms of participation and consultation should be left to the employees in each workplace (Industry Commission, *Work, Health and Safety: an Inquiry into Occupational Health and Safety*, Report No. 47, vol. 1, AGPS, 1995, p. xxxv).

*'I believe that when reasonable disciplinary action was written into the act it was intended to mean formal disciplinary action ... Bit by bit, Comcare have been knocking back claims to the point now where any conflict between a manager and a staff person is quite often coming into this exclusion.'* (Transcript pp. 365-366)

The *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) definition of 'injury' specifically excludes 'disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee'. As the provision indicates, a number of conditions must be met before this exclusion applies:

- there must have been 'disciplinary action' taken against the employee;
- the claimed condition must be 'as a result' of that action; and
- the disciplinary action must have been 'reasonable'.

Employees of the Commonwealth are subject to a body of duties and such rules of conduct or behaviour as are applicable to and enforceable against the employee by virtue of his or her employment by the Commonwealth. This is the relevant 'discipline'.

When the SRC Act commenced, the *Public Service Act 1922* (PS Act) provided for a consistent disciplinary code for all Australian Public Service employees whose conditions of employment were covered by that Act. However, not all Commonwealth employees were covered by this legislation and disciplinary provisions for non-PS Act employees were based on provisions contained in their relevant employing legislation, agreement or award.

Since the introduction of the *Public Service Act 1999* (PS Act 1999), agency heads have been required to develop procedures for determining whether an employee in their agency has breached the Code of Conduct contained in that Act. Employees employed under other legislation continue to be covered by agency-specific disciplinary provisions.

Against this background, Comcare provides policy advice and training to assist claims managers to make decisions that are consistent with the intention of the legislation, as interpreted by relevant decisions of the courts and tribunals, taking into account legislative changes and the different disciplinary procedures and provisions that prevail in different Commonwealth agencies. Some of the basic principles that have been established by the courts and tribunals and that guide Comcare claims managers in the application of the exclusion are as follows.

In order for a claim to be excluded under the 'reasonable disciplinary action' provision it must first be established that 'disciplinary action' has occurred. 'Disciplinary action' means action taken to promote compliance with discipline: *Comcare v. Chenhall* (1992). It has been established that action taken to determine whether or not disciplinary action will be taken, such as an investigation or other steps that precede a decision to take disciplinary action, is not sufficient to invoke the exclusion: *Comcare v Chenall* (1992); *Re Murray and Comcare* (1998). Consequently, conditions arising from processes undertaken prior to disciplinary action being instituted are considered as part of the normal injury or disease provisions of the SRC Act.

Specific examples of action that *may* constitute disciplinary action are:

- counselling leading to a warning about unsatisfactory conduct in relation to an employee's work duties: *Re Rizkallah and the Australian Postal Corporation* (1991); *Choo v. Comcare* (1995). Note, however, that in *Re Quarry and Comcare* (1997) a counselling session and preparation of a 'Competency Needs Analysis', in the circumstances of the case, was found not to be disciplinary action;
- termination of employment: *Pandos and Commonwealth of Australia* (1991);
- suspension of employment: *Choo v. Comcare* (1995); and
- involuntary retirement: *Re Bennett and Comcare* (1992).

Disciplinary action does not include action taken by the Commonwealth as part of the general maintenance of discipline over employees of which the particular employee is but one: *Comcare v. Chenhall* (1992). A performance Management Scheme and associated inefficiency procedures have been found not to be 'disciplinary action': *Re Carson and Comcare* (1998). And the process of annulment of a probationary appointment has also been found not to

constitute disciplinary action: *Re Roderick and Telstra Corporation Limited* (1994).

As noted above, for the purpose of the exclusion, it is not sufficient to establish that disciplinary action has occurred. In *Telstra Corporation Limited v Warren* (1997) disciplinary action was established, but the court held that the injury could not be said to result 'solely from the disciplinary charges' and the exclusion did not apply. In the circumstances of *Re Inglis and Comcare* (1997), it was held that a 'performance review interview' was disciplinary action, but that it was not 'reasonable' because of the way in which it had been conducted. This was because there was no prior warning of a serious allegation of a breach of confidentiality and a requirement to respond to the allegation immediately. As the disciplinary action was found not to be reasonable, the exclusion did not apply.

As a review of the above cases suggests, the various conditions that must be met to establish the 'reasonable disciplinary action' exclusion, as interpreted by the courts and tribunals, mean that its application has not been widespread. In response to the position developed by the courts and tribunals, Comcare claims managers apply the exclusion only to the limited range of circumstances where they are satisfied that the requirements of the provision have been met.

*Updating Normal Weekly Earnings—'This is an issue which we wanted to raise as a supplementary issue ...' (Transcript p. 366)*

Under sections 19 - 22 of the SRC Act, Comcare is liable to pay compensation to employees where they are incapacitated for work. These sections prescribe different formulae to be used in calculating entitlements to take into account normal weekly earnings (NWE) and offsets for superannuation and other retirement benefits.

Most injured workers are paid directly by employing agencies but approximately 6000 receive incapacity payments direct from Comcare because they are no longer employed in the public service and, in the majority of cases, the agencies that employed them at the time of injury no longer exist.

Practically speaking, the only way Comcare could, until recently, keep abreast of changes to NWE for these ex-employees was to seek advice from employing agencies, or their successors, about pay details. It has often been difficult to get updates, particularly where agencies ceased to exist and, as in many cases, there were no more equivalent public service jobs.

Indexed pay increases were introduced via amendments to the SRC Act in July 2002 to resolve this problem.

Before indexation was effected, Comcare conducted a project to review whether the payments made to ex-employees were correct. Comcare is

following up a number of individual cases identified in the review with the agencies concerned.

*Claimant entitlements and expired AWAs (Transcript p. 368)*

Comcare understands that the Department of Employment and Workplace Relations has been asked to provide the Committee with information on the application of AWAs that have passed their nominal expiry date.

*'To say that stress is not worthy of attention as a workplace hazard is wrong. I think it needs the development of guidance material for dealing with issues. I take the view that Comcare have a role across Commonwealth employment, as an expert agency, to provide assistance and advice. By not doing it, I guess they are leaving it up to individual agencies to develop their own approaches.'* (Transcript p. 370)

Comcare believes that the issue of occupational stress is of significant concern and recognises it as an identifiable workplace hazard.

To assist Commonwealth employers to deal with occupational stress, Comcare has developed the following guidance material which is available on its website:

- *The Management of Occupational Stress in Commonwealth Agencies: Implementing an Occupational Stress Prevention Program;*
- *The Management of Occupational Stress in Commonwealth Agencies: A joint ANAO/Comcare Better Practice Guide for Senior Managers;*
- *Quality of Working Life Series: Supervisors' Handbook—Managing Staff with Stress Responses;* and
- *Counselling for Better Work Performance: A Joint PSMPC/Comcare publication.* This publication includes a section on occupational stress arising out of feedback and counselling.

The Safety Rehabilitation and Compensation Commission has approved Comcare undertaking a review of all its office based hazards guidance material and regulations. A review and update of the guidance material on occupational stress is incorporated in this process and is scheduled to occur in March 2003.