

Chapter 4

Key Issues:

The use of FND assessments to determine workers compensation claims

4.1 A second issue that was central to the inquiry was the contention by unions and employees that Australia Post has been using FND assessments obtained under the EIP and fitness for duty processes as evidence in workers compensation claims.

4.2 In its submission, the CEPU outlined the common practice within Australia Post when an employee is injured in the workplace:

Australia Post employees have little choice – they must visit a FND if directed. The FNDs in over 90% of cases send that employee back to work – even if it is to watch TV in a work lunchroom.

But if an employee follows the advice of a family doctor to take time off from work to recover and recuperate, what happens?

When the employee submits the official paperwork indicating that they experienced an incident or injury at work...it is referred to an internal workers' compensation delegate.

The delegate considers the advice of the family doctor and the FND – then issues a determination whether to accept liability for the injury/illness and liability for treatment costs and loss of time (Normal Weekly Earnings).¹

4.3 A number of concerns were raised regarding this issue, including whether it is in breach of Comcare's policies, or the *Privacy Act 1988*.²

Does the practice breach Comcare's policies?

4.4 In its submission, Australia Post stated that it is allowed to consider FND fitness for duty assessments when making decisions regarding workers' compensation claims because:

Under the provisions of the SRC Act and associated licence conditions Australia Post Claims Managers have the power to do all things necessary or convenient to be lawfully done for, or in connection with, the performance of functions under the SRC Act...

Having regard to these provisions Claims Managers are empowered to make decisions in relation to claims on the evidence provided to them or

1 CEPU (Communications Division), *Submission 10*, p. 20.

2 Chapter 5 discusses the related matter of Australia Post allegedly preferring the assessments of FNDs over family doctors and specialists.

where necessary seek additional evidence to assist with making a decision...

A Claims Manager will consider a fitness for duty assessment, along with other relevant information, when deciding whether a period of absence from duty should be accepted and paid as incapacity under the provisions of the SRC Act.³

4.5 However, the CEPU submitted that the practice breaches Comcare's policies, specifically its jurisdictional policy advice No 2000/05, entitled *Application of "Fitness for Duty" Provisions*, which states:

If information regarding an employee's medical condition is collected for an employment related purpose (for example, to record absences from work or to assess their fitness for duty) it should not, in principle, be used for a compensation-related purpose (for example, to support a decision to continue or cease liability).⁴

4.6 Ryan Carlisle Thomas Lawyers agreed with the unions on this issue, and in their submission explained the implications of an injury not being managed under the SRC Act:

...Australia Post's right to suspend all entitlements under the SRCA when a worker "unreasonably" refuses to participate in a return to work/rehabilitation program even when the worker is following the advice of their own doctor, is excessively harsh and used by Australia Post without hesitation as a weapon to pressure workers to return to work or risk being left without income and without access to medical treatment under the SRCA.⁵

4.7 In its submission, the CEPU informed the committee that it had raised the apparent inconsistency with Comcare, and was told that:

...Comcare can conclude that Australia Post's IMP [Injury Management Program] has been established as a mechanism to effectively manage employees injured at work by adopting the best practice approach of making available, through an FND, early diagnosis and treatment of injuries with an emphasis on matching an employee's current functioning to available duties in the workplace.⁶

3 Australia Post, *Submission 6*, p. 30.

4 Comcare, Jurisdictional Policy Advice No 2000/05, *Application of "Fitness for Duty" Provisions*, p. 2, available from www.comcare.gov.au/forms_and_publications/jurisdictional_policy_advices/jurisdictional_policy_advices_january_1999_-_december_2006 (accessed 2 April 2010).

5 Ryan Carlisle Thomas Lawyers, *Submission 8*, p. 5.

6 CEPU (Communications Division), *Submission 10*, p. 23.

4.8 Comcare also provided the committee with the results of a number of recent audits of Australia Post's compliance with the SRC Act.⁷ Mr Kibble, Comcare's Deputy Chief Executive Officer, stated that 'the audit did not identify any systemic issues with Australia Post's injury management system'.⁸

Privacy concerns

4.9 Australia Post's use of medical information given by employees for the purpose of fitness for duty assessments or under the EIP being used for the purpose of determining compensation claims also raises questions about compliance with the *Privacy Act 1988*.

4.10 The jurisdictional policy advice issued by Comcare in 2000, part of which is extracted above, states that 'with the employee's written permission' medical information obtained from an employee for an employment related purpose, may be used to determine a compensation claim.⁹ The advice continues:

Determining authorities which are also employing authorities may wish to consider seeking permission to grant access as a matter of course when they refer employees for fitness for duty examination.¹⁰

4.11 In its submission, Australia Post claimed that Principle 10 of the Information Privacy Principles and Principle 2 of the National Privacy Principles enable Australia Post to use medical information gathered by way of a fitness for duty assessment because:

Principle 10 of the Information Privacy Principles allows the use of personal information where 'the purpose for which the information is used is **directly related** to the purpose for which the information was obtained'.

Principle 2 of the National Privacy Principles allows the use of personal information for a secondary purpose where:

- (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection; and
- (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose.¹¹

7 Comcare, additional information, 10 February 2010, 'Claims Management Systems Audit Report'; 'Rehabilitation Management Systems Audit Report'; and 'Injury Management Systems Supplementary Audit Report'.

8 Mr Steve Kibble, Deputy Chief Executive Officer, Comcare, *Committee Hansard*, 12 February 2010, p. 81.

9 Comcare, *Jurisdictional Policy Advice No. 2000/05 Application for "fitness for duty" provisions*, 27 June 2000.

10 Comcare, *Jurisdictional Policy Advice No. 2000/05 Application for "fitness for duty" provisions*, 27 June 2000.

11 Australia Post, *Submission 6*, pp 32–33. Emphasis from original submission.

4.12 Australia Post argued that assessments by FNDs under the EIP and the Determination are 'directly related' to an employee's entitlements under the SRC Act because the EIP:

- (a) is intended only for injuries where a work relationship is indicated;
- (b) states that it interacts and must be read in conjunction with existing Australia Post policies and relevant legislation, including the Safety, Rehabilitation and Compensation Act; and
- (c) expressly states that, although FND assessment is not a medical examination for the purposes of establishing liability under the SRC Act, where appropriate the information may be accessed by the Claims Manager to assist in the determination of liability.¹²

4.13 The privacy principles quoted above only apply in the absence of consent. Australia Post advised that it obtains express consent from employees to use and disclose private, personal and medical information when 'an employee signs the current claim forms for compensation'.¹³ Furthermore, Australia Post stated that the information provided to employees when they are directed to attend a FND examination advises employees that:

The doctor will send your fitness for duty report to your supervisor or manager...If you submit a workers' compensation claim under the [SRC Act] the doctor may be requested to provide a copy of his or her report to a workers' compensation delegate.¹⁴

4.14 This approach, by way of Australia Post's claim form, has been approved by Comcare and is deemed by Comcare to meet the requirements of the SRC Act.¹⁵

4.15 With specific regard to Comcare's jurisdictional advice, Australia Post stated that it did:

...not accept that any of its policies or procedures related to employee health and safety, including EIP and FFD [fitness for duty] processes are in breach of the Privacy Act or Comcare policy.

There has been no finding that Australia Post has breached the Privacy Act or the Comcare jurisdictional advice...¹⁶

Committee comment

4.16 The committee is satisfied that Australia Post's use of FND assessments has been determined by Comcare not to breach Comcare's policies or privacy principles.

12 Australia Post, *Submission 6*, pp 32–33.

13 Australia Post, *Submission 6*, p. 31.

14 Australia Post, *Submission 6*, p. 33.

15 Comcare, *Submission 13*, p. 8.

16 Australia Post, *Submission 6*, p. 34.

However the committee suggests that there are further steps that Australia Post could take to better inform its employees and managers about the use of FND information, and to ensure its policies are consistent with best practice.

4.17 The committee recommends that every time an Australia Post employee attends an FND, either voluntarily or compulsorily, the uses to which the FND's medical assessment may be put, must be made clear in advance to the employee. Australia Post should bear the onus of ensuring that this occurs, and that its employees understand the implications of giving information to an FND. The committee advises that this information should be clear and upfront, and not contained in the fine print of EIP forms, compensation claim forms or other forms.

4.18 Furthermore, based on Comcare's advice that fitness for duty assessments should not, in principle, be used for compensation-related purposes, the committee recommends that Australia Post cease the practice of using medical assessments under the EIP as evidence in compensation claims. In the committee's view, it is inappropriate for employees to be required to attend an FND outside of the workers' compensation process, and for information obtained during that process to be used against their interests in determining a workers' compensation claim.

4.19 This process appears to be undermining the effectiveness of the EIP by causing employees to be sceptical of the objectives of the EIP. The committee considers that the EIP would be more effective in assisting workers to return to work and recover from injury, if employees felt assured that EIP medical assessments would not undermine their claims for workers' compensation. Accordingly, the committee recommends that the EIP and workers' compensation processes should be separated, and that medical information from the former should not be used in the latter.

Impact of the proposed new model for use of FNDs

4.20 The in-principle agreement reached between Australia Post and the CEPU regarding the use of FNDs may go part of the way towards addressing the committee's concerns related to this issue, by limiting and clarifying the circumstances in which employees may be directed to attend an FND.¹⁷ The new process also has the potential to reduce the perception amongst employees of being compelled to give information to an FND which may then be used against their interests. This will also diminish the current level of scepticism amongst employees about the EIP.

4.21 The proposed model also creates an opportunity for employees to be informed of the implications of giving information to FNDs at the point at which they are given the option of choosing to visit an FND or their own doctor under the EIP. The committee recommends that at that point, injured employees be given clear advice about the uses to which FND assessments may be put, to enable them to choose the option which best suits their interests.

17 The details of this agreement are discussed in chapter 3.

4.22 However, the proposed new FND model does not entirely resolve the issue of FND assessments under the EIP being used to resolve workers' compensation claims, as there remain instances in which employees may be compelled to attend an FND.¹⁸ The committee maintains its view that in circumstances where an employee is compelled to give information to an FND outside of the workers' compensation process, that information should not ordinarily be used against their interests in determining a workers' compensation claim, as a matter of principle.

Recommendation 2

4.23 The committee recommends in the strongest terms that Australia Post consider ceasing the practice of using medical assessments obtained under the Injury Management (Early Intervention) Policy for workers' compensation purposes.

4.24 The committee further recommends that Australia Post ensure that every time an employee attends a Facility Nominated Doctor (FND), whether voluntarily or compulsorily, the employee is advised of the uses to which the FND's medical assessment may be put. The committee urges Australia Post to consult with the unions representing Australia Post employees to develop appropriate material to inform employees of the implications of FND visits.

18 These are discussed in chapter 3.