Ian Emery

20 January, 2007

The Secretary,
Senate Employment, Workplace Relations & Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Re: Inquiry into the Safety, Rehabilitation and Compensation and Other Legislation Bill (2006)

I have been receiving a Comcare benefit since 1994. I make this submission in the hope of drawing to committee's attention to:

1. the inadequacies of the proposed amendments in regard to the deeming rate;

2. the deeming on monies not received;

3. to the concept and accumulation (or otherwise) of notional superannuation; and

4. the proposed reduction of the benefit (in cases similar to mine) from 75% to 70% of Normal Weekly Earnings (NWE).

In her letter (20 July, 2006) Comcare's current CEO, Barbara Bennett, suggested "there should be no reason for Comcare to write to you further on these matters". So, it is my hope that an independent inquiry such as yours will recognise the injustices meted out by Comcare's longstanding misinterpretations of the intentions of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and its inability to admit its interpretations might be wrong – notwithstanding what I believe to be the misinformation provided by Comcare to different ministers over the past twelve years.

I am concerned that the acceptance of the proposed amendments will bestow legitimacy on those misinterpretations, legitimacy that will continue to deny my family and the families of some 2000 similarly affected former public servants, the level of benefit to which they are entitled under the original Act.

1. **The Deeming Rate**
   Set at 10% in the1988 SRC Act (to be accurate it is actually a divisor of 520) the deeming rate has not been adjusted by Comcare/DEWR since that time despite advices (copies obtained under FOI) to the (then) minister from Comcare officers. For example, on 15 March, 2002 Mr Barry Leahy wrote:

> "The deemed rate of 10% may well have been appropriate when it was struck in 1988. But the effect of continuing lower interest rates is that it is not possible to maintain combined superannuation and incapacity payments at the target level of pre-injury weekly earnings."

And, an internal memo (27 October, 2003) indicates that Mr John Rowling, when writing an advice on a reply to a question from Mr Bernie Ripoll MP, admitted to

> "...some element in the suggestions that the deeming rate might be too high… (but that) "For any changes to be acceptable we will have to achieve a net (sic) zero impact on the Scheme."

Why, if the advice creates inequity and disadvantage to clients?

In his memo referred to above, Mr Leahy also advised that other Commonwealth agencies periodically adjusted the deeming rate "in response to the market".

The deeming rate currently applied by Centrelink and the Department of Veterans' Affairs (DVA) is two-tiered, insofar as 3% is applied to the first $62,000 and 5% to the balance.

Centrelink and DVA websites advise that:

> "Deeming rates of interest are set by the Minister for Family & Community Services in line with market trends, and are reviewed in March and September each year".

I have copies of numerous items of correspondence from Comcare to me, the Superannuated Commonwealth Officers' Association (SCOA) the CPSU and the ACTU, which maintain that it is bound by Sections 21 and 21A of the Act and that 10%, is the rate to apply.

Comcare officers have commented, in replies to me, SCOA, the CPSU and the ACTU, that long-term averages support this stance.

Mr Tony Thompson, from Comcare's Policy & Coordination Group, in a briefing minute (2 September, 2002) to the then Comcare CEO, Mr Leahy, says:

> "The divisor of 520 is based on the assumption that – over the long term – the lump sum can be invested at a 10% rate of return ... (There is a widely-held misapprehension among claimants – and some legal practitioners – that the divisor indicates that the lump sum is intended to last for ten years, or 520 weeks, only. It is sometimes difficult to explain that the assumption is that the sum will be prudently invested and will continue – subject always to some fluctuations – to provide the indicated rate of return indefinitely.)".

Mr Thompson, it would seem, was the one labouring under a misapprehension. Neither assumption has proved to be correct. Even more disappointing is that neither assumption was even close to being accurate. It is no surprise, therefore, that "It is sometimes difficult to explain….", particularly in the latter months of 2002 when "prudent" returns were averaging less than 5%. Was it "difficult" because of incorrect interpretation or simply because the explanation was false and difficult to justify?

All credible economic data indicates that prudent investment would not have achieved such a return over the past decade or more.

I note that in an email from Tony Thompson to Sarah Hodgers dated 21/10/2003 he makes a prediction that in the longer term the rate would fluctuate between 5% and 12% , perhaps

even higher, so any rate would be reliable for a snapshot at best. This prediction , by a Senior Policy Officer , could be of concern to the Australian community.

Claims have been made in writing by Mr. Leahy (1 November, 2001) and Mr. Thompson (30 May, 2002) and the Hon Tony Abbott (12 June, 2002) that other agencies take into account what is actually received from investments (whereas Comcare does not).

An internal email, from Mr Thompson to a Ms McSorley (30 May, 2002) says,

> "perhaps the brief could mention that the comp scheme, unlike the pension schemes, takes no regard of what the super recipient actually does with the lump sum – so, in Mr Emery's case… (and) it might be possible to insert a suggestion that a flexible deeming rate should be accompanied by some mechanism for a follow-up".

The brief referred to would seem to be that written May/June, 2002) by DEWR's, Mr John Rowling, Assistant Secretary, Safety Compensation & Policy Branch, to assist the then minister to respond to SCOA's letter (9 May, 2002). Comments in the brief are similarly disingenuous, if not misleading, insofar as my case is concerned.

Subsequently, the accuracy of the Minister's response suffered. (e.g. it claimed that the deeming of employee contributions by other agencies balances out Comcare's 10% but did not mention that other agencies deem on only the nett lump sum received.) I will return to this under point 2.

Information on the websites of and obtained directly from Centrelink and the DVA, is that "the actual income is not counted when assessing", which denies the claims of Leahy et al.

From the records I have obtained under FOI, it would seem that from (at least) early 2002, senior Comcare personnel were aware that a 10% deeming rate was inappropriate. It would also seem that this concern, no matter how cautiously couched, was passed on to DEWR personnel and the then Minister.

That such advices firstly, took so long to be formulated and secondly, went unheeded, created serious inequities for incapacitated clients such as me.

The proposed change to the Deeming Rate would still place it on a higher rate than that levied by Centrelink or the DVA. How does Comcare/DEWAR justify this? Why can't Comcare apply the same process as other government agencies?

2. The deeming on monies not received

When I was invalided out of the taxation department I received a gross lump sum of $141,000, being the employer contribution to my superannuation fund.

After tax the nett amount I received was $119,000.

Comcare insists that the gross lump sum benefit must be deemed, not the actual sum received after tax.

Centrelink staff advised that if a client's gross lump sum benefit was $115,000 and $15,000 was paid in tax, the nett of $100,000, not the gross, would be deemed.

One might think that this is a simple matter. How could anyone be deemed to receive an income from a sum that was never received and, therefore, not able to be invested?

In Barry Leahys letter to me dated 1/11/2001 he makes this statement in respect of the continued use of the 10% deeming rate.

> " I understand that this rate was struck on the basis that it could be achieved ,on average over the long term ,by the commercial investment of the lump sum."

The question remains whether Comcare's continued use of the gross amount for deeming purposes is justified. The $21,000 remitted to the Taxation office was never available for investment .To include that amount would mean I would have had to obtain around 12% on $119,000-00. The interest received on such investment would have been taxed at 30% ,and still would never have lifted my payments anywhere near the 75% safety net they were suppose to.

Section 21 refers to the *superannuation amount*. Section 4 of the Act, *Interpretation, superannuation amount,* refers to "…a lump sum benefit received by an employee…", not payable to, not gross, just simply "…benefit received by…". How can tax paid be a benefit when no benefit can be derived from it?

Disappointingly, the response took a long time to come and was disingenuous; it cited internal legal advice which upheld Comcare's interpretation.

In addition, it claimed that the formula used to calculate the amount payable to me required that all sums involved be gross. This also, is misleading.

Mr Alex O'Shea (Comcare) verbally refused a request to provide a copy of the opinion, claiming that it was the intellectual property of the legal person involved.

An SRC Commissioner (31 May, 2004) said:

> "Clearly the intention of deeming is to establish the amount of money that you can earn from your lump sum so any calculation should be based on what you receive and in theory have available to invest i.e. the net amount".

I ask the honourable senators, how could any other interpretation be either possible, reasonable or just?

I draw the committees attention to the fact that the Secretary of D.E.W.R., Mr Peter Boxall In July 2002 stated at a meeting of Senior staff that the 10% deeming rate was to high and should be changed .

.In a later email from Louise McSorley to John Rowlings headed 'Secretarys issues with super' dated November 2002 the following comments was made.

> "Mr Boxall raised the issues of what was happening with the superannuation deeming provision in the SRC Act.''

I ask the Senators to determine as to why my payments are still being subjected to a deduction of $271-42 based on a 10% deeming rate while clients of other federal agency\ies have enjoyed significantly lower deeming rates over long periods of time.

3. Notional Superannuation

A letter (30 April, 1992) from Mr Bruce Quigley, Deputy Commissioner, Australian Taxation Office (my employer at the time) to Heather Blanchard, Comcare Brisbane, referred to a Dr Bendeich's assessment that:

> "Mr Emery will not be able to undertake any form of employment 'in the next 20 years'. ….and if Mr Emery's employment status be unresolved in the immediate future, she expects that his condition will deteriorate to the extent that he will become totally and permanently disabled".

John Dacey, Comcare Brisbane (25 May, 1993) wrote to the Commissioner for Superannuation Retirement Benefits Office advising that based on the medical evidence of Drs P. Lawson, R. Apel and P. Cotton, Mr Emery "is 'totally and permanently incapacitated' as defined" in the relevant Act .

The SRC Act makes it clear that notional superannuation deductions can only take place where the employee remains employed. I have not been employed since 1994. Further, under section 21A of the Act, notional deductions can only take place where the employee is in receipt of a superannuation pension and a lump sum benefit. Not only am I not an employee, I do not receive a superannuation pension.

Mr Leahy's letter (1 November, 2001) also refers to comments made by the then Minister for Social Security, the Hon Brian Howe, when introducing the Bill, that it sought to prevent "double dipping" by employees using superannuation entitlements while on compensation". He then went on to explain that under the previous law officers could receive payments from both Comsuper and Comcare in excess of the monies they earnt whilst working.

The former Minister has since confirmed that it was not meant to penalise the likes of those who, according to medical evidence, "will never work again… (and) …were not eligible to make superannuation contributions".

Mr Leahy also said:

> "Current employees receive 75% of NWE but continue to contribute to superannuation. The additional 5% was intended, at the time of drafting the Act, to take account of the compulsory superannuation contributions required to be made by the great majority of employees covered by the Act".

Section 21A of the SRA Act does not indicate such an intention. Section 19 (3) (a) specifically refers to 75% being the entitlement, which is confirmed on Comcare's own web site, as previously mentioned.

Mr Noel Swails, Acting Chief Executive Officer, Comcare, said in a reply to SCOA (18 April, 2002)

> "This maximises the opportunity for rehabilitation in the workplace. It also allows the employee to continue to build up superannuation contributions".

Fine! Except that Mr Swails would have known that I could not be rehabilitated.

Mr Swails went on:

> "It could be seen as inequitable if an ex-employee receives a higher net income from combined incapacity and superannuation payments than an employee who is not currently working but who remains potentially available for rehabilitation."

I agree! Except, within Comcare, it was well known that I had neither the potential to receive a “higher net income” nor be “potentially available for rehabilitation”.

Mr Swails finished his letter off by stating ,

> “ I hope this additional information is useful to you and to Mr Emery.”

In his internal memo (27 October, 2003) Mr Rowling also says:

> “While there are arguments about the rationale for the notional deduction the net effect is to reduce the public servants to a rate equivalent to that available in the state schemes for permanently injured (i.e. about 70% of average weekly earnings)”.

Mr Leahy’s letter confirms:

> “The superannuation rules do not permit superannuation contributions by or on behalf of people who have ceased employment. Therefore, further superannuation benefits in respect of the deductions which have been made from your incapacity payments are not available”.

The first sentence is correct. However, I ask, why are the deductions (referred to in the second sentence) made? One might assume that Mr Leahy is referring to “notional superannuation”, however, according to the sub-heading of Section 21A, notional superannuation only applies if “….the employee is in receipt of a superannuation pension **AND** a lump sum benefit”. I do not receive a superannuation pension.

If Section 21 is being applied in my case then, considering that the deductions are described as “superannuation contributions” (not as “notional superannuation contributions”) they should not have been deducted as I had “ceased employment”. So, they should have been accumulating to my benefit-- somewhere. Is this simply an instance of poor drafting or a wrong interpretation by Comcare?

My curiosity is piqued by a comment (paragraph 14) in the abovementioned Mr Thompson’s brief (2 September, 2002). Under the subheading, “Superannuation Contributions”, he says,

> “The policy intention of the reduction is as expressed in paragraphs 2 and 3 above, but regrettably it cannot be directly justified by reference to the Second Reading Speech or the Explanatory Memorandum for the SRC Act”.

(The paragraphs referred to confirm the intention to prevent “double dipping” and retired employees receiving combined incapacity and superannuation benefits in excess of NWE.).

In the same letter to the C.E.O. Comcare Mr Thompson confirms that the Policy Branch has found it necessary to develop a policy approach which will “ fill in the gaps” left by the definition of the term”receives” and by the change in the environment since commencement of the legislation .They showed no concern for the fact these actions ensured my payments remained at 43% of former salary (more times than not, below the Federal Minimum Wage) They also knew that Centrelink was reducing my wifes Parenting Allowance (her sole income) by 80% each fortnight.($370-00 to $70-00) Comcare was fully aware that I had three young children who were also being disadvantaged by there actions.

In an email from Sarah Hodgers to Tony Thompson dated 21/9/2003 Mr Thompson states

" I think we need to run through the consequences of removing the notational superannuation deduction once more, as the draft brief doesn,t take into account of the effect on the transitional provisions .I admit the military Comp precedent is a difficulty, but the super arrangements aren,t the only issue where that is the case".

This statement confirms the fact that Senior officers knew so well that our group were being disadvantaged by their actions.There is also a comment on file that states the current super deduction breaches this government policy on super.

In an email dated 17 /9./2003 from Sarah Hodgers to Tony Thompson ,Mr Thompson writes " If we can get away from the term"notational superannuation contribution" it might do something to reduce unfounded expectations.

In the proposed new laws your committee is investigating D.E.W.R. have done as Mr Thompson suggested.

It is interesting to note that the DVA has ceased to make deductions for "notional superannuation" from the Military Comp Scheme and also have 75% as their safety net. In the recent changes proposed to the act Minister Andrews proposed an increase in the amount of Funeral costs to ensure parity between the two schemes as they walk hand in hand.Why then are they trying to reduce our safety net below 75% which is clearly the amount set in the schemes charter.

Under the SRC Act, Comcare is entitled to deduct an amount of money from an employee's pension where that person is temporarily off work through disability, but remains employed and is likely to be rehabilitated sufficiently to return to work. As I understand the process, that money is credited to the employee's super account.

In certain circumstances Comcare is allowed to deduct an amount of 5% as a notional superannuation contribution.

In my case, the amount deducted is a book-entry only. It is not deposited anywhere and, therefore, does not accrue for me as an asset. I contend that because my benefit has been incorrectly reduced in this way that I have been improperly been deprived of about $30,000- since 1994.

I draw the Senators attention to comments made by Louise McSorley to Marjorie Hutchinson ,dated 7/11/2002.

When discussing the super contributions and Notational deduction she writes,

" It may be that at the time it was unpalatable to have benefits set at 70% and the SC was a tricky way to bring it down."

4. The reduction of benefit from 75% to 70% of NWE

As already mentioned, section 19 (3) (a) of the SRC Act specifically refers to 75% being the entitlement for those in my situation. This is confirmed on Comcare's own web site.

That I was deprived of approximately $100 every fortnight by the improper deduction of 5% for notional superannuation for 12 years is bad enough, but to attempt to legitimise the

mistake by imposing the new provisions to limit the benefit to 70% of NEW on all Comcare's clients smacks of supreme arrogance.

With respect senators, that $100 a fortnight may not seem much to each of you, but to me and my family, and to those in the same boat, it most certainly has a profound bearing on the quantity and quality of food that goes onto our table, or whether or not I can afford the petrol to drive my daughter to her school swimming or my son to his football.

In conclusion, may I reiterate that the reduced benefit I have received, resulting from the delay by Comcare/DEWAR in reviewing the Deeming Rate, their intransigent attitude towards deeming the gross instead of the nett lump sum received, and the further imposition of a deduction for notional superannuation, have all placed an intolerable burden on my family's well being over the past 12 years.

The intended reduction of the Deeming Rate is, of course most welcome, but its basis should be aligned with other agencies, and its application be on nett not gross lump sum received. That the notional superannuation has been discarded is of no benefit when my entitlement is reduced from 75% to 70 % of NWE.

In closing I had wanted to include a submission sent to Andrew Blyth by myself dated 26/4/2005 which outlines the full details of the actions of staff in D.E.W.R.. Their bureaucratic heartlessness combined with a dismissive culture, the supplying of misinformation to Ministers, obfuscation is of serious concern.

Evidence of that can be found in a letter from John Rowling, Assistant Secretary Safety and Compensation Branch, dated 5.5.2002, when he states

> "the 10% deeming rate was established after acturial consideration of the value of the lump sum."

I requested under FOI provisions the release of this advice which resulted in the Department advising me that this advice never existed or could not be found.

The abovementioned submission to Mr Blyth can be made available to the committee Secretary on request.

I thank you for your attention.

Yours faithfully,

IAN EMERY

19/1/2007