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Introduction

Comcare has a responsibility to recover debts where an employee, employer or service provider receives money they are not entitled to receive. Recovery action must be initiated in most cases prior to any consideration for the write off or waiver of a debt. Only in certain circumstances will Comcare decide to write off or waive an overpayment.

The Debt Recovery team is responsible for preparing submissions for write off and waivers.

Comcare's delegation instrument sets out the roles and amounts in relation to writing off and waiving debts. The Debt Recovery Team can only put forward a recommendation for a waiver / write off to the delegate. It is up to the delegate to approve or decline the waiver / write off requests.

Sections 114C and 114D of the SRC Act give the legislative provisions regarding write offs and waivers.

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Who can request a write off or waiver of an overpayment?

An employee, employer or CM can request a write off or waiver of an overpayment. No matter who requests the write off or waiver, the CM managing the claim on which the overpayment has been raised is responsible for referring the overpayment to the Debt Recovery Team for review and action.

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Write off of an overpayment

Where a debt is written off by Comcare it means an administrative decision has been made not to recover the debt that is owed at that time. The debt remains legally payable until it is waived, repaid or the statute of limitations expires before legal proceedings have commenced.

A write off of an overpayment should be considered when an employee does not have a current capacity to repay a debt but would, due to a change in circumstances, have a future capacity. A write off should also be considered when the decision that created the overpayment is subject to reconsideration by the Disputed Claims Team or appeal with the Administrative Appeals Tribunal (AAT) or Federal Court.

The decision to write off a debt under section 114C of the SRC Act is not reviewable by the AAT as it does not constitute a determination as defined under section 60 of the SRC Act.

The Debt Recovery Team will monitor all approved write offs to ensure further action is taken at the end of the write off period.

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Types of write offs

The ways a debt can be written off are outlined below.

Deferred recovery (write off)

Recovery of a debt may be written off for a specified period. This would normally be appropriate where recovery is not currently possible, but successful recovery of the whole or part of the debt may be possible within a reasonable period, usually two years.

The most common cases which may justify deferral are where the employee:

- is willing to repay but has no capacity to repay in the short term i.e. limited income, but will resolve in one year
- cannot, or will not, repay at present, but may soon be entitled to third party compensation, lump sum payment (redemption or permanent impairment), employer funded retirement benefit or a common law settlement, and
- has appealed against the decision which created the overpayment.

Generally, recovery should not be deferred for a period in excess of one year. Reviews of the claim should be undertaken on a six-monthly basis to confirm whether recovery action is possible. The statute of limitations must be considered before recommending a write off (i.e. will the overpayment become statute barred during the write off period?).

Conditional write off

A conditional write off is a type of deferred recovery. An agreement is reached between Comcare and the employee that the debt be written off at present but will be recovered at a specified later date. A conditional deferment should be accompanied by a debtor agreement. A debtor agreement sets out the terms for the future recovery of the debt.

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Waiver of an overpayment

Where a debt is waived by Comcare it means an administrative decision has been made to not recover the debt. When a debt is waived by Comcare it effectively ceases to exist and cannot be recovered at a later date.

The legislative provisions for a waiver of an overpayment can be found in section 114D of the SRC Act.

The Debt Recovery Team must review all waiver requests to ensure decisions about whether or not to waive are consistent.

Circumstances where an overpayment can be waived

There are a number of circumstances where a debt may be waived.

Administrative error

In general, wherever a mistake has been made in administering a payment, the debt will arise solely as a result of Comcare's administrative error providing the employee's conduct has not contributed to the debt in any way. Examples of administrative error may include, but are not limited to, mistakes made in:

- calculating the amount of a payment
- determining liability under the wrong section of the SRC Act, and/or
- incorrectly actioning or not actioning information provided by the employee.

The requirement that the debt must have arisen 'solely' as a result of Comcare's error means that there must have been no other factors that caused the debt to arise or contributed to the debt arising.

Jurisdictional error

Jurisdictional errors of law are errors made when interpreting and applying legislation. Abuses of discretion and failure to exercise discretion may also constitute errors of law. If an administrator, such as Comcare, makes a jurisdictional error whether of law or fact, the decision (or failure to make a decision) is invalid.

Where a finding of jurisdictional error is made Comcare does not have to re-visit old claims or re-examine the circumstances surrounding the decision made. However, where Comcare becomes aware that an error has occurred, the initial determination must be reconsidered. The reconsideration of claims involving a 'jurisdictional error' has the capacity to create significant overpayments. It is generally Comcare's policy that where an overpayment has occurred due to a jurisdictional error then recovery of the overpayment should not be sought but a waiver request should be prepared. This should be coordinated through the Debt Recovery Team.

Waiver submissions should detail the financial impact of the intended decision and confirm that the payments involved were genuinely received in good faith. A completed Statement of Financial Circumstances form is not required in these cases.

Received in good faith

A payment is received in good faith if there is no fault on the part of the employee and they did not know or could not reasonably be expected to know that there was no entitlement to the payment that has been made in error. If the employee knows or had reason to know that they were not entitled to a payment they received, they cannot be said to have received the payment in good faith.

When deciding whether an employee received a payment in good faith the Debt Recovery Officer should have regard to the employee's state of mind and consider all circumstances of the claim, including, but not limited to:

- information given to the employee via letters and other forms of correspondence such as Comcare publications, interviews, phone conversations etc – to establish the employee's reasonable expectations of their payments.
- information provided to the employee about their circumstances – to establish their expectations about future payments and the impact of any new information they provide to Comcare.
- the employee's regular pattern of payment – what would they reasonably expect to receive on a regular basis and therefore what might represent an unexpected payment or amount?
- the amount of the excess payment – it might be expected that an employee would question a large amount of money received.
- the period of time over which the incorrect payments were made – a short period may be considered by the employee to be administrative delay in actioning new information, while a longer period may not.

Consideration as to whether an employee has been 'wilfully blind' in relation to the overpayment they received.

Financial hardship

When an overpayment is raised the Debt Recovery Officer must assess the employee's financial circumstances. If, following this assessment, the officer believes that recovery of the debt will cause financial hardship to the employee they may make a recommendation to waive the debt.

Note: You must consider whether there is likely to be an improvement in the employee's financial position in the near future, which would enable recovery of the debt. If improvement is likely, a write off should be considered rather than a waiver.

Irrecoverable at law

A debt may be waived as irrecoverable at law where it is considered that recovery of a debt could not be pursued successfully by civil action through the courts. Debts may not be recovered at law in situations including, but not limited to:

- action is barred by the statute of limitations, or
- where there is insufficient evidence to prove the debt in court. A case of insufficient evidence would only arise where the claim information available does not adequately substantiate the debt e.g. the file is lost.

Exceptional circumstances

Exceptional circumstances are by their nature incapable of precise or exhaustive definition. They look to circumstances that are unusual, uncommon, or special. Whether the particular circumstances answer to any of these descriptions depends on the context in which they occur. At all times the circumstances must be considered in its entirety.

There may be certain circumstances where it would be unreasonable to take or to continue taking, recovery action. Some special or exceptional circumstances may include, but are not limited to, the following:

- an employee is seriously or terminally ill and any funds available may be required for medical treatment or funeral costs.
- a term of imprisonment has been served in lieu of the repayment of the debt, as distinct from imprisonment for failure to pay a fine. Where it's not clear whether the term of imprisonment was imposed in lieu of repayment, the advice of

Comcare's legal area will need to be sought.

Appealing the decision to waive a debt

The decision to waive a debt under section 114D of the SRC Act is not reviewable by the Administrative Appeals Tribunal (AAT) because it is not a determination under section 60 of the SRC Act.

Waiver decisions are, however, subject to proceedings under the Administrative Decisions (Judicial Review) Act 1977.

Statute of limitations

A statute of limitations is legislation within each state and territory that sets the maximum time after an event that legal proceedings based on that event may be initiated. This timeframe is known as the 'limitation period'. In terms of overpayments, the limitation period is the set time within which Comcare is able to recover overpayments in a court of competent jurisdiction as a debt owed to Comcare. If Comcare has not commenced recovery action, including legal proceedings, before the limitation period has expired Comcare cannot pursue the debt in court to recover the overpayment.

The limitation period in all states and territories is 6 years, except for the Northern Territory which has a limitation period of 3 years.

A debt may be written off as irrecoverable at law where it is considered that recovery of a debt could not be pursued successfully by civil action through the courts. Where legal action is barred by the Statute of Limitations a debt cannot be recovered at law.

Cost effectiveness

If it is not economical to pursue recovery of a debt Comcare does not have to institute recovery proceedings. When considering whether to write-off or waive a debt the debt recovery officer must consider the cost effectiveness of the recovery process and should only consider the administrative and legal costs associated with the recovery process, not costs already incurred.

When determining whether recovery is cost effective, consideration should be given, but is not limited to, the following factors:

- the amount of the debt - if the debt is small and it will cost more to try to recover the debt it may be that it is not cost effective to recover the debt
- the age of the debt and when the last (if any) recovery action occurred - if the debt is outside the limitation period or the limitation period is close to expiring and Comcare has been unable to recover the debt it may not be cost effective to continue recovery action
- the course of action required to pursue recovery (i.e. if the employee is no longer receiving benefits from Comcare and recovering directly from the employee is the only available option) - recovering from ongoing incapacity payments is more cost effective than attempting to negotiate a repayment plan with an employee who is not receiving any benefits.
- the likely outcome of pursuing recovery - not all recovery actions are successful, this may be because the debtor cannot afford to (or perceives that they cannot afford to) repay the debt or is refusing to cooperate with Comcare in our attempts to recover the money, or
- future administrative costs - in terms of staff resources, calculating and recording the debt and advising the recipient.

If the costs associated with the recovery of a debt from an employee are greater than the debt, recovery is not cost effective.

Financial circumstances

When an overpayment occurs, the debt recovery officer will need to assess an employee's financial circumstances in order to decide whether the debt should be recovered, waived or written off. This is normally done by requesting the employee to complete the Statement of Financial Circumstances form.

The Statement of Financial Circumstances form is used to assess an employee's financial circumstances and determine their ability to repay an overpayment. The form should be used when:

- a repayment plan is being negotiated due to a claim of financial hardship by the employee, or
- reviewing an existing repayment plan, or
- a write off or waiver is being considered.

Where an employee claims that a repayment rate of 10% of their amount of compensation will cause them financial hardship or they have requested the write off or waiver of an overpayment, you will need to assess the Statement of Financial Circumstances form and decide, based on the evidence provided, whether to negotiate the repayment rate or support a write off or waiver of a debt. You should exercise discretion and common sense in your assessment of the Statement of Financial Circumstances form. Every employee's financial circumstances will be different and will depend on a number of factors. When reviewing the form, you will need to consider all of the sections of the form before making a decision regarding if and/or how much an employee can repay of an overpayment.

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Preparing a write off or waiver submission

In most cases, the CAIS Debt Recovery Team (DRT) is responsible for drafting a write off or waiver submission. The CM will be made aware and can request the write off or waiver submission to the Debt Recovery Team. The submission provides information on:

- how the overpayment occurred
- steps taken to recover the monies owed
- a summary of information provided by the employee
- a recommendation on whether the debt should be written off or waived, and
- supporting evidence to justify the recommendation.

Once the write off or waiver recommendation has been elevated to the delegate a decision will be made one of three ways:

- agree with the recommendation

- reject the recommendation, or
- return the recommendation requesting clarification of the recommendation or supporting information.

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