# Submission Cover Sheet

FOI 2024/804

**(NOT FOR PUBLICATION)**

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| **Individual OR Organisation's Name** | Comcare |
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## Executive Summary

Comcare's workers' compensation law has mandated the rehabilitation and compensation support of injured federal workers for over twenty years. The 1988 law represented progressive social reform at the time. Since then, working arrangements, remuneration and employment dynamics have changed. Originally, the laws only covered the public sector. Now, private sector companies are included, operating in a diverse range of industries. Similarly, court and tribunal decisions over the years have created anomalies. Amendments to federal laws have made the legislation overly complex and unwieldy.

While the underlying legislative principles remain sound, Comcare believes a thorough refresh is required given these incremental changes within the scheme and more broadly in the Australian community.

Comcare supports legislative reform to improve the usability of the SRC Act to ensure the Commonwealth workers' compensation legislation reflects contemporary social models, best practice and allows for clear and effective implementation.

Comcare endorses the Issues Paper and provides the following submission against the issues raised.

# SAFETY, REHABILITATION AND COMPENSATION ACT REVIEW

*ISSUES PAPER RESPONSE FORM – Terms of Reference One*

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| Comcare endorses the contents of the Issues Paper and provides the following submission in respect to the issues raised. |
| **Individual or Organisational Name: Comcare** |

## Part III: Rewriting the Safety, Rehabilitation and Compensation Act 1988 (the Act)

### *A. Should the SRC Act be amended?*

| *Questions* | *Comments* |
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| 1. What key principles do you suggest should guide the design and drafting of amendments to the Act? | **Comcare supports a legislative design that:**<br>• follows a logical path through the injury management process with primary emphasis on rehabilitation supported by compensation<br>• provides clear objectives and purposes by way of an introduction to the Act and to each of the Act's Parts and Divisions<br>• is written in plain language with limited legal terminology where possible<br>• reflects the varied nature of the current Act workforce and the systems and environments in which they operate with regard to differing work and remuneration arrangements<br>• uses terminology and definitions that are consistent with similar or related Commonwealth legislation<br>• uses terminology that either aligns with—or sets an improved standard for—state and territory injury management legislation |

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| | • follows a consistent methodology in calculating adjustments to statutory rates as prescribed by the Act; for example the Act currently uses a mix of Consumer Price Index, Wage Price Index, Reserve Bank interest rates and Ministerial instrument<br>• details clear and concise rights and responsibilities for all parties, including penalties in the event of non-compliance by those parties<br>• provides that injured employees who exit employment should not be better off than those who are still employed<br>• provides for 'grandfather' provisions for Defence personnel currently covered by the SRC Act to transition to the *Military Rehabilitation and Compensation Act 2004* (MRCA)<br>• carries awareness of consequential effect on the *Seafarers Rehabilitation and Compensation Act 1992* and the MRCA<br>The Act is now a fractured and difficult statute to apply, with delegates placing greater reliance on extrinsic tools, such as the Annotated Act or internal policies and procedures, to support their decision making.<br>**Comcare recommends that any proposed suite of amendments to the Act apply the same date of effect to provisions and any supporting regulations or instruments**. |
| 2. What do you suggest the objects and purposes of the Act should be? | Comcare fully endorses the broader objectives identified in the Review—namely that the primary aim of the scheme is to promote early rehabilitation intervention and achieve return to work outcomes focused on sustainability and employee capabilities rather than incapacity. Compensation should be seen as supplementary to maintain the 'at work or return to work' objectives of the Act.<br>The Act does currently not carry an objectives paragraph, but its long title, *An Act relating to the rehabilitation of employees of the Commonwealth and certain corporations and to workers' compensation for those employees and certain other persons and for related purposes* implies a rehabilitation first approach with the reference to compensation and related purposes clearly secondary. Unfortunately, the Act does not maintain this emphasis in its design and construction. The Act would benefit from a legislated statement on the key principles of rehabilitation and a hierarchy of issues for consideration in compensation claims administration. |

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| | **The objects of the Act should be made clear and proposed changes to the Act should be consistent with the Australian Government's commitment that' the compensation system which is fair and supports people to regain their health – always improving their capacity to get back to work. The Act should support a scheme which is best practice in operation and service delivery'.** (The Hon Bill Shorten, MP Comcare National Conference 19 September 2012).<br><br>The objects should align with Comcare's 2015 Strategic Plan, in particular the principle of 'providing a sustainable injury compensation scheme that is fair and responsive for the workers and their families who rely on it, while representing value for money for employers'.<br><br>**Recommended high level objectives include:**<br><br>• providing fair, adequate and efficiently delivered compensation to injured employees<br><br>• reducing the burden on families seeking workers' compensation entitlements for employees who are killed or sustain catastrophic injury by extending compensable services to impacted families—for example, financial counselling, respite care, and other enabling support services<br><br>• consistency with Government policy in related areas such as social security, workforce participation and initiatives including the National Disability Insurance Scheme<br><br>• preference for Comcare (and the Commission where appropriate) to have the power to make all subordinate legislation. For example, currently a ministerial instrument or amendment of the Act is required to make changes to the *Guide to the Assessment of Permanent Impairment* (section 28*)*, the per kilometre rate in section 16(6) and nominating indexation applied by the Act. In Comcare's view, it would be simpler and more expedient for Comcare or the Commission to have these and other like powers<br><br>• introducing key definitions to clarify the application of proposed changes. |

## Part IV: Specific issues for consideration based on 24 years' experience with the Act

### A. *Eligibility issues*

#### 1. *Definition of "employee"*

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| 3. Are there particular categories of employees, currently not covered under the Comcare scheme, who should be covered? | Section 5 provisions of the Act prescribe persons who are and who are not defined as employees, for the purpose of workers' compensation coverage. It also provides mechanisms for declaring persons to be covered, by way of Ministerial declaration. The provisions have been amended and declarations have been added or superseded by machinery of Government changes.<br><br>For employees whose conditions of employment are not straightforward, it can be challenging to decide if cover exists under the Act. There is the potential that, notwithstanding the definition of Commonwealth employees, that some contractors to Commonwealth authorities may be considered employees by the state legislation but not by the Act<br><br>**Comcare therefore supports simplification of these provisions and clarity around the meaning of a contract for service.** This would ensure that employees undertaking contract work on behalf of a scheme covered employer have a right to workers' compensation coverage under the Act. |
| 4. Would the definition of "worker" in s 7 of the *Work Health and Safety Act 2011* be an appropriate definition of "employee" under the Act? | **Comcare supports a greater connection between the *Work Health and Safety Act 2011* (WHS Act) and the Act**. In particular, the duty of care obligations to protect workers against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.<br><br>If any changes are made to the definition of employee for the Act, care should be taken to avoid the possibility of dual coverage under state legislation which may result in frequent and otherwise unnecessary application of the double dipping recovery provisions in the Act. |

| *2. Coverage of injuries suffered during home to work travel* | |
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| 5. Should home-to-work travel be covered under the Comcare scheme? Why? | **Comcare considers this is a policy matter for the Government** but notes that the Act provides mechanisms to recover statutory compensation payments in the event that liability for an injury sustained in this circumstance lies against a third party.<br><br>If the Government chooses to extend coverage for home-to-work travel, the usefulness of sections 6(1A) and 6(1B) in defining the boundaries of the home from which the journey commences or ends will need to be considered. Whether coverage for travel to medical treatment only applies between work and the place of medical treatment—per subsection 6(1)(g)—or if Government policy is to extend coverage for travel between that place of treatment and the home may also be considered.<br><br>Finally, consideration should be given to differentiating terminology to avoid confusion. For example, the term 'travel' could be used in connection with employment, whereas 'journey' applies to home-to-work scenarios. These terms were originally applied in this manner and some remnants remain in the current Act. |
| 6. Should travel undertaken as a result of being "on-call" be covered under the Comcare scheme? Why? | The operation of exclusion 6(1C) excludes travel from between the employee's residence and usual place of work. Employee's 'on-call' are therefore not covered from their place of residence.<br><br>**Comcare suggests that the review consider providing coverage in this circumstance**, given the principle that where an employee is required to travel for any purpose arising out of or in the course of employment, journey coverage should exist. |

| *3. Appropriate coverage for heart attacks, strokes and similar injuries* | |
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| 7. Should an employment contribution test apply to heart attacks, strokes and similar events in order for workers compensation coverage to apply? If so, what should that test be? | **Comcare suggests the review address anomalies in definitions that relate to injury and disease, and bring these into line with state and territory workers' compensation schemes** (particularly NSW and Victoria). A High Court decision (*Burch*) ruled that conditions previously held to be diseases including myocardial infarct and cerebro-vascular conditions such as strokes are in deemed to be injuries. This has resulted in these conditions being compensable because they occurred at work, despite work possibly not contributing to them in a significant way. The states that legislated to exclude these scenarios now require a clear causal link between the employee's employment and their injury, not just that the condition manifested while the employee was physically at a workplace. |
| 8. Or should there be automatic coverage when events of that kind occur at the work place? | **Comcare's preferred position is to align with the states that require a clear causal link between the employee's employment and their injury**. |

| *4. The definition of "reasonable administrative action"* | |
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| 9. Has the *Reeve* decision created an outcome inconsistent with the intent of the "reasonable administrative action" provision in the Act? | Comcare considers the original intent of the 2007 amendment to the Act in section 5A was to enable employers to undertake reasonable and appropriate staff management without the risk of a workers' compensation claim arising purely from that reasonable management action—and that this preferable intent should be clearly reflected in section 5A.<br><br>The Federal Court decision has not changed the state of the law too far from how Comcare had originally interpreted the 2007 amendment. The Reeve decision helps clarify that 'reasonable administrative action' for the purposes of section 5A of the Act must be targeted and responsive to the terms and conditions of the injured employee's employment<br><br>**It is still too early for Comcare to say with any certainty what long-term impact the *Reeve* decision will have on the scheme.** However, there is no evidence at this time to suggest the Reeve decision will open the way to a significant increase in liability for psychological injury claims across the Comcare jurisdiction. |
| 10. If so, what could be done to return the provision to its original intent? | **Comcare considers section 5A should be reviewed to ensure it clearly indicates which forms of management action can or cannot give rise to a compensable injury**. Clarifying the intent of the reasonable administrative action (RAA) provision in section 5A should be considered. Perhaps a more restrictive definition of RAA in this section would be appropriate if the original intent of the provision was for the exclusion to be limited in nature. Alternatively, the list of examples of RAA provided in section 5A(2) could be expanded to provide a comprehensive and exclusive list of what constitutes RAA so the concept is clear for decision-makers.<br><br>Comcare also considers that the phrase 'employee's employment' is also a key concept in properly understanding RAA, and that the scheme would benefit from greater clarity in this area. Possibly, a definition for 'employee's employment' could be inserted in the Act to clarify the term. Alternatively, the words *'…*in respect of the employee's employment' could be removed from subsection 5A(1)(c) altogether.<br><br>Another limitation of the provision at present is that the action must be directed to the specific employee, and so operational decisions such as restructures may not be protected by the exclusion as they apply to a broader class of employees. If the intent of the exclusionary provision is to cover these types of management actions and decisions—a |

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| | policy decision on which Comcare takes no position—the section could be amended to expand upon the list of examples. |
| 11. Are there examples of concepts similar to "reasonable administrative action" outside the Comcare scheme that could inform the definition in the Act? | **This is a matter for the review.** However, Comcare suggests the review consider excluding psychological injury arising as a result of an employee's perception (of an event/action). |

## B. Incapacity payments

### 1. Normal weekly earnings for the purpose of calculating incapacity benefits

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| 12. Does the current formula for calculating NWE fairly represent lost earnings? | Comcare's view is that the basic formula for calculating NWE no longer resonates with the industrial arrangements in place for employees covered by the scheme. Since 1988 many employees now covered by the Act have terms and conditions of employment that do not neatly fall within the prescribed formula. The NWE calculated for this group of employees may not always be a fair reflection of their lost earnings. The following examples highlight unintended outcomes faced by injured employees and their determining authorities.<br><br>Example 1<br><br>The Act requires that normal weekly hours (NWH) of work are based on hours worked before the injury. The Act does not provide for post injury recalculation of NWH and the employee must work 100 per cent of NWH to receive 100 per cent of NWE. A truck driver's employment conditions are governed by the Transport Workers (Long Distance Drivers) Award and they are paid by cents for kilometres travelled, not hours worked. Consequently, there is a dislocation between the hours 'worked' by the truck driver and the hours now taken as the NWH. Where the hours are substantial and unlikely to be duplicated in post injury, full-time sedentary employment the employee is disadvantaged. Where an employee's hours were minimal but pay significant due to the nature of their work, the employer is disadvantaged because there is no incentive for the employee to increase their hours to full-time in sedentary employment.<br><br>Example 2<br><br>For employees whose conditions of employment provide for rostered days off (RDOs), differing NWE outcomes can be experienced depending on whether the employee chose to bank or take a RDO day during the relevant period immediately before the injury. If the RDO is taken as income then it is included in the NWE—but the additional hours worked are included in the NWH making it difficult for the employee to achieve 100 per cent of NWE post 45 weeks incapacity. If the RDO is not included then, while the employee is required to work less hours, they will not receive the RDO payment as part of their NWE.<br><br>Given the diversity of workplace arrangements covered by the Act it is also challenging for determining authorities to |

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| | apply the section 8 increasing and decreasing provisions to adjust NWE over the life of a claim**.**<br><br>**Comcare suggests that the review team explore the introduction of an annual increase—by way of Wage Price Index or similar mechanism—to increase an injured employee's NWE, as well as a one off methodology for decreasing NWE in the event that industrial workplace arrangements change for a group of employees**. |
| 13. If not, what changes should be made to the existing formula? | **Comcare supports review outcomes that simplify the calculation of NWE** and clarify the meanings of overtime, allowances and part-time earnings, under the relevant period provisions, to ensure an employee's pre-injury NWE is a fair representation of their income loss. This amount could then be indexed over the life of an employee's compensation claim.<br><br>Comcare is aware that the formulas applied by other state and territory workers' compensation schemes are also complex and that the recent review of the Military Compensation Scheme recommended, due to the complexity of like provisions in the *Military Rehabilitation and Compensation Act 2004* (MRCA Act), that this aspect be explored further. |
| 14. What formula would you suggest (which may or may not be based on a "week")? | **The formula could be simplified by removing the NWH definition and clarifying the relevant period which would cater for seasonal and other employees who do not work standard hours**. However, such a change would require further legislative reform to the sliding scale provisions that rely on NWH and apply to the calculation of weekly incapacity compensation after 45 weeks of incapacity. |

| *2. Calculating incapacity benefits after the first 45 weeks of incapacity according to hours worked* | |
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| 15. Should "normal weekly hours" be referable to the hours worked pre-injury or in post-injury employment? | After the first 45 weeks of incapacity compensation the Act provides incentive for an injured employee to return to work by adjusting their level of incapacity compensation, based on the hours they are able to work.<br>In order to achieve maximum compensation an employee must return to their pre-injury hours of work. This means that injured employees who move to a position that requires them to work more or less than their pre-injury NWH are unable to receive maximum compensation—or will receive maximum incapacity compensation by working fewer hours than the job requires.<br><br>The Full Federal Court decision in *Comcare v Heffernan [2011] FCAFC 131* recently affirmed Comcare's policy position that NWH must be calculated with reference to the relevant period before an employee is injured and that there is no mechanism in the Act that allows for adjustment of NWH over the life of a workers' compensation claim. This decision has highlighted the need for legislative reform to ensure employees who are working all hours available to them are compensated fairly, and to provide incentives for employees to achieve their maximum working potential.<br><br>**Comcare would support a move away from the concept of NWH**. If it remains a mechanism, Comcare would support the Act allowing for NWH to be adjusted over the life of a claim to provide equitable compensation and the incentive to return to work. |
| 16. Does the existing formula for adjusting normal weekly earnings post 45 weeks produce unfair and inappropriate outcomes? | The *Heffernan* decision identified circumstances where the formula has produced unfair and inappropriate outcomes. For employees who are employed during a week of their incapacity the result is twofold:<br>• those injured employees whose conditions of employment change to a position that requires them to work less than their pre-injury hours will be unable to receive maximum incapacity compensation; and<br>• those injured employees whose conditions of employment change to a position that requires them to work more than their pre-injury hours will receive maximum incapacity compensation when working less hours than the position requires—this may limit any incentive to work the additional hours of that position.<br><br>The following two examples received by Comcare highlight inappropriate outcomes:<br><br>Example 1 (less hours than pre-injury hours)<br><br>A new enterprise agreement removed two hours of required and regular overtime. As a result, each employee's normal weekly hours changed from 40 to 38 a week. This resulted in the following: |

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| | • an injured employee's NWE is decreased because overtime is no longer available<br>• the adjustment percentage of NWE is based on 40 hours a week, the injured employee will therefore never be able to receive maximum compensation.<br><br>Example 2 (more hours than pre-injury hours)<br><br>A group of part-time employees have been promoted to full-time to meet the operational needs of the changing business industry. Where any of those employees had a pre-existing compensable injury and NWH calculated at their date of injury was based on their part-time hours there is no mechanism in the Act to change those hours to reflect their current hours of work. This resulted in the following:<br>• the adjustment percentage of NWE is based on part-time hours and an injured employee will receive maximum compensation (based on full-time NWE) once they have worked those part-time hours<br>• there is no incentive for the injured employee to increase their hours of work. |
| 17. If so, what changes should be made to the existing formula? | Comcare is of the view that the 75 per cent adjustment applied by the Act, for employees who as a result of their injury have no capacity to work, is fairly consistent with approaches taken by other state and territory workers' compensation schemes. Although the step down at 45 weeks is considerably later than in most state and territory schemes.<br><br>The current sliding scale—for employees who have a capacity to return to work—is not working well to motivate and maximise early and safe return to work.<br><br>**Comcare recommends that the review explore the following options**:<br>• removal of step downs with a focus on whether an injured employee can be returned to work in a reasonable timeframe, and if not, provide a lump sum payment in lieu of weekly payments; or<br>• a quicker step down to 75 per cent (e.g. at 13 or 26 weeks); or<br>• incapacity duration based on level of impairment. |

| *3. Earnings from additional employment for full time injured employees and actual earnings* | |
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| 18. Should full time employees have any earnings they receive from additional employment taken into account when calculating their NWE and NWH? | NWE captures earnings from other employment—whether it is with an employer covered under the Act or not—for part-time Commonwealth employment and casual employees covered under the scheme. The Act does not provide for the inclusion of other earnings for employees who are employed full-time with an Act employer. Consequently the calculation of NWE and NWH for full-time employees is based on their scheme-covered employment only.<br><br>Where an injured employee only receives compensation for their full-time employment, their lifestyle—which was previously based on their full-time *and* part-time earnings—is affected. In the event that an injured employee is unable to return to their full-time job, but has the capacity to work in their part-time job, their part-time earnings are applied as an 'ability to earn', reducing their weekly incapacity compensation amount.<br><br>**Comcare considers that this issue should be reviewed to ensure consistent calculations of pre-injury earnings.** |
| 19. Should there be consistency in the earnings taken into account when calculating NWE and "actual earnings"? | **Comcare supports a consistent approach**. This would require legislative amendments that accommodate industrial pay arrangements as a result of changes to our jurisdictional makeup. |

| *4. "Deeming ability to earn"* | |
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| 20. Should there be greater clarity in relation to "ability to earn" for injured employees? | The Act provides a relevant authority with the capacity to deem an injured employee with an 'ability to earn' amount, which is deducted from their weekly amount of compensation. However in practice, Comcare finds the deeming provisions difficult to apply because the meaning of suitable employment is narrow and the onus is placed on their employer to provide or find suitable employment.<br><br>For employees who are no longer employed there is an obligation that they job seek, and that the relevant authority may have regard to the employment market place.<br><br>**Comcare supports simplification of these provisions to ensure injured employees who have a capacity to earn are expected to do so**. This may be, for example, through the employee taking up offers of suitable employment made by their employer, or after a qualifying period such as 45 weeks, obliged to take up suitable employment within the meaning of any employment, including self-employment. This may provide clarity for injured employees about their obligations and responsibilities to job seek. It may also provide clarity for relevant authorities and rehabilitation authorities on how to apply an employment market place test. |
| 21. If so, what should be included in the calculation? | The calculation of weekly incapacity compensation in section 19 of the Act relies on many factors—the initial NWE, NWH, AE—with reference to numerous definitions, contained in different parts of the Act.<br><br>**Comcare believes the review team should develop a package of reforms that simplifies the calculation with stronger links to the rehabilitation provisions of the Act**. |

| *5. Injured employees who receive incapacity and superannuation benefits* | |
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| 22. Should the superannuation off-set provisions be modernised and simplified? If so, how? | The intent of the superannuation provisions of the SRC Act was to prevent injured employees from receiving dual employer-funded benefits. However, since the Act was implemented in 1988 the superannuation laws have been reformed and employees who leave their employment are not always able to access their superannuation benefit—unless they are retired on invalidity or have reached their minimum preservation age.<br><br>As a result, the current superannuation offset provisions in the Act are out of step with the superannuation reforms. It is challenging for relevant authorities to apply and communicate the dual test of 'received' and 'retired' for employees who exit employment before their minimum superannuation preservation age. It is also challenging to obtain information about employer funded superannuation amounts given the broad spectrum of superannuation schemes and retirement savings accounts that employees covered by the scheme can choose from.<br><br>**Comcare believes there is an urgent need to simplify the application of these provisions while continuing to support the concept that injured employees who exit employment should not be better off than those who are still employed**. |
| 23. Should the entitlement to weekly benefits for an employee who is also in receipt of superannuation benefits be altered in any way? Should the 5% deduction remain? | **One option is the removal of the notional deduction, by making the maximum combined post-retirement benefit payable 70 per cent of NWE** (not 75 per cent minus 5 per cent). The same rule would apply to the increase in the compensation ceiling as the employee increases their hours of employment to a maximum of 95 per cent of NWE (not 100 per cent minus 5 per cent). In effect this is the status quo.<br><br>**An alternative option is to maintain the employer superannuation contributions for the benefit of incapacitated employees who are no longer employed and have not reached their superannuation preservation age** (currently aged 55). |

| *6. Redeeming weekly incapacity compensation through lump sum payments* | |
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| 24. Should the set weekly amount in s 30 be increased? Should there be a limit? | **Comcare considers the set weekly amount in section 30 is a policy matter for Government**. The current low level—'administrative'—redemption threshold was the Government's policy at the time. This was set out in the Minister's 2nd reading speech to the CERC Bill in 1988:<br><br>*Given that benefits under the scheme have been set at levels which are fair and equitable, the Government has decided that it would no longer be appropriate for employees to be able to redeem weekly benefits for lump sums except where those weekly payments are below $50 per week.*<br><br>However**, Comcare would support a review of whether—even with indexation arrangements under subsection 30(4)—the set weekly amount should be increased further to allow redemptions in a greater number of cases**.<br><br>Expanding the scope of the redemption provisions should also be considered.<br><br>For many injured employees ongoing contact with the relevant compensation scheme can have a detrimental impact on their recovery—psychological as well as physical. Another benefit of allowing redemptions is that it would further reduce the ongoing administrative burden for Comcare.<br><br>There is a risk that the potential for lump sum redemption will motivate some employees to maximise their level of impairment and resist returning to suitable employment. |
| 25. Should the Comcare scheme provide for the redemption of medical or rehabilitation costs? | This is a complex issue as the future course of an injured employee's medical condition may not be adequately predicted. This means an early redemption may later turn out to have been grossly inadequate where an injured employee's condition deteriorates after the redemption. **Comcare supports a review of this issue but stresses the need for adequate safeguards to ensure redemptions of medical/rehabilitation costs only occur where there is a reasonably high degree of stability in the injured employee's condition, or a likelihood of improvement**.<br><br>Furthermore, if the employee poorly manages their redemption payment there is a risk that they will return to ongoing weekly incapacity compensation under section 31 of the Act. |

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| 26. Should redemption be compulsory or at the election of (a) the employee or (b) Comcare (or the licensee)? | **While Comcare would not support compulsory redemptions, given the wide range of possible circumstances in individual claims, it does suggest exploring the possibility of extending redemptions in certain circumstances**. However, there is a risk that this may create a perverse motivation to stay incapacitated.<br><br>The preference may be to maintain a ceiling on the incapacity payments that attract redemption and then provide for the redemption on request—as opposed to the redemption being compulsory as is the case currently. |
| 27. Should there be any conditions attached? | **Yes**, for the reasons set out above in questions 24 to 26. |

| *7. Appropriate coverage arrangements when the pension age is increased to 67* | |
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| 28. Should the weekly benefit cut-off age of 65 be increased to 67? | Age restrictions in workers' compensation have historically reflected the fact that employees generally retire at age 65 and employees at this age have access to other means of financial support, such as the age pension and superannuation. The Government's policy direction is to ensure that workers' compensation coverage does not disadvantage employees over the age of 65. This policy seeks to encourage older workers to remain in the workforce and have access to the same income protections as other workers.<br><br>**Comcare's view is that the provisions of the Act should continue to align with this intent and therefore the Act should move in line with whatever statutory changes the Government applies to its mature age worker policy.**<br><br>While on this issue, Comcare notes that section 23(1A) was introduced with effect from 5 December 1999 to provide for 104 weeks of incapacity entitlements (whether consecutive or not) for a compensable injury suffered at or over the age of 63. This amendment was introduced to accommodate employment beyond the age of 65. However, the amendment has created an inequity. Injuries may result in intermittent periods of incapacity. For an employee, for example, injured at age 62 incapacity entitlements cease at age 65 irrespective of whether the 104 weeks of entitlements has been paid. Whereas employees aged 63 and older may still be accessing 104 weeks of incapacity entitlements for many years thereafter—assuming there is evidence of intended continued employment.<br><br>**Comcare invites consideration to amending section 23(1A) to provide for incapacity entitlements to be payable for any incapacity suffered within 104 weeks of the injury to create a more equitable arrangement**. |
| 29. If so, should that increase mirror the changes in the age pension age? | **Yes**, for the reason set out above at question 28. |

| C. Rehabilitation issues | |
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| 30. Should the Act be amended to include access to early intervention? | **The scheme would benefit from legislative support for early intervention to support injured employees and reduce claims length and cost**. Currently, Comcare relies on the *Guidelines for Rehabilitation Authorities 2012* to legitimise pre-liability rehabilitation.<br><br>**Legislative authority may be achieved by requiring the notice in writing (under section 53) to be served on the rehabilitation authority rather than the relevant authority**. This would give rehabilitation authorities the legislative capacity to arrange a rehabilitation assessment or provide a rehabilitation program prior to a claim being lodged—in parallel to the legislative authority to arrange a medical examination solely on the receipt of a notice of injury per subsection 57(1)(a).<br><br>This proposed amendment may benefit from a statement that arranging an assessment or providing a program for rehabilitation is not considered to be a concession of liability under section 14. |
| 31. Should early intervention be contingent on the acceptance of liability? | The value of early rehabilitation intervention outweighs the instances in which liability is subsequently denied.<br><br>The Act provisions allow for rehabilitation to be provided for an injury as defined under sections 4(1) and 5A. That is, where there is reasonable evidence that the injury arose out of or in the course of employment, or was significantly contributed to by the employment. As the decision on rehabilitation rests with the rehabilitation authority there is no requirement to consider the exclusionary provisions as that is the relevant authority's delegation. Consequently, the *Guidelines for rehabilitation authorities 2012* and Comcare's operational advice on the payment of rehabilitation costs at least to the date of liability argues against early rehabilitation intervention being contingent upon liability. However, **a legislative amendment along the lines proposed at question 30 would assist**. |

| *1. Obligations on employers and employees to participate in rehabilitation* | |
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| 32. Should the regulatory tools of the Act relating to rehabilitation obligations be strengthened? | **The Act should clearly specify an employer's primary role and duty to provide rehabilitation. Comcare suggests examining something similar to the positive duty arrangements detailed in the WHS Act for 'officers'**—for example, Secretaries/Deputy Secretaries must meet rehabilitation authority responsibilities.<br><br>Rehabilitation obligations should incorporate relevant WHS obligations as safety and rehabilitation universally rest with the employer. An incident that results in an injury should include the success, or otherwise, of the return to work as part of the incident investigation, corrective action and report. The employer should ensure the causal factors of the incident are addressed before the injured employee returns to those duties. This would strengthen the rehabilitation management system and bring the same intensity to rehabilitation regulation as WHS regulation. |
| 33. What should those legislated obligations be? | **This is a matter for the review**. |
| 34. Where claims are managed by Comcare, should Comcare be able to initiate rehabilitation for injured employees who have separated from their employers? | **Comcare supports an amendment to the Act that would allow Comcare to initiate rehabilitation in circumstances where the employee has separated from their Act employer**. This may include the power to direct the Act employer to provide rehabilitation to the separated employee.<br><br>**The review should also explore providing Comcare with the power in certain circumstances to nominate who the rehabilitation authority should be and to direct that rehabilitation authority to provide rehabilitation**. This could occur where the employer ceases to exist due to machinery of government change or the dissolution of a licensed corporation. An alternative rehabilitation authority is also required when an agency ceases to be a Commonwealth authority or a licence is revoked. |

| *2. Obligation on employers of injured employees to provide "suitable employment"* | |
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| 35. In cases where an injured employee is unable to return to the employee's pre-injury employment, but has a capacity to work, are the obligations on employers to provide, and injured employees to accept, suitable employment sufficient? | Comcare is aware of employers who are not taking reasonable action to find suitable employment for injured employees with work capacity, or where injured employees with work capacity are failing to reasonably engage with their employer's return to work efforts. Any increase in obligations in this area, with appropriate safeguards, would be of benefit to the scheme as a whole. |
| 36. If not, how can those obligations be strengthened? | **The 2007 SRCOLA amendments could be expanded to include 'any' employment as suitable employment after a nominated period—not just after retirement**.<br>**The provisions of the Act should clearly address the mutual duty of the employer and injured employee to place the employee in suitable employment** by:<br>• reasonable adjustment–so that reasonable failure by a liable employer to provide suitable employment/reasonable adjustment would be seen as discrimination on the basis of disability<br>• preventing termination of an injured employee's employment—in the absence of another legitimate reason such as discipline or genuine redundancy—unless durable suitable employment is achieved within or outside of the employer<br>• providing for vocational and functional capacity assessments to determine the injured employee's fitness/capacity for suitable employment<br>• broadening the definition of suitable employment definition to include, after 45 weeks incapacity, outside employment which meets the employee's assessed capacity<br>• expanding the definition of rehabilitation after 45 weeks incapacity to include vocational programs, job search and job placement programs to achieve suitable outside employment.<br><br>It needs to be clearer that it is possible to restrict or suspend some or all compensation for an injured employee who voluntarily removes themselves from an area where suitable employment/duties are available and chooses to work in an area where rehabilitation and return to work efforts are more difficult.<br><br>Comcare would be able to charge employers a penalty fee if they fail to undertake rehabilitation authority powers and relevant employer duties.<br><br>Prescribing penalties for premium-paying rehabilitation authorities if they fail to comply with the rehabilitation |

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| | guidelines or fail to seek and provide injured employees with suitable duties should also be considered.<br><br>Vocational assessments and functional capacity evaluations should be compulsory for deeming an injured employee with an ability to earn. Currently section 57 is limited to medical examinations by a legally qualified medical practitioner. **Comcare recommends that this section be amended to allow for functional capacity evaluation, vocational assessment and job market analysis by a suitably qualified person**. This would assist the relevant authority with gauging the employee's capacity for suitable employment. |
| 37. Should the definition of "suitable employment" be amended to enable an injured employee to be provided with employment with a different employer? | There needs to be greater legislative flexibility to explore the widest possible range of suitable options for the injured employee. |
| 38. Should a scheme-wide employment incentive scheme be established? | Comcare cannot comment with certainty on this proposal given the limited details provided to date. However, Comcare would support amendments that establish an incentive scheme for improving overall return to work rates across the jurisdiction. |

| *3. Identifying the Rehabilitation Authority of employees* | |
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| 39. Should the Act be amended to identify clearly the rehabilitation authority for an injured employee, in case of the employees who have separated from their employers? | **Yes**, refer to question 34. |
| 40. Who should be the rehabilitation authority for employees who are no longer employed by the liable employer? | **Refer** to question 34. |

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| ***D. Permanent Impairment*** | |
| *1. Adequacy of current permanent impairment lump sum benefits* | |
| 41. Should the maximum permanent impairment lump sum payable be increased? | **The level of compensation payable in permanent impairment (PI) claims is a policy decision for Government**. The Review should have consideration to the recommendations submitted by Comcare following its review, in 2009, of the Act's PI provisions and benefit regime.<br><br>Comcare considers the current statutory maximum amount for PI lump sums as inadequate, particularly at the higher levels of impairment, in light of the very serious impairments these levels entail. It is also noteworthy that other Australian jurisdictions have historically provided significantly higher PI entitlement levels than that available under the Comcare scheme.<br><br>However, any increase in the statutory levels would potentially have a significant impact on longer-term claims liabilities for the Comcare scheme. Having said that, the vast majority (approximately 90 per cent) of Comcare PI claims have a total whole person impairment rating of less than 40 per cent.<br><br>In addition, it is important to note that a successful PI claim also entails entitlement to an award for non-economic loss (NEL). This means any variation in the amount for PI lump sums would also necessitate a consequential review of the maximum NEL entitlement.<br><br>A further important aspect in assessing whether the level of the maximum PI lump sum is still appropriate is that the level of entitlement to PI awards has a linkage to the degree of access to common law. In theory, the policy intent behind workers' compensation schemes are that the more limited the degree of access to common law, the higher the PI entitlement. As a result, Comcare recommends that any review of the maximum PI lump sum consider this issue. |
| 42. If so, to what amount should it be increased? | As above, **Comcare considers this is a policy decision for Government**. If the maximum PI lump sum is to be increased, the amount to which it is increased should be set in light of the considerations detailed in response to question 41.<br><br>An option which has been considered in earlier reviews of the PI system is to peg the maximum lump sum for PI to the death lump sum rate under subsections 17(3) and (4). When the Act commenced, the death lump sum amount was |

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| | $120 000 and the combined amount for PI and NEL combined was set at approximately 90 per cent of the death lump sum, which at present rates would be approximately $428 366[1]. Since that time, the death lump sum has increased almost fourfold, however the maximum for PI lump sums has only increased by half. |
| 43. Should the cap on common law damages be increased? | The statutory maximum of $110 000 has remained unchanged to discourage common law actions by injured employees against employers and their fellow employees.<br><br>The decision on the amount to change the current cap on damages is a policy question for Government. The government view in 1988 was that limited access to common law and a capped maximum amount are fundamental to the design of the legislation. **Comcare considers there may be merit in the review exploring whether this principle should still be applied.** If there are proposals to increase the cap Comcare would suggest that access be limited to impairment of a significantly greater nature than the current 10% threshold. The irrevocable election should be retained. |
| 44. If so, to what amount? | **Comcare considers the actual amount of any common law cap is a policy decision for Government**. |

[1] Death lump sum at 1 July 2102 is $475, 962.79

| *2. Permanent impairment lump sum benefits where there are multiple injuries* | |
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| 45. Should permanent impairment compensation be calculated on the basis of "whole person" impairment by combining all impairments resulting from multiple injuries that arise from a single incident (for example, a motor vehicle accident or a fall)? | This approach would represent a common sense, and easily applicable approach to calculating permanent impairment entitlements. Currently, as a result of the High Court's decision in *Canute v Comcare*[2], each injury must be assessed independently and the 10 per cent threshold for permanent impairment compensation applied. This approach achieved a fair outcome for Mr Canute in the particular circumstances of his claim. However, it has also meant that many more claimants with significant overall impairments do not qualify for any permanent impairment lump sum.<br><br>At present, due to the operation of *Canute*, an injured employee can sustain multiple impairments of up to 9 per cent whole person impairment each, but not qualify for any lump sum payment, given that each separate injury must meet the 10 per cent threshold in its own right. Comcare considers this outcome to be unfair to injured employees, and not in keeping with the intent of the Act.<br><br>As a result, **Comcare would strongly support a new statutory approach to this issue which would see the level of permanent impairment viewed holistically, and not on the current artificial basis of assessing each injury in isolation**. There has been a national policy process under the auspices of Safe Work Australia aimed at increasing consistency of jurisdictional approaches to a number of areas of workers' compensation, including permanent impairment. Any changes to the Act in this area should take Safe Work Australia's work into account. |

[2] *Canute v Comcare* [2007] HCA 47, 28 September 2006

| *3. Impairment thresholds for the purpose of permanent impairment lump sum benefits* | |
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| 46. Should the threshold for permanent impairment claims be reduced? | **Comcare considers the threshold for eligibility for a permanent impairment claim is a policy matter for Government**. However, given that most PI claims are at the lower end of the PI scale, the threshold at which a PI lump sum is payable will be a significant issue for many injured employees. An injured employee with less than 10 per cent whole person impairment (WPI) is still significantly impaired and the decision to set the threshold just above these levels can appear arbitrary to many employees. Lowering the threshold below the current 10 per cent WPI will mean many more PI claims will succeed, but will also have an effect on overall scheme liabilities.<br><br>In other jurisdictions, thresholds for PI lump sums have been as low as 1 per cent WPI (NSW), with a number of schemes also having thresholds of 5 per cent WPI. The maximum lump sum in some cases is significantly higher than under the Act. |
| 47. If so, what should the threshold be? | **Comcare considers this is a policy question for Government**. In 2009, when Comcare conducted a Policy review of the Permanent Impairment provisions, there was agreement that there was simplicity in having one threshold (with a few exceptions, notably hearing loss) and this was a positive aspect of the benefit structure of the Comcare scheme.<br><br>In considering this issue, the balance between equitable and fair benefits and the financial viability of the scheme must be kept in mind. |
| 48. Should there be (any) other limitations put in place? | No comment. |

## *E. Other issues*

### *1. Appeal and reconsideration process for disputed compensation claims*

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| 49. Should the Act's dispute resolution mechanisms be altered in any way? | Comcare's experience has been that claim disputes which are resolved as early as possible in the review and appeal process tend to achieve better outcomes for both the injured employee and the scheme as a whole. Generally, injured employees involved in traditional dispute resolution procedures do poorly in terms of return to work, length of claim and cost of claim.<br><br>Comcare's view is that the more formal dispute resolution procedures should be limited to the very few cases where such processes are necessary.<br><br>Comcare strongly supports an emphasis on early and alternative dispute resolution processes under the Act. In particular, **Comcare would support a legislated mediation/dispute resolution as an interim measure before matters go to the Administrative Appeals Tribunal (AAT)**. Currently under section 67 an injured employee can only recover legal costs and disbursements once a claim is before the AAT. This means that injured employees will often only obtain legal advice or medical evidence at this stage, and their claim is not properly formulated until after proceedings have commenced.<br><br>If it was possible for injured employees to recover reasonable legal costs and disbursements associated with Administrative Dispute Resolution (ADR) at the reconsideration stage—subject to the injured employee obtaining a more favourable result than that of the determination—it would encourage greater use of this process and may reduce the number of claims that proceed to the AAT.<br><br>One option is to gazette costs Comcare and other determining authorities in the scheme incur for legal guidance. Currently, there is no cost penalty for an injured employee if they are not successful on appeal at the AAT. Comcare is unable to recover costs even if the appeal was ill-founded or essentially frivolous. Further, solicitors for most applicant injured employees in the Comcare scheme act on a no-win, no-fee basis. Therefore, while legal costs are relevant, they do not appear to be a determining factor in most cases in encouraging an applicant injured employee to settle a claim. An amendment to the Act could provide that if a matter proceeds to the AAT, and an eventual settlement is the same |

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| | as was offered at the interim dispute resolution stage, the applicant may seek costs based on gazetted legal costs schedule. The gazetted schedule would publish costs aligning with defined outcomes rather than the extent of legal activity.<br><br>Comcare suggests that the review examine the WorkSafe Victoria and the TAC structure of dispute resolution procedures. This model establishes the authorising environment in legislation, but avoids prescribing the process/rules in legislation. |
| 50. Should the legislation be amended to allow or require disputes about medical issues to be referred to a medical panel/tribunal for resolution of the medical issue alone, or for resolution of the entire dispute? | **Comcare recommends the review explore a model of medical assessment tribunals for medical diagnoses and treatment**. Such a tribunal could act in lieu of matters proceeding to the AAT under the AAT Act. |
| 51. Should the legislation require alternative dispute resolution as a pre-cursor to AAT review in appropriate cases? | **Comcare would support an amendment to the Act that requires alternative dispute resolution before any review by the AAT—provided appropriate criteria for by-passing ADR are specified**. While the detail needs to be considered, Comcare considers a statutory requirement for alternative dispute resolution prior to proceeding to the AAT could, in appropriate cases, result in a quicker and more efficient resolution of disputed claims.<br><br>Comcare considers that there is an important point of law which needs to be clarified and resolved with guidance from the AAT or higher courts in some disputed claims. If a compulsory ADR process were to be introduced into the Act, Comcare would support including a power for it to by-pass the ADR stage where it considers an important point of law needs to be resolved. In such cases the Act could provide that any fees otherwise payable by the injured employee under the new gazetted fees regime (see question 49) would be payable by Comcare, not the injured employee. |
| 2. *Comcare's inability to make payments redressing loss when errors have occurred* | |
| 52. Should the legislation be amended to allow payments to be made for detriment caused by defective administration? | In its report of March 2010 (04/2010—*Comcare and Department of Finance and Deregulation: Discretionary Payments*), the Commonwealth Ombudsman reported on a number of complaints made by injured employees to the Ombudsman about maladministration in the management of their claims. The Ombudsman found that, as presently structured, the Act does not provide a means for injured employees to receive redress for loss when maladministration has occurred |

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| | on the part of Comcare.<br><br>Licensed corporations under the Comcare scheme have the power, as corporations, to make such payments in cases where they consider this is justified. Injured employees for whom the Department of Veterans' Affairs is the claims manager can also access redress through the Commonwealth's Compensation for Detriment caused by Defective Administration (CDDA) scheme, given that it is an agency subject to the *Financial Management and Accountability Act 1997* (FMA Act). Comcare, however, is established as an entity under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). This means that injured employees who suffer maladministration in a Comcare-managed claim do not have access to the CDDA scheme.<br><br>As a CAC Act body, Comcare does not currently have the authority to make payments to injured employees other than those allowed for by the Act. In light of this limitation, and the recommendations of the Ombudsman's report—which Comcare has fully accepted—**Comcare would strongly support amendments to the Act to give Comcare the power to provide financial redress for defective administration**.<br><br>**Comcare supports the review extending CDDA arrangements to all administrative and legislative activities undertaken by Comcare**. |
| 53. If so, what should the amendments provide for? Would the features of the CDDA scheme be appropriate for the Comcare scheme? | **The amendments should accommodate the remedies provided under the FMA Act CDDA arrangements**. For example Comcare is unable to pay interest on outstanding claim payments which have occurred as a result of defective administration, even in cases where there has been significant maladministration in the management of the claim.<br><br>The Act only allows Comcare to pay interest on a delay to the payment of a permanent impairment lump sum. Any amendments to the Act should allow Comcare to compensate for financial detriment resulting from defective administration for those claimants under the Act whose claims are significantly delayed, or where there has been other significant maladministration under the Act. |

| Final Comments – In-confidence. Not for Publication. | |
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| *Final Comments?* | |
| 54. Any other matters you wish to bring to the attention of the Review? | Comcare would like to raise the following additional issues as part of its submission to the Act Review. Comcare has sought the views and ideas of its staff. The comments raised do not necessarily reflect Comcare's corporate views.<br><br>***This part should be treated as confidential and not for publication.***<br><br>**Notional Liability**<br><br>The benefits of provisional liability in encouraging earlier engagement with the injured employee are supported in principle by Comcare. Comcare would welcome the Review giving this matter consideration not withstanding that its complexity may warrant a new Act to allow for its practical implementation.<br><br>**Definitions**<br><br>**Definitions in the Act need to be reviewed and updated.** For example:<br>• Revising the definition of medical treatment so that it can measure the effectiveness of the treatment. This would allow injured employees, their medical providers and determining authorities to assess whether the treatment is improving, worsening or not changing the effects of the compensable injury. This informs and justifies medical treatment decisions and prevents the development of dependence on ineffective treatment which may worsen the health outcomes of injured employees. Measurement of outcomes to determine clinical effectiveness is considered best practice. Measures should be related to the functional goals of treatment and relevant to the IW's injury.<br>• Changing the definition of Legally Qualified Medical Practitioner to 'registered medical practitioner'—the current definition of medical treatment within the Act has not been modified to reflect the national changes that regulate registered professionals. |

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| | • Amending the therapeutic treatment definition to require the ability to produce a demonstrable clinical outcome or ensure treatment is provided in line with the Clinical Framework.<br>• the definition of 'incapacity' in the Act should be expanded to focus on the employee's abilities rather than disabilities for employment purposes – see UK "Fitnotes Legislation".<br>**Rehabilitation**<br>• **The Act's rehabilitation provisions need to be updated and amended to improve injured employee outcomes.** Comcare also suggests including explanatory commentary in the Act, to support rehabilitation and compensation delegates administrating the new provisions with an overview of their object and purpose. Include a specific definition of 'return to work'. The definition could address the notion of 'durability' and focus on the value of return to 'work', in lieu of or in addition to the current outcome measures of same employer, same job, same wages etc.<br>• **The Act should support early intervention even where employees are injured but a claim has not yet been lodged**. Comcare suggests the Act require the notice in writing (under section 53) be served on the rehabilitation authority rather than the relevant authority. This would give rehabilitation authorities the legislative capacity—in addition to the authority under the *Guidelines for Rehabilitation Authorities 2012*—to arrange a rehabilitation assessment or provide a rehabilitation program prior to a claim being lodged.<br>• Sections of the Act that relate to the approval of rehabilitation providers need to be amended to allow for **national consistency** of the Comcare Approved Rehabilitation Providers approval process with the National Approval of Rehabilitation Providers model.<br>**Respite care services**<br>• Currently the Act does not provide for respite care services. **Comcare suggests that the review explore the inclusion of such services for catastrophically injured employees.**<br>**Household and attendant care services**<br>• The current provision provides a threshold of 28 days before household and attendant care services can be provided. While the original policy intent may have been that the injured employee should be encouraged to not become dependent on such services at such an early stage, **Comcare's view is that where an injured** |

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| | **employee requires such services, it should be irrelevant that 28 days has not elapsed.**<br>• **Comcare suggests that the review explore the statutory cap on provision of attendant care services** for catastrophically injured employees.<br>**Clinical framework**<br>• Comcare's clinical framework outlines a set of guiding principles for the delivery of allied health services to injured employees. **Comcare suggests that the Act needs to support the implementation and effective monitoring of Comcare's Clinical Framework.**<br>**Relocation of an injured employee**<br>• The Act should clarify when weekly incapacity compensation should cease to be payable as a result of an **injured employee's relocation, away from suitable employment.**<br>**Schedule of Diseases**<br>• The regulations to section 7(1) of the Act limit the intended effect of the legislation. The reference to "Disease" in the Schedule should be amended to read "Disease of a kind" to be in keeping with the legislative phraseology.<br>• Additionally, Comcare would invite a review of that Schedule to ensure it aligns with the ILO Convention on Industrial Diseases.<br>**Secondary conditions**<br>• The Act requires more clarity around the treatment of secondary conditions—that is, whether they are considered a separate injury, or a sequela and accepted on the primary injury claim. **Comcare therefore suggests that the definition of injury be incident based.**<br>**Collection of information**<br>• **Comcare and other determining authorities need greater powers to obtain information** to properly and quickly assess claims. The review could consider using WHS Inspector powers under the WHS Act to obtain relevant documents.<br>**Monitoring and Facilitating Equity of Outcome**<br>The scheme envisages equity of outcomes for claims made by employees in similar circumstances regardless of whether the decision was made by Comcare, a licensee or the Military Rehabilitation and Compensation Commission (MRCC). One of the mechanisms the Act provides to facilitate monitoring equity of outcomes is to require licensees |

and the MRCC to inform Comcare of proceedings brought against them in relation to determinations made or anything done in managing a claim. In practice, Comcare has experienced some difficulties in achieving the objective of these provisions.

- Section 108C and section 144(7) require Comcare to be informed of 'proceedings brought against' the licensee and MRCC. This clearly encompasses all AAT proceedings at first instance as the licensee or MRCC will always be the respondent in those proceedings. There is some debate about whether appeal proceedings brought by a licensee or MRCC in the Federal or High Court are also encompassed. Comcare's view is that as an extension of the initial proceedings, these appeals are encompassed by the provisions and that to facilitate equity of outcomes Comcare clearly needs to be informed of court appeals. **The review may wish to consider however whether the Act should be clarified to confirm that both licensees and MRCC are required to inform Comcare of proceedings brought both against and by them.**
- Comcare has the power to join proceedings and object to submissions being made within those proceedings. While powers to request or require documents and other information in relation to the proceedings may be implied from the Act or included in licence conditions, there is currently no explicit statutory requirement for licensees or the MRCC to provide such documents or information. The effective discharge of Comcare's functions regarding proceedings would be improved by **giving Comcare clear statutory powers to require licensees and the MRCC to provide information and documents in relation to proceedings and the consideration of sanctions, such as penalty points, in the event of non-compliance.** Another, possibly less administratively burdensome, option would be to require Tribunals and Courts to provide copies of documents to Comcare.
- The provisions regarding licensee and MRCC proceedings are largely consistent but differ in some respects. For example, while the Commission may make it a condition of licence that licensees not make submissions to which Comcare objects, this is a statutory condition of the MRCC exercising its functions under the Act. **Comcare recommends consistency between the provisions regarding proceedings wherever possible.**
- **The Act could also benefit from more clarity regarding the regulatory roles of Comcare and the Commission.** For example, while it is a Commission function to ensure equity of outcomes, we note that the Act requires licensees and the MRCC to inform Comcare rather than the Commission that proceedings have been brought under the Act. In addition, it is Comcare, rather than the Commission, that has the statutory right to join, and to object to submissions being made within, those proceedings.

These provisions are clearly intended to assist the Commission in ensuring equity of outcomes and Comcare may undertake these functions as part of its duty to assist the Commission under section 72A of the Act. The

provisions also assist Comcare in ensuring determinations are made accurately and quickly and in advising the Minister about anything relating to its functions and powers. Monitoring and intervening in proceedings when necessary is an important regulatory function that may have been intended to relate to both Comcare's and the Commission's role. This serves however as one example where the governance arrangements are not entirely clear under the Act.

- While the functions of both licensees and the MRCC (set out in sections 108E and 142 of the Act) include maintaining contact with the Commission and Comcare to ensure that there is equity of outcomes, the correlative Commission function (s89B) relates only to Comcare and licensees. This also appears inconsistent with the Commission's power to make guidelines regarding defence-related claims. This inconsistency may have been a drafting oversight when Part XI was inserted in 2004 and could be easily **resolved by amendment**.

**Comcare considers that the role of the Commission in these matters, and Comcare's duties, should be clarified in the Act**.

**Employees on Compensation Leave**

**There is a need to delink workplace relations leave entitlements from workers' compensation entitlements** (see Fair Work Act review).

The review could therefore explore the operation of section 116 that provides guidance on the accrual of leave for the first 45 weeks of incapacity compensation but is silent on how it accrues therefore after. Comcare is also aware of the issues faced by employers in refusing other types of leave during a period of compensation leave and is of the view that the SRC Act should not prescribe workplace arrangements.

Repayment of salary, wages or pay, and re-crediting of paid leave, where compensation claims successful (section 23A)

There should be an ability to recover incapacity overpayments from employers. The Act was amended to facilitate payments to injured employees through employers (creation of s23A and s112A). However, no amendments were made to allow for recovery.

**Fraud**

Section 13A of the SRC Act provides that 'the *Criminal Code* applies to all offences against this Act.'

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| | Fraud investigators currently rely on fraud offences as prescribed under the Commonwealth *Criminal Code Act 1995* - mostly Part 7.3 fraudulent conduct and Part 7.4 false or misleading statements.<br><br>**Comcare recommends amendments are made to the SRC Act to specifically define particular actions or the absence of actions in certain circumstances as constituting offences under the Criminal Code**. An example would be an employee failing to provide Comcare with information of a change in circumstances.<br>The suggested amendments are in response to the case of Poniatowska[3] where the High Court found that criminal liability does not attach to an omission unless there is a legal obligation to perform an act.<br><br>**Comcare considers legislative authority for information gathering powers for authorised fraud investigators including production notices and ability to execute search warrants etc. be considered.**<br><br>**Comcare also suggests that an amendment be considered for when an injured employee is convicted of defrauding the scheme, the relevant authority should have the power to determine a cessation of liability on the particular claim.**<br><br>**Self-insurance**<br><br>The process for license applications is too complex. **The roles of the Minister, SRCC and Comcare need to be clarified.** It is suggested that:<br><br>• **Ministerial functions under sections 102–107A be taken up by the SRCC**, with Ministerial direction still provided through section 89D<br>• **requirements for license extensions and revocations are clarified**—the Act could be amended to provide for a prescribed form for extensions included in the Regulations<br>• **group licenses** should be introduced for eligible corporations<br>• **a time limit/'sunset clause'** be placed on declarations<br><br>where a licence is granted or extended for less than 12 months, **fees should reflect the shorter period** of licence and no further fees should be incurred by the licensee that financial year.<br><br>**Recovery of compensation in common law in relation to disease**<br><br>Comcare cannot recover compensation paid if an injured employee obtains a common law settlement in relation to a disease (this can be done in cases of injury). **This anomaly should be rectified.** |

[3] : **Commonwealth Director of Public Prosecutions vs. Poniatowska [HCA 43] – 26 October 2011 – A20/2010 (Centrelink case)**

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| | Comcare has ceased the practice of recovering compensation directly from insurers as it was found to have the potential to diminish the rights of the injured employees to recover damages in the future. **An amendment to the SRC Act could empower Comcare to recover compensation paid from an insurer without prejudicing the employees' rights to recover damages.** |

Australian Government
Comcare

PUTTING YOU FIRST

30 May 2014

Secretariat

Education and Employment Legislation Committee

SG.52 | Parliament House | PO Box 6100 | Canberra ACT 2600

Dear Senators,

I write to provide information to support the Committee's inquiry assessing the potential impact of proposed changes to federal law on work health and safety (WHS) coverage for workers within the Comcare scheme.

Comcare's submission is attached. Its key message is that Comcare has the appropriate regulatory model and operational capacity to monitor and enforce WHS obligations both in Australia and overseas.

The WHS outcomes achieved by an integrated WHS, rehabilitation and compensation system, together with Comcare's regulatory approach have been consistently delivered good performance and outcomes.

Please do not hesitate to contact me with any questions you may have or if you require clarification.

Yours sincerely

Paul O'Connor

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CHIEF EXECUTIVE OFFICER

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Comcare

## Purpose

This is Comcare's submission to the Senate's Committee on Education and Employment Legislation in respect of its inquiry assessing the potential impact of proposed changes to federal law[1] on work health and safety (WHS) coverage for workers within the Comcare scheme.

## Background

Comcare is a federal WHS regulator and underwriter of workplace liabilities. Its purpose is to prevent workplace harm and support those affected by it. Comcare's work is derived from four statutory charters described in **Attachment 1**.

Comcare is largely self-funded[2] for its three programs of work[3]:

| | |
|---|---|
| **Outcome 1** | Protection of workers' health, safety and welfare at work |
| **Outcome 2** | Early and safe return to work and access to compensation through best practice rehabilitation and claims management |
| **Outcome 3** | Managing the Commonwealth's liability for compensation for asbestos-related diseases |

Outcome 1 is relevant to the Committee's inquiry.

The Comcare 'scheme' provides WHS coverage for some 438,000 Australian people working for the Australian Defence Force[4] and a mix of public and private sector employers. Federal workers' compensation law covers employees of self-insured licensees, Commonwealth employees and public sector workers in the ACT Government.[5]

It's expected that Comcare's WHS coverage will expand with the entry of new national companies if the proposed amendments to federal law are passed.

The Department of Employment's submission provides information regarding the Comcare scheme and its legislative base. It also describes the role and activity of the Safety, Rehabilitation and Compensation Commission (SRCC) that has licensed 29 organisations[6] to be self-insured in the Comcare scheme.

[1] Amendments proposed to the *Safety, Rehabilitation and Compensation Act, 1988* (SRC Act)
[2] In Comcare's 2013-14 funding ($554 million) 87 per cent ($481.3 million) is independent income while special appropriations account for 12 per cent ($66.3 million) with the 1 per cent balance ($6.3 million) funded by appropriation.
[3] *Portfolio Budget Statements 2013-14*, Budget related paper 1.5
[4] This includes 78,000 members of the Australian Defence Force, its reserves and cadets and 3,000 workers in Commonwealth agencies that only have WHS coverage.
[5] ADF members have compensation coverage administered by the Department of Veterans Affairs.
[6] As at 30 May 2014

## Regulatory operations

Comcare's regulatory work uses federal WHS law to focus duty holders on the prevention of workplace harm and to hold them to account where they fail to do so.[7] Comcare uses federal compensation law to ensure scheme employers are clear about their role in an ill or injured worker's recovery, rehabilitation and return to work.

Comcare believes it provides an efficient and effective system of integrated WHS, rehabilitation and compensation regulation for national employers.[8]

## Integration of WHS with rehabilitation and compensation

The integration of WHS, rehabilitation and compensation arrangements is a key feature of the design and operation of the Comcare scheme. It's the model adopted in several, but not all, Australian and Canadian schemes.

Comcare argues the integration of these functions allows alignment of prevention efforts with the consequences of workplace harm. It creates mutually beneficial incentives for both WHS and compensation. It aligns the financial performance and social impact of outcomes.

Critics of integration argue that WHS priorities become misplaced when there is joint management of the two activities. Comcare's stakeholders have not raised this as an issue.

## Commonwealth regulation of national employers

It's important that the Commonwealth continue to regulate WHS, rehabilitation and compensation arrangements for the national employers, both public and private sector, in the Comcare scheme. The proposed amendments ensure new licensees are regulated by Comcare for WHS.

As federal law stands, new entrant employers[9] and their workers would be subject to the fragmented and uncoordinated systems of WHS regulation in each State and Territory in which they operate. Comcare suggests this is remarkably inefficient and increases the regulatory burdens, uncertainty and the costs of compliance at two levels:

- A local response from a state WHS regulator achieves local outcomes; a local response from a national regulator is more likely to achieve national outcomes for all workers in that business; and

[7] Comcare inspectors provide proactive advice and assistance to WHS duty holders to promote prevention of harm and also apply enforcement measures following WHS breaches and pursue appropriate justice outcomes.
[8] Comcare's regulatory compliance model and its regulatory policy is published at http://www.comcare.gov.au/Forms_and_Publications/publications/corporate_publications/comcare_regulation_policy
[9] For example, the SRCC will soon consider applications from DHL Supply Chain and Bank West.

- There is no common approach, coordination or harmonisation of WHS, rehabilitation and compensation laws, regulatory policies, systems, processes or cost structures across Australia. Where systems are common they are inconsistently applied.

## An efficient system

The Comcare scheme represents a highly efficient model for the national employers licenced to self-insure their workers' compensation risks. They deal with one regulatory system for their WHS and compensation arrangements. Their workers have common coverage and entitlements regardless of where they live or work within Australia.

National companies outside the Comcare scheme have to navigate the complexity of fragmented State and Territory regulatory and insurance systems.

## Comcare service is highly regarded

Recent market research explored the service experience of employers, workers and others with Comcare and its people. Highlights from recent independent surveys include an overall Comcare service index of 72.5 per cent (up almost two percentage points from 2011-12). Licensed self-insurers report a more positive experience with Comcare, with their index increasing almost 10 percentage points to 77.7 per cent (2011-12: 68 per cent).

Other service results[10] include:

| **Comcare's WHS regulation** | HSRs (per cent agree) | WHS managers (per cent agree) | Injury managers (per cent agree) |
|---|---|---|---|
| Comcare cares about WHS | 83 | 89 | 82 |
| Comcare is trusted | 70 | 68 | 62 |
| Comcare is respected | 67 | 70 | 62 |

| **Comcare services** | HSRs[11] (per cent agree) | WHS managers (per cent agree) | Injury managers (per cent agree) | Injured workers (per cent agree) |
|---|---|---|---|---|
| Satisfied with Comcare | 64 | 70 | 70 | 76 |

## Comcare has reshaped its business regulation

Comcare adopted a new business model in early 2014 that established a stand-alone scheme management and regulatory division, headed by the Deputy CEO. Its aim is to be an effective and modern workplace regulator and scheme manager to improve overall WHS, rehabilitation, return to work and compensation outcomes for all scheme employers.

[10] What people think about Comcare, April 2013
[11] Health and safety representatives

As a regulator, Comcare:

- Works in partnership with employers and their employees to prevent workplace injuries and achieve high standards in injury management and return to work;
- appropriately uses regulatory sanctions for any demonstrable failure of compliance with the requirements of federal law;
- Provides policy, guidance and encouragement for improvements in WHS and rehabilitation performance, systems and standards.
- Provides performance and licensing support to the SRCC's licensing decisions.

### A focus on continuous improvement

The SRCC's self-insurance licensing model requires continuous improvement in WHS, rehabilitation and claims management systems to meet set performance standards and outcome-based performance goals as a condition of licence.

Licensees are subject to a range of regulatory and monitoring activities, including:

- Prudential financial performance monitoring and assessment;
- Reporting against the Commission's key performance indicators;
- System audits for the prevention, rehabilitation, and claims management functions;
- Complaints monitoring; and
- WHS interventions and enforcement actions.

### Comparative assessment with other WHS schemes

The *Comcare Review*, conducted in 2009 by then Department of Education, Employment and Workplace Relations found that, overall, the Comcare scheme's approach to WHS regulation was comparable with other Australian schemes. The provision of self-insurance licenses to private sector corporations was not seen as placing them or their employees at a disadvantage.[12]

Assessment of the WHS frameworks which protect the interests of workers and others requires an assessment of:

- The legislative and regulatory policy framework(s);
- The capacity and approach of the regulator; and
- The scheme's WHS outcomes.

[12] DEEWR, 2009, Report of the Review of Self-insurance arrangements under the Comcare Scheme, p.2

Each state and territory may have differing WHS priorities and regulatory models and behaviours. This means that the events related to the death or injury of a worker in one place may be responded to differently in another state for similar incidents involving the same employer. It also means that improvements levied on an employer cannot be required nationally, leaving those national employers covered by multiple jurisdictions with the choice of whether or not they implement change across their workforce and systems.

The Comcare WHS regime is based on a nationally directed and outcomes-based approach to WHS management. The approach focusses on prevention. It encourages compliance through assistance and education, balanced with proactive and reactive inspections and workplace and work system audits.

Comcare's approach reflects the nature of the employers and workplaces being regulated. The defining characteristics include (both at a general level and relative to other schemes):

- A relatively small number of employers (approximately 250);
- Large workforces (95 per cent of employees are in workforces over 100 people);
- Geographic spread across Australia;
- A mature and well-developed national WHS system; and
- The capacity and capability to respond effectively to Comcare's regulatory model.

Comcare's regulatory approach is not significantly influenced by occupational type. The scheme's risk and occupation types have always been diverse, extending well beyond low risk, white collar occupations. They include:

- Defence, law enforcement and border protection operations, in Australia and overseas;
- Scientific, medical and research operations including nuclear science;
- Maritime and aviation operations, in Australia and overseas;
- Technical, manual occupations, often in remote, challenging locations;
- Telecommunications including field work and construction;
- Road and rail transport and logistics;
- Manufacturing, construction and mining services; and
- Banking and financial services.

The Comcare scheme has a ratio of inspectors to employees comparable[13] to the other state and territory schemes.

Comcare has a national team of 53 authorised inspectors who have nationally accredited qualifications. They are supported by a team of specialists.

[13] Safe Work Australia, 2013, Comparative Performance Monitoring Report: 15th Edition, p.47

The inspectors:

- Undertake proactive WHS interventions;
- Respond promptly to a serious incident or alleged WHS breaches, regardless of location;
- Provide advice and education;
- Resolve disputes; and
- Provide audit services.

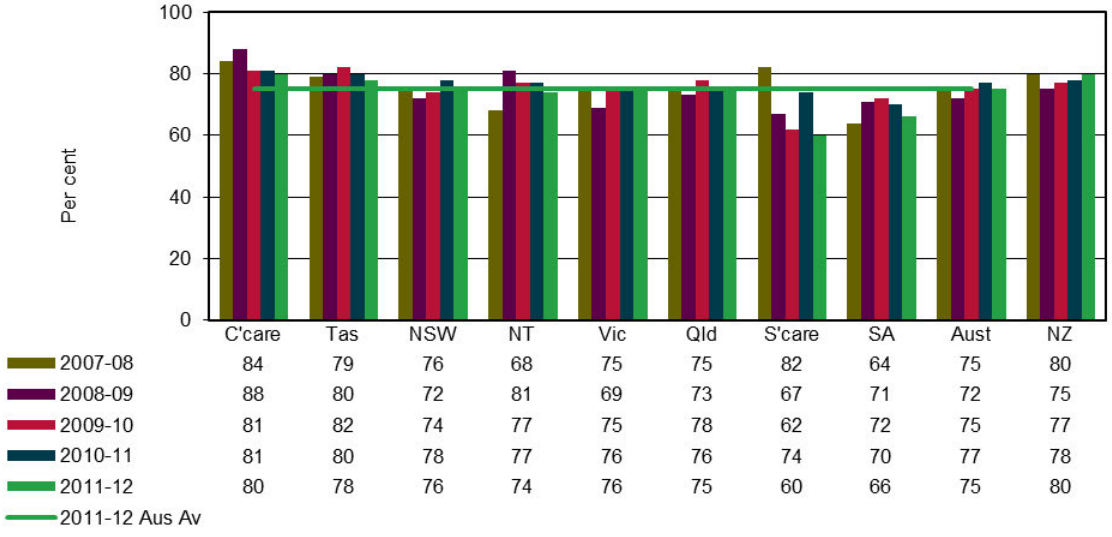
Consistent with the integrated nature of the Comcare scheme, inspectors deal with WHS issues as well as return to work, health standards and injury management performance in order to address the full consequences of a workplace injury.

## Results

The WHS outcomes achieved by having an integrated regulatory approach within the scheme, particularly the incidence and frequency of injury as reported in the comparative performance monitoring reports, have consistently demonstrated the scheme's good performance.

According to the latest published comparative figures, the Comcare scheme has fewer workplace injuries and better return to work outcomes for injured employees than any other Australian scheme. **Attachment 2** is a comparative performance table that depicts Comcare scheme performance results being better than the Australian average for every indicator. Comparing rehabilitation outcomes, reports show that the Comcare scheme has consistently had one of the highest durable return-to-work rates of all jurisdictions across Australia and New Zealand: see **Figure 1**:

Figure 1: Durable return to work[14]




[14] Safe Work Australia, Comparative Performance Monitoring Report, 15th Edition, October 2013

## ATTACHMENT 1

| | |
|---|---|
| **Work Health and Safety Act, 2012 (WHS Act)** | Implements, in the federal jurisdiction, model work health and safety arrangements agreed by Australian Governments. The WHS Act calls out Comcare as the federal work health and safety regulator and describes its related functions and powers. The WHS Act also allocates oversight and consultation functions to the Safety, Rehabilitation and Compensation Commission (SRCC). |
| **Safety, Rehabilitation and Compensation Act, 1988 (SRC Act)** | Establishes Comcare as a statutory agency and describes a range of functions and powers related to the regulation of workers' compensation and the claims management of workers' compensation liabilities. It also establishes the SRCC and describes its functions and powers. It calls out the SRCC as the regulator of certain national companies approved by the Minister to be licenced for self-insurance of their workers' compensation liabilities. The SRC Act divides and allocates regulatory responsibility for workers' compensation arrangements to each of Comcare and the SRCC and in some cases, jointly (in that sense they co-regulate). The SRC Act requires Comcare to provide staff and funding for the SRCC's work. |
| **Asbestos-related Claims (Management of Commonwealth Liabilities) Act, 2005 (ARC Act)** | Provides for Comcare to assume and manage the common law liabilities of the Australian Government and, with certain exceptions, its agencies and controlled companies, for asbestos-related conditions claims made by certain Australian workers. |
| **Seacare legislation** | A series of five related pieces of federal law create the scheme of work health and safety, rehabilitation and workers' compensation arrangements that apply to certain Australian seafarers and establish the Seacare Authority and its functions. The scheme is Australia's only example of an industry-based scheme. Its workers' compensation arrangements are modelled on the SRC Act. The SRC Act requires Comcare to provide the secretariat for Seacare Authority. |

CHIEF EXECUTIVE OFFICER
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Australian Government
Comcare

1 May 2015

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senators

Thank you for your letter of 30 March 2015 inviting Comcare to provide a submssion to support the Committee's inquiry assessing the potential impact of proposed changes to federal law on worker's compensation coverage for workers within the Comcare scheme.

Comcare's submission is attached. Its key message is that the provisions of the Bill are in line with current research and evidence on rehabilitation and return to work. The changes will greatly assist all scheme participants in improving scheme outcomes, especially as they relate to effective medical treatment, rehabilitation and earlier return to work.

Please do not hesitate to contact me with any questions you may have or if you require clarification.

Yours sincerely

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# Senate Standing Committee on Education and Employment Legislation

# Inquiry into the Safety, Rehabilitation and Compensation Legislation Amendment (Improving the Comcare Scheme) Bill 2015

## Submission of Comcare

## Introduction

This is Comcare's submission to the Senate Education and Employment Legislation Committee inquiry into the Safety, Rehabilitation and Compensation Amendment (Improving the Comcare Scheme) Bill 2015 (the Bill).

## Purpose of the submission

This submission focuses on the objectives of the Bill aimed at supporting employees who are injured at work participate actively in their injury management and rehabilitation, and where they are able to do so, seek and engage in suitable employment.

## The Comcare scheme

The Comcare scheme (the scheme) provides an integrated safety, rehabilitation and compensation system, no matter what Australian state or territory an employer operates in or where its employees are located.

Comcare's work is derived from four Commonwealth statutes described in **Attachment 1.**

*The Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) provides for rehabilitation and compensation to employees covered by the scheme for work related injury. The following employees are covered (as at 1 January 2015):

- Commonwealth and Australian Capital Territory (ACT) public servants
- Employees of Commonwealth and ACT statutory authorities and corporations
- Employees of corporations who have a licence to self-insure under the SRC Act.

The SRC Act also applies to members of the Defence Force injured during non-operational service before 1 July 2004. Schedule 16 of the Bill amends the SRC Act to ensure that the amendments made to the SRC Act, with minor exceptions, do not apply to defence-related claims.

## Comcare functions

Comcare's functions[1] under the SRC Act include:

- to make determinations accurately and quickly in relation to claims and requests to Comcare under this Act;
- to minimise the duration and severity of injuries to its employees and employees of exempt authorities by arranging quickly for the rehabilitation of those employees under the Act;
- to co-operate with other bodies or persons with the aim of reducing the incidence of injury to employees;

[1] Refer section 69 of the SRC Act.

- to conduct and promote research into the rehabilitation of employees and the incidence and prevention of injury to employees;
- to promote the adoption in Australia and elsewhere of effective strategies and procedures for the rehabilitation of injured workers; and
- to publish material relating to the rehabilitation of employees under this Act.

Comcare has a long history of claims management and working with employers and employees to access compensation benefits where appropriate and achieve return to work outcomes. In addition, Comcare has used its research, promotion and publication functions to test the performance of its approaches and monitor trends in other jurisdictions and internationally.

## Better practice claims management

Better practice claims management involves actively managing the claim to enhance return to work and recovery outcomes. Active management of claims will be enhanced by scheme parameters which clearly define the roles and responsibilities of all parties and which promotes early intervention and mitigate risks of longer term incapacity.

The Bill provisions will better support relevant authorities to implement better practice claims management in order to achieve the above objectives. It does this by:

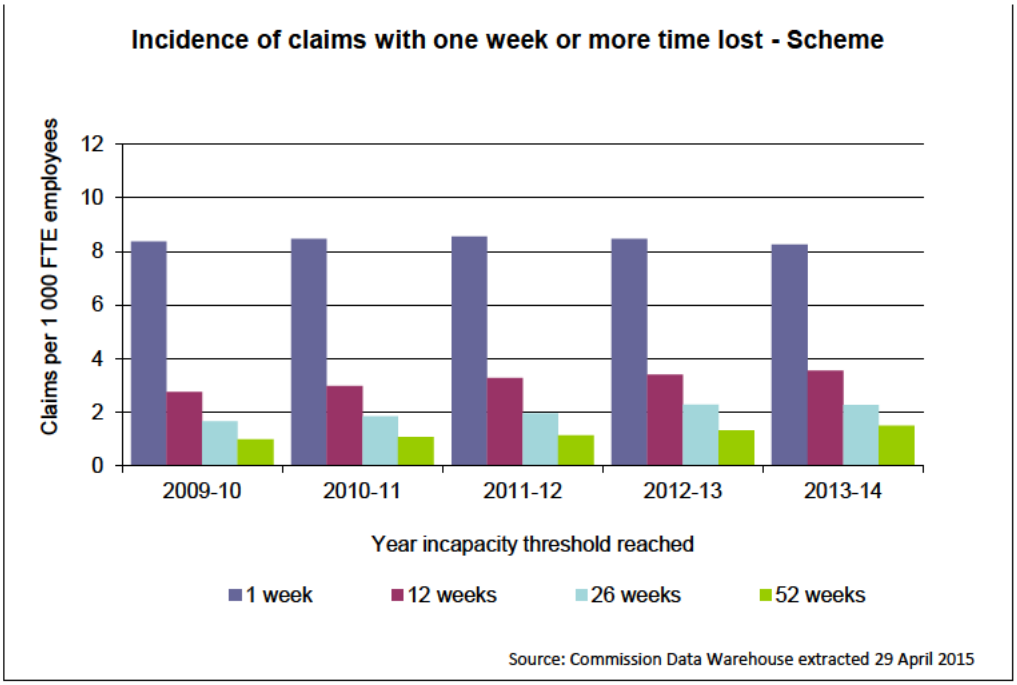
- requiring the early notification of injury;
- imposing clear rehabilitation roles and responsibilities on employers and employees;
- imposing obligations relating to assisting employees find and maintain suitable employment; and
- the introduction of work readiness assessment to assist in identifying suitable employment options.

If someone is ill or injured, getting the right treatment is important but health care alone has little impact on work participation outcomes.[2] Central to achieving improved return to work outcomes under the Comcare Scheme are those amendments that strengthen the rehabilitation and return to work requirements in the SRC Act and emphasise the vocational nature of rehabilitation services.

The legislative changes are complementary to Comcare's efforts[3] (as a relevant authority in the Scheme) to actively manage claims in conjunction with rehabilitation and return to work support provided by the employer.

[2] Bandura, A (1997) Self –Efficacy: The Exercise of Control. New York: W.H. Freeman & Company. Fear, W J (2007) Return to work revisited. The Psychologist, 22, (6), 502-503.
[3] Comcare is currently implementing an active claims management model in its Claims and Liability Management Division to improve return to work outcomes and reduce time taken off work.

## Incidence of claims with one week or more time lost




As shown in the above table, the proportion of injured employees receiving compensation benefits at 12, 26 and 52 weeks have been increasing.

The amendments contained in schedule 2 of the Bill will create an improved regulatory environment and assist improved return to work outcomes employees who are off work longer and are more likely to develop long-term incapacity if no effective intervention is made.

## Research

Comcare has access to the latest thinking on return to work and how a quicker return to work can assist both the employee and the workplace, as well as reduce the economic and human costs associated with work place harm.

The Bill supports the key insights derived through Comcare's research.

**Early Intervention**

Early intervention programs have been found to have a positive effect not only in terms of improving employee outcomes (recovery), but also in terms of their capacity to remain at work, reducing the length of time they are away from work, reducing the likelihood of further sickness absences, and ultimately, improving their longer term perceptions of the workplace. Similarly, workplaces using early intervention programs have found that they

reduced the number of days employees are absent from work, their costs, and the amount of lost productivity. [4]

**Case study**

Comcare and the Department of Defence collaboratively developed an administrative framework to provide early response to injury, to prevent long-term absence from the workplace and reduce the development of chronic illness.

A review of Defence's claims management outcomes over the last three years suggests that the strategy has been effective through a significant reduction in the number of accepted claims, cost of claims and duration of incapacity.

The Bill provides clear roles and obligations which will help all Comcare scheme employers and Comcare share responsibility to reduce the human and financial impact of workplace harm.

The Bill provisions relating to rehabilitation are aimed at assisting in improving the time taken by an employer in notifying Comcare of a claim, thereby providing greater opportunity to ensure employees with these injuries are getting the support they need as early as possible. The amendments will also enable the early provision of medical treatment to employees in order to minimise unnecessary disability.

**The health benefits of work**

There is compelling international and Australasian evidence that work is generally good for health and wellbeing, and that long-term absence, disability and unemployment generally have a negative impact on health and wellbeing.[5,6]

Australian medical experts are clear and united in their support, led by The Royal Australasian College of Physicians (RACP) and the Royal Australian College of General Practitioners (RACGP). The RACP released a Consensus Statement on the Health Benefits of Work in March 2011. It outlines the positive relationship between health and work and the negative consequences of long term work absence and unemployment. Comcare joined almost 100 signatories, including business groups and accident compensation agencies, in endorsing its application and acknowledged their role in promoting the health benefits of work.

[4] Comcare Early Intervention Report of October 2014: (http://www.comcare.gov.au/promoting/research_and_case_studies/early_intervention)
[5] Marmot, M 2005, 'Social determinants of health inequalities', *The Lancet*, vol.365, pp.1099-104.
[6] Waddell, G and Burton A.K 2006, *Is work good for your health and wellbeing?,* London, UK: The Stationery Office.

There is a vast body of evidence that people with mental ill health are one of the highest risk groups when it comes to long term sickness.[7] A good job contributes to good mental health[8,9] and long absences form work increase the risk of permanent work disability[10].

For these reasons Comcare places a genuine priority on prevention and early intervention activities.

**Case example**

*"In my case, I'm not in the least bit afraid to talk about my recovery from depression, because I'm extremely proud of the progress that I've made, and that I've been able to get back into the workplace against fairly significant odds. It was always my goal to get back to work. I felt, and still feel, I've got probably 10 good years at least left to me in the work place"*

The Bill, if enacted, will encourage employees to participate actively in their injury management, and where they are able to do so seek, engage and remain in suitable employment. By providing clear roles and responsibilities on all key participants in the rehabilitation and return to work process, the Bill will enable employers, their employees and the relevant authority to work more closely together to identify employment opportunities to improve outcomes for employees.

The Bill also provides Comcare with the ability to arrange work place rehabilitation for an employee, which is important in circumstances where the employee is no longer employed by that employer and they are unable to provide workplace rehabilitation for the employee, or where an employee has a capacity to work but refuses to do so.

**Case example**

At the time of injury the employee was employed by an employer who was an employer under the Comcare scheme. The employer's attempts to rehabilitate the employee to his pre-injury position were successful to a degree. However with a worsening of the employee's medical condition it became apparent that the employee was not able to sustain this return to work.
During this time the injured employee's employer left the Comcare scheme.

[7] Organisation for Economic Co-operation and Development 2012, *Sick on the Job? Myths and Realities about Mental Health and Work,* Paris: OECD Publishing.
[8] Thomas C, Benzeval M and S.A Stansfeld 2005, 'Employment transitions and mental health: an analysis from the British household panel survey, *Journal of Epidemiology and Community Health,* vol.59, pp.243-249.
[9] Karsten I.P and K Moser 2009, 'Unemployment impairs mental health: Meta-analyses', *Journal of Vocational Behavior,* vol.74, pp.264-282.
[10] Kivimaki, M, Forma, P, Wikstrom, J, Halmeenmaki, T, Pentti, J, Elovainio, M and J Vahtera 2004, 'Sickness absence as a risk marker of future disability pension: the 10-town study', *Journal of Epidemiology and Community Health,* vol.58, pp.710-711.

This left the employee with no rehabilitation authority, which had the potential to increase the length of time where the employee was not working.

While Comcare put in place administrative arrangements to provide the injured employee with advice and support the Bill will provide Comcare with the ability under the SRC Act to arrange workplace rehabilitation, to assist employees seek, find and maintain suitable employment.

The Bill provides relevant authorities with the ability to arrange work readiness assessments, and employers with greater incentives to provide alternative work or reduced hours of work to employees, which is important in circumstance where an employee is no longer able to work in their pre-injury employment but has a capacity to work.

**Case example**

At the time of the injury the employee was employed by the Australian Public Service (APS). Medical evidence certified the employee unfit for work in the APS and fit to undertake a work trial outside of the APS.

For this claim suitable employment under the SRC Act is defined as APS employment only. If the employee refuses to seek or undertake employment outside of the APS they will continue to be entitled to weekly incapacity payments, even though they have a capacity to work elsewhere.

The Bill will expand the definition of suitable employment to include any employment and provide greater opportunity for employers to support employees find, seek and maintain suitable employment in all employment sectors.

## Conclusion

Comcare believes that the provisions of the Bill are in line with current research and evidence on rehabilitation and return to work and will greatly assist all scheme participants in improving scheme outcomes, especially as they relate to effective medical treatment, rehabilitation and earlier return to work.

## ATTACHMENT 1

| | |
|---|---|
| **Work Health and Safety Act, 2011 (WHS Act)** | Implements, in the federal jurisdiction, model work health and safety arrangements agreed by Australian Governments. The WHS Act calls out Comcare as the federal work health and safety regulator and describes its related functions and powers. The WHS Act also allocates oversight and consultation functions to the Safety, Rehabilitation and Compensation Commission (SRCC). |
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