

Overview of the Comcare scheme

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Introduction

1. This paper is intended to provide an overview of the Commonwealth workers' compensation scheme established pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (the **SRC Act**). The entity responsible for paying compensation, and various functions, under that Act is Comcare.¹ Hence, the common reference to the Comcare scheme.²
2. This paper is focussed on compensation claims under the Comcare scheme, particularly in regards to the litigation of those claims in the Administrative Appeals Tribunal (the **Tribunal**). The three most commonly litigated forms of compensation under the SRC Act are probably periodic incapacity payments, lump sum compensation for permanent impairment, and compensation for medical expenses.³ I will give a short overview of each of those types of compensation after first mentioning some of the general concepts within the SRC Acts.

General concepts

3. The payment of compensation under the SRC Act first depends upon a determination of liability. Section 14(1) states:⁴

Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

4. The critical concept which appears in s 14(1) is that of an “injury”. It is defined in s 5A(1):

“*injury*” means:

- (a) a disease suffered by an employee; or
- (b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or
- (c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

5. Importantly, the inclusion of the concept of “disease” operates so as to extend rather than restrict the scope of “injury”.

1 Of course, a range of licencees (or self-insurers) are now also part of the scheme: SRC Act, Part VIII.

2 See <https://www.comcare.gov.au/the_scheme/overview_of_the_comcare_scheme>.

3 Other compensation payable under the SRC Act includes compensation for household and attendant care services (s 29), compensation for death (s 17), compensation for funeral expenses (s 18). The Act also includes important provisions regarding rehabilitation (Part III).

4 However, compensation is not payable in respect of an injury that is intentionally self-inflicted (s 14(2)); or that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment (s 14(3)).

6. The term “disease” is defined in s 5B(1):⁵

“**disease**” means:

- (a) an ailment suffered by an employee; or
- (b) an aggravation of such an ailment;

that was contributed to, to a significant degree, by the employee's employment by the Commonwealth or a licensee.

7. On the concept of an “injury” or a “disease” generally, see *Szajna v Australian Postal Corporation* (2014) 226 FCR 1, [76]-[78]; *Gaffey v Comcare* [2015] FCA 1024; and *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19, [42]-[56] (albeit in relation to an earlier version of the SRC Act).
8. On the concept of “arising out of, or in the course of, the employee's employment”, see *Badawi v Nexon Asia Pacific Pty Limited* (2009) 75 NSWLR 503, [72]-[79]; *Comcare v PVYW* (2013) 303 ALR 1; *Lee v Transpacific Industries Pty Ltd* [2013] FCA 1322; *Telstra Corporation Ltd v Bowden* [2012] FCA 576.
9. On the concept of “reasonable administrative action”, see *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463; *Drenth v Comcare* [2012] FCAFC 86; *Peters v Comcare* [2013] FCA 1361, [28]; *Long v Comcare* [2016] FCA 737, [31]; *Vos and Comcare* [2016] AATA 515.
10. The concept of “employee”, which appears in s 14(1), is also important, but is not often controversial. The term is defined in s 5.
11. It is generally accepted that s 14 itself requires or authorises the making of a decision. If the decision is that there has been no “injury”, then it follows that any claim for compensation will be rejected. If the decision is that there has been an “injury”, then further determinations will be made in respect of what compensation (if any) is payable. As to those subsequent determinations, the Court in *Telstra Corporation v Hannaford* (2006) 151 FCR 253 described it this way (at [57]):

The statutory scheme allows for progressive and evolving decision-making giving effect to the provisions of ongoing review of relief or entitlements in the nature of course of workers compensation, being review which allows for adjustment or change in the light of events and circumstances which may subsequently happen. The statutory scheme hence reflects a flexible scope for adjustment by way of decisions in the nature of awards to be made subsequently to the determination of s 14 liability, whether that determination be made in isolation, or in the context of decision-making concerning consequential relief that may be required in the light of evolving circumstances. It is therefore a scheme which allows progressively for ongoing relief, and is thus not comparable of course with the process of curial resolution of the traditional common law entitlement of an injured employee for damages as a consequence of the negligent conduct of an employer. The opening words of s 14(1) ‘[s]ubject to this Part...’ are consistent with the flexibility inherent in the ensuing codification of the various facets of compensation envisaged.

⁵ The provision previously referred to an ailment that “was contributed to, to a material degree ...” and so earlier cases reflect that language. The term “significant degree” is defined as meaning “a degree that is substantially more than material”: s 5B(3).

Compensation by way of periodical incapacity payments

12. Section 19 of the SRC Act is headed “Compensation for injuries resulting in incapacity”. Subject to certain exceptions, it “applies to an employee who is incapacitated for work as a result of an injury”: s 19(1). It provides for periodical income replacement payments.
13. When deciding whether an incapacity is “a result of an injury”, there is no requirement that there be “a substantial contribution, or a contribution to a significant degree” as between the “injury” and the “incapacity”: *Kavas and Comcare* [2011] AATA 935, [42]. The phrase “as a result of” refers to “an operative cause that is not confined to the immediate proximate cause of incapacity and imports a test of causal connection that requires a commonsense evaluation of the causal chain between the claimed incapacity and the injury”: *Clement v Comcare* [2012] FCA 166, [8]. See also *Commonwealth v Smith* (1989) 18 ALD 224.
14. Section 4(9) provides a definition of “incapacity for work”:

A reference in this Act to an incapacity for work is a reference to an incapacity suffered by an employee as a result of an injury, being:

 - (a) an incapacity to engage in any work; or
 - (b) an incapacity to engage in work at the same level at which he or she was engaged by the Commonwealth or a licensed corporation in that work or any other work immediately before the injury happened.
15. In *Prica and Comcare* (1996) 44 ALD 46, the Tribunal said that the phrase “work at the same level” was:

... a reference to the nature of the work in the sense of its characteristics, which will include its degree of difficulty. ... A finding of an incapacity itself does not necessarily result in any entitlement to periodic or lump sum compensation under the Act. There are additional requirements in ss 19, 24 and 27 concerning those issues. Hence a construction of s 4(9)(b) which permits a finding of an incapacity for work in circumstances where the Applicant subsequent to an injury is engaged in light duties at their former salary does not produce any anomaly within the Act and recognises that incapacity for work is a relative concept and a matter of degree.
16. See, also, *Comcare Australia v Rowe* [2002] FCA 1034, [7]; *Fleming and Comcare* [2011] AATA 936.
17. Incapacity payments are calculated by reference to the employee's “normal weekly earnings” (NWE) (as to which see s 8). Generally, incapacity payments are paid at full rate for the first 45 weeks and then at 75% of NWE (see s 19). Incapacity payment can be paid until an employee turns 65 years of age (see s 23). There are limited rights of redemption (see s 30).
18. The Act does not make express provision for the cancellation of incapacity payments. Rather, it is implicit within s 19(1) of the SRC Act that Comcare is only liable to pay compensation for so long as the “employee ... is incapacitated for work as a result of an injury”. Once Comcare determines that compensation should be paid under s 19, it is subsequently entitled to cease those payments if it is satisfied that the employee is no longer “incapacitated for work as a result of an injury”.⁶

6 See, *Brackenreg v Comcare* [2010] FCA 724, [60]; *Ryan and Linfox Armaguard Pty Ltd* [2011] AATA 747, [64].

Lump sum permanent impairment compensation

19. Sections 24 and 27 of the SRC Act provide for the payment of lump sum compensation where there is a permanent impairment. The starting point is s 24(1):

Where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury.

20. Generally, compensation for permanent impairment is payable only if the impairment is assessed as being at least 10%: s 24(7). There are exceptions to that proposition, though: see s 24(7A) and (8).

21. The term “impairment” is defined in s 4(1) as follows:

“impairment” means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function.

22. The reference to a loss or loss of the use of a body part will generally include a *partial* loss: *Page v Telstra Corporation Ltd* [2004] FCAFC 80.

23. Section 24(2) deals with determining whether an impairment is “permanent”:

(2) For the purpose of determining whether an impairment is permanent, Comcare shall have regard to:

- (a) the duration of the impairment;
- (b) the likelihood of improvement in the employee's condition;
- (c) whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and
- (d) any other relevant matters.

24. The degree of impairment must be assessed using the “approved Guide”: s 24(5). The current approved Guide is Edition 2.1 of the Guide to the assessment of the degree of permanent impairment.⁷ It is a legislative instrument. See, generally, *Guppy v Australian Postal Corporation* (2013) 212 FCR 380 and, in relation to an earlier edition of the Guide, *Comcare v Broadhurst* (2011) 192 FCR 497.

25. Once an employee is determined to have sustained a permanent impairment of (generally) 10% or more, he or she is entitled to a lump sum under s 24 and s 27 (which factors in 'non-economic loss'). Comcare publishes a useful calculator for estimating permanent impairment payments.⁸

26. Employees within the Comcare scheme have a right to elect to pursue a common law claim for non-economic loss instead of permanent impairment compensation under ss 24 and 27 (see s 45). However, this avenue is rarely taken because of the dual hurdles of the employee having to prove negligence and being restricted by a statutory cap of \$110,000 for any non-economic loss awarded in such a claim: s 45(4).

⁷ <https://www.comcare.gov.au/Forms_and_Publications/publications/services/claims/claims/guide_to_assess_of_the_degree_of_perm_impair>.

⁸ <https://www.comcare.gov.au/claims_and_benefits/benefits_and_entitlements/permanent_impairment/permanent_impairment_information_for_claims_managers>.

Compensation for medical expenses

27. Section 16(1) of the SRC Act provides:

Where an employee suffers an injury, Comcare is liable to pay, in respect of the cost of medical treatment obtained in relation to the injury (being treatment that it was reasonable for the employee to obtain in the circumstances), compensation of such amount as Comcare determines is appropriate to that medical treatment.

28. The term “medical treatment” is defined in s 4 of the SRC Act as meaning:

(a) medical or surgical treatment by, or under the supervision of, a legally qualified medical practitioner; or

(b) therapeutic treatment obtained at the direction of a legally qualified medical practitioner; or

(c) dental treatment by, or under the supervision of, a legally qualified dentist; or

(d) therapeutic treatment by, or under the supervision of, a physiotherapist, osteopath, masseur or chiropractor registered under the law of a State or Territory providing for the registration of physiotherapists, osteopaths, masseurs or chiropractors, as the case may be; or

(e) an examination, test or analysis carried out on, or in relation to, an employee at the request or direction of a legally qualified medical practitioner or dentist and the provision of a report in respect of such an examination, test or analysis; or

(f) the supply, replacement or repair of an artificial limb or other artificial substitute or of a medical, surgical or other similar aid or appliance; or

(g) treatment and maintenance as a patient at a hospital; or

(h) nursing care, and the provision of medicines, medical and surgical supplies and curative apparatus, whether in a hospital or otherwise; or

(i) any other form of treatment that is prescribed for the purposes of this definition.

29. The test for whether medical treatment is obtained “in relation to” an injury is a broad one. The medical treatment need not be “of” or “for” the injury, although there must be some relational connection: *Luttrell and Military Rehabilitation and Compensation Commission* [2012] AATA 692, [13]; *Brown and Australian Postal Corporation* [2014] AATA 261.

30. See, generally, *Thiele v Commonwealth* (1990) 95 ALR 172; *Comcare v Watson* [1997] FCA 149; and *Howes and Comcare* [2015] AATA 39.

Tribunal proceedings generally

31. Part VI of the SRC Act deals with reconsiderations and reviews of determinations. Under s 62(1), Comcare (or a licensee) has the power to reconsider a determination on its own motion. It may exercise that power even if proceedings are pending before the Tribunal.

32. Alternatively, a claimant may request Comcare (or a licensee) to reconsider a determination: s 62(2).⁹ This will commonly occur where liability has been rejected, or particular forms of compensation have been rejected. The general procedure is dealt with s 62(4) and (5):

⁹ Commonwealth authorities (such as employers) may also request reconsiderations: s 62(2).

(4) On receipt of a request, the determining authority shall reconsider the determination or cause the determination to be reconsidered by a person to whom its power under this section is delegated, being a person other than a person who made, or was involved in the making of, the determination.

(5) Where a person reconsiders a determination, the person may make a decision affirming or revoking the determination or varying the determination in such manner as the person thinks fit.

33. A claimant who is dissatisfied with a reconsideration decision may apply to the Tribunal for review: SRC Act, s 64(1).¹⁰ In *Telstra Corporation v Hannaford* (2006) 151 FCR 253, the Court described the Act as providing for a “three-tiered” procedure for the resolution of disputes (at [19]):

... firstly, the determination of claims for compensation by the determining authority by reference to the various sections of the Act therein identified (including ss 14, 16, 19, 24 and 27); secondly, the reconsideration or review of determinations by the determining authority, if sought pursuant to s 62 (so-called reviewable decisions); and thirdly, the further review of reviewable decisions by the Administrative Appeals Tribunal (‘AAT’), if sought pursuant to s 64 of the SRC Act.

34. Generally, an application to the Tribunal must be lodged within 60 days of the reconsideration decision: SRC Act, s 65(4). Under s 67, a claimant who is successful in an application to the Tribunal will generally be entitled to recover legal costs and disbursements from Comcare (or the relevant licensee).¹¹ There is no provision for Comcare (or a licensee) to recover costs from an unsuccessful claimant.

35. There is extensive case law regarding issues that arise in the Tribunal, but for present purposes two main points should be noted:

(a) There is no onus of proof in the Tribunal's review of Comcare decisions. It is always, however, important to clearly identify the statutory questions that must be resolved by the Tribunal. Sometimes, the application must succeed only if the Tribunal is positively satisfied that a particular state of affairs exists. Other times, the application must succeed unless the Tribunal is positively satisfied of some state of affairs. See, generally, *Comcare v Power* [2015] FCA 1502.

(b) The requirement under various provisions of the SRC Act that there must be an “injury” is a question that may be re-visited from time to time. In *Telstra Corporation v Hannaford* (2006) 151 FCR 253, the Full Court held that even though Comcare (or a licensee) has made findings (and a decision) under s 14 that there is an “injury”, the Tribunal may subsequently make a contrary or inconsistent finding when reviewing a decision under provisions such as ss 16, 19, 24 or 27 of the SRC Act. That is, the existence of an “injury” may be reconsidered without any formal revocation of the original s 14 decision.

36. Disputes under the SRC Act are routinely litigated in the Tribunal. For the conduct of Tribunal proceedings regarding Comcare decisions, see the Tribunal's *Guide to Workers'*

¹⁰ As may Commonwealth authorities or licensees: s 64(1).

¹¹ As to which, see the Tribunal's *Taxation of Costs Practice Direction* <<http://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Taxation-of-Costs.pdf>>.

*Compensation Jurisdiction*¹² and the *Administrative Appeals Tribunal Act 1975* generally.

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