

# POLICY REVIEW OF COMCARE PERMANENT IMPAIRMENT GUIDE- OPTIONS PAPER

## Contact:

**Angela Sdrinis**, Partner  
Ryan Carlisle Thomas Lawyers  
Telephone: (03) 9238 7864

**Patrick Coetsee**, Legal and Policy Officer  
Australian Lawyers Alliance  
Phone: (02) 9258 7700

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001  
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E [enquiries@lawyersalliance.com.au](mailto:enquiries@lawyersalliance.com.au)

[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

# Contents

- 3 Who we are
- 4 Introduction
- 4 Issues: 1. The adequacy of current impairment benefits
- 5 2. Separate payments for permanent impairment non-economic loss
- 6 3. The irrevocable election between permanent impairment and common law
- 6 4. The reasonableness of current impairment thresholds
- 7 5. Multiple injuries (Canute):
- 7 6. Pre-existing conditions:
- 8 7-10 General Review of the Guide
- 9 11. Psychiatric conditions
- 9 12-14 Comcare PI Guide Tables and the 10% Threshold
- 9 15. Ongoing training package:



# Who we are

## Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

## Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

## Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

## Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

# Introduction

Any review of the Comcare Guide should be approached from the perspective that the introduction of the 2<sup>nd</sup> Edition Guide has resulted in a significant reduction in lump sum benefits, both in terms of the number of claims that have been accepted under the 2<sup>nd</sup> Edition Guide, but also in terms of payment of actual monetary compensation.

The current review of the Permanent Impairment Guide gives the Federal Government an opportunity to redress the more draconian effects of the changes brought about by the introduction of the 2<sup>nd</sup> Edition Guide and to finally introduce a Guide which allows for an equitable and efficient delivery of lump sum compensation to the hundreds and thousands of Australian workers who are now covered by the Comcare Scheme.

## ISSUES

### 1. The adequacy of current impairment benefits:

Comcare's preferred option with respect to the increase of the maximum amount payable for permanent impairment/NEL is welcomed. There is however no justification for the maximum impairment payment to be pegged at 90% of the death benefit. As has been put in another submission, the death benefit could be seen as representing a 100% impairment and the design of the Guide is such that it is extremely unlikely that any worker would ever be entitled to claim or receive a 100% impairment benefit. The maximum payment or 100% impairment should therefore be equal to the death benefit.

However, Comcare's preferred option that the maximum amount available under common law is not to be increased is extremely disappointing.

The number of workers who elect to sue for damages under the SRCA is already minimal, in part as a result of the fact that the maximum payable under common law has not been indexed since the introduction of the legislation in 1988.

Substantially increasing the maximum amount payable for permanent impairment but not increasing the maximum for common law damages would create an even greater disincentive for workers to sue. Whilst we note that it was Parliament's intention to discourage or reduce the number of common law claims for Commonwealth workers when the SRCA was introduced, the ongoing erosion of the common law right is in fact tantamount to an abolition of the right to sue by stealth.

In *Georgiades v. Australia and Overseas Telecommunications Corporation* (1994) 179 CLR 297, the Plaintiff Mr. Georgiades asserted that the introduction of Section 44 of the Safety Rehabilitation & Compensation Act amounted to an acquisition of property other than on just terms as required by Section 51(xxxi) of the Constitution. This assertion was upheld by the High Court.

Unless the maximum amount available under common law claims brought by workers covered by the SRCA is substantially increased and indexed, the right to sue will eventually become a "Clayton's" right, i.e. the right you have when you don't have any rights.

It has never been Parliament's intention to abolish the right to sue under the Commonwealth Scheme and the current review of the Impairment Guide and the legislation is an opportunity for the ongoing erosion of the common law rights of workers to be halted and indeed redressed.

The ALA strongly supports the maximum payable by common law damages being pegged to the maximum available by way of lump sum compensation and indexed annually in the same way.

## **2. Separate payments for permanent impairment non-economic loss:**

Any attempt to include the NEL component into Section 24 should be resisted, particularly if Comcare's preferred option re common law is

accepted. In the absence of a viable common law right to sue, the NEL component is the only recognition of the particular affects of injuries on workers in their individual circumstances with respect to their pain and suffering . In other words the NEL component is an appropriate recognition that the effects of injury can vary depending upon the individual circumstances of individual claimants.

**3. The irrevocable election between permanent impairment and common law:**

There is no basis for continuing to require workers to make an irrevocable election, except to punish a worker who makes the “wrong” choice. To the extent that making the wrong choice in litigation should be punished, the current costs arrangements in every jurisdiction where these damages claims would be brought allow for this to occur, i.e. the unsuccessful party pays the costs of the successful party and if a worker was not able to prove negligence, then a costs order against him or her would be the appropriate consequence.

Further, to maintain the requirement for workers to make an irrevocable election in circumstances where the right to sue is now so limited makes the irrevocable election particularly pernicious.

The point has been made that no other jurisdiction requires the worker to make an irrevocable election between his or her lump sum entitlements and the right to sue.

Comcare’s preferred option should be rejected and the requirement forcing worker’s to make an irrevocable election should be abolished.

**4. The reasonableness of current impairment thresholds:**

As outlined in the introductory paragraph, we have seen that the 2<sup>nd</sup> Edition Guide has resulted in substantially reducing the number of successful

impairment claims particularly with respect to musculoskeletal injuries. In the absence of wholesale changes to the 2<sup>nd</sup> Edition Guide, but in particular to Chapter 9, the permanent impairment threshold should be reduced to 5% (at most) whole person and the threshold re subsequent impairment should be maintained at the same level.

**5. Multiple injuries (Canute):**

Whilst at first glance Canute was a victory for workers on the basis claimants were able to claim separately for multiple impairments, this decision has meant that workers have been in effect unable to rely upon multiple impairments to get to the 10% threshold. Given that the 2<sup>nd</sup> Edition has made it much harder for individual injuries to qualify for the 10% impairment threshold, particularly under Chapter 9, the application of Canute has further reduced the number of successful impairment claims.

In these circumstances, there is an argument to maintain the precedent established by Canute only if the 2<sup>nd</sup> Edition Guide is significantly modified to enable individual injuries to more readily reach the 10% impairment threshold or if the threshold itself is reduced to 5% or less, as suggested above. However, in the absence of such beneficial modification, Comcare's preferred option that all impairments resulting from injury should be combined should be seriously considered.

**6. Pre-existing conditions:**

Whilst there are always good arguments in support of clarity and certainty, the ALA doubts that it is possible to establish a "clear legislative mechanism" to allow for the discounting of pre-existing conditions. The whole point of pre-existing conditions is that in some circumstances, they can be relevant whereas in many situations, the previous condition has been asymptomatic and is therefore completely irrelevant.

The option of introducing legislation to deal with pre-existing conditions does not allow the decision maker flexibility in determining the extent to which a pre-existing condition is playing a role in a condition which has been aggravated or accelerated by employment. Given the variety of circumstances in which such an aggravation or exacerbation can occur, the current system which allows for individual cases to be dealt with flexibly should be preferred. Indeed, the introduction of legislation specifically to deal with this issue may simply result in less clarity and more litigation.

#### **7-10 General Review of the Guide**

If Comcare is to develop a further stand alone Guide, issues 7 to 10 should be considered as part of this process. Further, any review should be undertaken as a matter of priority given the reduction in benefits that are being delivered to workers under the current Guide.

On this point, attempting to tie any new Guide to the AMA model simply perpetuates the problems that exist within this model, which are in part why the current review is being undertaken. The Australian Lawyers Alliance has previously made the point that the AMA Guide was never designed by its authors to be a tool for the delivery of compensation. The preferred option should be the development of a stand alone guide which could take the best of the number of models which exist both within Australia and internationally and developing a state of the art guide which could be used as a model for other jurisdictions.

The Comcare jurisdiction is now sufficiently large to justify the development of a stand alone guide. Further, Comcare should be at the spearhead of innovation in the delivery of benefits to injured workers. This is an ideal opportunity for Comcare to develop a just and equitable guide which caters to the requirements of modern workers and their employers.

In this connection, issues 9 and 10 highlight the current inadequacy of the AMA model and in particular the Comcare Guide 2<sup>nd</sup> Edition, and any review

should ensure that an Amended Guide covers as many conditions as possible and specifically deals with not only slow onset conditions but also intermittent conditions, some of which cannot be assessed under the current Guide.

**11. Psychiatric conditions:**

There is no basis for increasing the threshold in psychiatric conditions to 15% whole person or to adopt the Psychiatric Rating Impairment Scale (PIRS). Workers who develop a work related mental condition are already being punished by the SECOLA changes and the exclusionary provisions in general. Further the difficulties faced by workers with mental injuries in successfully pursuing their claims were compounded by the decision in Hart v. Comcare.

In other words, instead of seeking to punish workers who are suffering from work related stress by making it more difficult for them to successfully claim compensation, which has been the trend over recent years, Comcare should be working with employers and workers to address the reasons for the dramatic increase in stress in the work place and in this way aim to reduce the incidence of claims

Further, increasing the impairment threshold beyond the standard only with respect to workers with mental conditions would be seen to be discriminatory.

**12-14 Comcare PI Guide Tables and the 10% Threshold**

These proposals cannot be seen in isolation and need to be incorporated into a wholesale review of the Comcare Guide.

**15. Ongoing training package:**

Ongoing training of claims officers and other stakeholders is vital. The proposal to develop a training package for non-medical practitioners is welcomed.