



ABN 35 490 214 100

Partners
Michael A Carbonaro B.A., LL.B.
Greg Isolani B.A., LL.B.

Level 5
488 Bourke Street
Melbourne, Vic 3000
DX: 488 Melbourne
Ph: 03 8673 5888
Fax: 03 8673 5899
gregisolani@kcilawyers.com.au
www.kcilawyers.com.au

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Our Ref. GI:th

Comcare Policy Review of Permanent Impairment Guide*

Options Paper – September 2009

*Prepared by *Greg Isolani* – Partner



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KCI Response

Policy Review of Permanent Impairment Guide – Options Paper

Introduction

- I* We note that the Issues Paper dated 1 April 2009 attracted a total number of nine (9) submissions. Within the nine submissions listed in attachment two (2) are “two confidential submissions from employers”.
- II* The confidential submissions have been referred to extensively and have been given, in our view, significant weight with respect to the proposed options contained in the Options Paper. We are concerned since there is no indication as to whether the employers’ position and/or their agenda is to reduce or maintain costs involved in the current scheme. For example, by advocating for the retention of certain tables, to increase thresholds for other conditions ie psychiatric table and to maintain the Common Law payment at the statutory maximum of \$110,000.00 seem to be purely driven by “cost” considerations as opposed to the beneficial nature of the scheme and the “value” of Veterans and their service to Australia.
- III* We submit that, in the interest of transparency to all the parties making submissions on behalf of people who may be significantly affected by the options pursued that Comcare gives little weight to confidential employer submissions given that their agenda may be purely profit driven and not in the interests of the beneficial nature of the legislation or in recognition of the unique service Veterans give to Australia.
- IV* Furthermore, the response paper has not addressed how or if Veterans will be treated any differently under the proposed Options paper given that, in the past Comcare in consultation with the *Department of Veterans’ Affairs* (DVA) did not apply the Second Edition Guide to Veterans due to the restrictive nature of that Guide. There is no indication in the Option paper whether there is any scope to again consider separating the proposed options from Veterans’, for example if the proposals deny or restrict benefits currently available to Veterans then they should not apply.
- V* Finally there is no indication that Comcare will refer its’ recommendations to the DVA for comment or to ask DVA to include any of the proposals as part of the Military Compensation Review being undertaken.
- VI* In effect, there are two reviews currently undertaken by the Government that will have significant implications for past and current Defence members,

Veterans their families and dependents that are running independently of each other. We find this anomalous and capable of immediate rectification by asking DVA to comment on any the proposals and Options if they reduce benefits.

SPECIFIC RESPONSE TO OPTION PAPER

1 "The adequacy of current impairment benefits"

- 1.1 We accept the preferred option contained in paragraph 1.3 to increase the maximum amount payable for PI/NEL to 90% of the death benefit.
- 1.2 We are uncertain why there should be any trade off between increasing the PI and NEL level by maintaining Common Law at the statutory rate of \$110,000.00?
- 1.3 In particular, if the rationale to increase the maximum amount payable for PI and NEL so that it is within the approximate ratio of what was intended by parliament in 1988 i.e. 90% of the death benefit at that time, then conversely the Common Law rate should be amended proportionately or, at a minimum to be the current value if it had been indexed i.e. approximately \$202,748.00.
- 1.4 We query whether the employer who is quoted on this issue may have an agenda to reduce their exposure to potential Common Law claims if the limit was increased. Again it is not simply a matter of the employer having to potentially pay more money but, to have their work practices, procedures and/or systems of work scrutinised through the Common Law process to determine if there was negligence given any particular act or omission that may also be an issue.
- 1.5 Therefore, by keeping the Common Law rate capped at \$110,000.00 it is clearly a disincentive for employees or Veterans to pursue Common Law as a viable option and it will reduce the investigation into potential negligent acts or omissions before the Courts.

2. Separate Payments for Permanent impairment and Non-Economic Loss

- 2.1. It appears that the argument to have a combined payment is based effectively on the rationale contained in the AMA Guide (fifth edition). This is curious given that this particular Guide that produced the second edition Permanent Impairment Guide has been the cause of much criticism and has generated the need to review the second edition guide.
- 2.2. Therefore, why is the AMA Guide (Fifth edition) held up as a potential model to adopt when determining the benefit of having separate PI and NEL payments?
- 2.3. We submit the current system of separate payments for PI and NEL *should be maintained* as it allows (or should allow subject to *Canute* being maintained) for separate and individual assessment of the pain, suffering and other impairments with respect to *each particular injury* and the subsequent

impairment that arises from their Commonwealth employment or Defence Service to be assessed and payment made.

- 2.4. The fact that a Veteran or Commonwealth employee has the right to challenge why their assessment of the NEL Questionnaire has been reduced by a delegate should not be a consideration to abolish the current legislative provision given the beneficial nature of the legislation to compensate for the injury and the qualitative losses.

3. **Irrevocable Election between Permanent Impairment and Common Law**

- 3.1. With respect to Option 1 reference is made to the *Occupational Health and Safety Act 1991* (OHS Act 199) as the incentive for employers to maintain safe workplaces. This is not supported by any statistics showing how Comcare, as compared to other States and Territories investigate and prosecute occupational health and safety breaches in support of maintaining the current system.
- 3.2. We submit this is highly relevant with respect to Department of Defence who, by the inherent nature of Defence service, may expose Veterans to inherently dangerous, hazardous and life threatening conditions. On regular occasions and in particular during the course of training exercises or in normal peacetime activities there have been in our view many instances of significant breaches of OHS that have not been investigated by Comcare.
- 3.3. In our submission the Common Law rate should not be capped at the current 1988 rate as Common Law claims may assist Comcare in circumstances where negligence is alleged and common law action taken against Defence to establish if there have been potential breaches of the OHS Act 1991.
- 3.4. We are uncertain why that this would "change a fundamental element of the design of the legislation". What it would do is provide a person with relatively quick compensation payment for the permanent impairment and pain and suffering that, at some future point in time **may** be deducted from a Common Law settlement.
- 3.5. The SRCA already provides for notification to Comcare of any Common Law claim and damages received with penalties payable in the event of a failure by the employee to notify Comcare of any such claim or damages received.
- 3.6. We submit that, in the face of there being only two options that we prefer **option two** as the preferred option. In particular it is a simple process for any lump sum payment that has been made to be deducted from any Common Law settlement subsequent to a Common Law claim being pursued and damages paid for pain and suffering only.

4. **Reasonableness of current impairment thresholds**

- 4.1. The rationale to not reduce the current minimum level of impairment from 10% as it may “*increase in the total costs of Permanent Impairment in the jurisdiction*” is in our view irrelevant. We are uncertain if the price to be paid for someone’s disability in particular, a Veteran who is not an employee but a servant of the Crown and directed to undertake dangerous and hazardous duties and suffers an injury should be denied compensation because of a threshold and due to the overriding consideration being the cost to the Australian Taxpayer.
- 4.2. In our view, Veterans’ perform a service that is of such value that the injuries sustained in the circumstances should not be subject to a threshold which, on average is significantly more than the State and Territory average as outlined in our paper.
- 4.3. We submit that the *cost* of paying a Veteran for an injury sustained during the course of their service by reducing the threshold to 5% is irrelevant when considering the *value* they provide to Australia which should be considered *invaluable*. It is the price that we should be paying for expecting Veterans to perform service on behalf of and in our name.
- 4.4. Again, the confidential employers number “1” and “2” have been given significant consideration in the options presented. We are uncertain what the particular agenda of the employers’ may be i.e. to reduce the potential for there to be “*profound costs impact on the Commonwealth and the licensees*” by reducing the threshold level below 10% for most conditions. Is this a consideration that must be imposed on Veterans’?
- 4.5. We refer to the above paragraph with respect to the value of service provided by Veterans as opposed to the overriding consideration as to the potential “cost” to the Commonwealth and licensees. Why should a Veterans’ service, level of impairment and the amount to be paid be compared to that of an Australia Post employee, transport worker or a licensed employee?
- 4.6. We **accept the threshold for deterioration of impairment should be reduced to 5% when the condition** is, in itself assessed at 5%, as opposed to, for example combining it with the previous impairment assessment of say 20%.
- 4.7. For example, if the 5% threshold is needed to be met before a deterioration can be accepted for an injury affecting a person’s mobility that had previously been accepted at 20% then, the combined values table 14.1 of the first edition Guide i.e. the Guide that applies to current and former Defence employees **needs to have suffered a deterioration of seven (7) percent ie 20% plus 7% equals a twenty five (25%) percent impairment under Table 14.**
- 4.8. We refer to our submission regarding the threshold being reduced to 5% impairment as the preferred option and for the deterioration of condition.

- 4.9. As a compromise **we argue this threshold ie 5% should apply to Veterans who are covered under the first edition Guide only.** Again this is in recognition of the particular type of service provided by the ADF, the inherent dangers and hazards of such service and the value that we put upon it.

5. **Multiple Injuries (Canute)**

- 5.1. We maintain the preferred option is that which provides the most beneficial application to a Veteran when determining if conditions should be combined in order to achieve, for example the current minimum threshold of 10% or the maximum amount payable by using the beneficial approach.
- 5.2. We note with respect to Veterans that Option 1 does not apply as clearly a Veteran may not be able to be assessed under the first edition Guide to have impairments of 9% and 7% of their ankle and wrist as there is no such gradient in the tables i.e. 9.2, 9.5 or 9.1 and 9.4 respectively.
- 5.3. As a compromise it may be reasonable to cap the total amount payable at 100% of the whole person. Again this does not apply to Veterans who have the benefit of the Defence determination that provides for an increase in the lump sum for a severe injury adjustment when their impairments are assessed at 80% whole person.
- 5.4. We refer to our introduction and again are uncertain whether the review of the current Guide may result in Veterans covered under the SRCA to now lose the beneficial entitlement to the Severe Injury Adjustment Benefit payable for 80% impairment?
- 5.5. Furthermore, the effects of "combining" impairments for injuries arising out of one accident or that may manifest sometime after, in particular psychiatric conditions including but not limited to post traumatic stress disorder conditions (PTSD) makes it a significant hurdle for Veterans to achieve an 80% whole person impairment and therefore be entitled to the severe injury adjustment.
- 5.6. **Our preferred option** that impairments can be *either* combined to enable a 10% threshold or separately assessed to achieve the most beneficial outcome. This will enable Veterans to achieve an 80% whole person impairment by separate impairments being arithmetically added (as opposed to being combined) to arrive at 80% whole person impairment.
- 5.7. It is consistent for psychiatric conditions that may arise as a consequence of, for example a physical injury, i.e. motor vehicle accident or facial injuries and the Veteran then develops PTSD diagnosed later to have that condition assessed separately with a separate lump sum payment to be made. This approach is in accordance with the beneficial nature of legislation and to treat Veterans separately to enable them two separate and distinct lump sum payments that includes a separate calculation of their pain, suffering and other losses associated with their physical and psychological injury.

6. **Pre-existing conditions**

- 6.1. We note Comcare's preferred option and can not adequately describe the difficulties when trying to provide a "*clear legislative mechanism*" to determine or discount pre-existing conditions within the medico legal arena and before the AAT.
- 6.2. If, as envisaged in Option 2 that the **second edition Comcare Guide** be revised to enable pre-existing conditions to be discounted, we assume that Comcare envisage that Veterans covered under the **first edition Comcare Guide** will therefore be exempt from such a "discounting". This needs to be clarified as again, we refer to comments in our introduction that we need DVA to indicate whether they will be adopting Comcare recommendations that may have significant implications for Veterans covered under the SRCA if they now come under a new ie Third edition Guide.
- 6.3. We also note the significant reference and reliance upon one Federal court Decision ie *Jordan* to have prompted this imperative to "*discount pre-existing conditions*" given the complexity of determining what condition is or is not "pre-existing". Again we refer to our primary submission noting the degenerative and other changes that may arise by a Veterans' arduous nature of service that, in some views may be considered "pre-existing" ie degenerative spine or knee condition, osteoarthritis and so forth when there is a particular event that causes a "injury" superimposed on such 'underlying conditions'.
- 6.4. There is also uncertainty as to how a psychological condition may be subject to a "pre-existing condition" offset to deny, reduce or discount a benefit payable for a psychiatric condition, for example PTSD.
- 6.5. The difficulty with psychiatric conditions for Veterans who, for example may have obsessive compulsive personality traits may be a feature as to how they apply themselves diligently to their service ie how they plan and are meticulous in their training and deployments. However if they suffer psychological trauma, ie PTSD the obsessive compulsive component may be considered some sort of personality disorder and be relied upon to deny or reduce liability for the primary condition ie PTSD.
- 6.6. We suggest that any attempt to legislate against the significant body of Common Law doctrine that has evolved dealing with degenerative conditions because of one Federal Court decision ie *Jordan* will be the source of constant litigation and medico-legal conjecturing if adopted into legislation. This is an unsavoury feature of the second edition Guide that should not effect Veterans who are only bound by the first edition Guide.
- 6.7. The only consolation that we make is to support the Law Council of Australia's recommendation that if such an option is pursued that "*the onus on the employer or Comcare to show that the degenerative factors were a significant component in the level of impairment*".

7. **General Review of Guide**

- 7.1. We note the preferred option contained in paragraph 7.3 does not make any reference as to whether Veterans who are currently exempt from the second edition Guide will now be potentially drawn into a new Guide based on the fifth edition AMA Guide?
- 7.2. Given that Veterans and the *Ex-Service Organisations* (ESO's) already made significant submissions and appearances before the review of the first edition Guide and agreed that Veterans covered under the SRCA for injuries arising up to the 1st of July 2004 would be exempt from the second edition Guide, we are uncertain what could be gained by now having Veterans bound by a further proposed Guide.
- 7.3. For simplicity, consistency and to maintain the beneficial nature of the legislation as it applies to Veterans, the first edition Guide should be maintained unless and until the modelling of any proposed Guide shows that Veterans would not be worse off when the same conditions are assessed under the proposed new Guide as compared to the first edition Guide.

8. **Stand Alone Guide**

We refer to our response in the above paragraph 7 as to why Veterans should be exempt from any proposed new Guide unless and until it can be shown that it is more beneficial than the first edition Guide that currently applies to them.

9. **An impairment of a kind which cannot be assessed in accordance with the provisions of the Guide**

We agree with the preferred option contained in Table 9.2.

10. **Slow onset conditions**

- 10.1. We agree with the issue raised by the Australian Lawyers Alliance (ALA) that the issues paper did not define what "slow onset" conditions are? Does this include for example, degenerative changes, osteoarthritis, skin cancer and so forth?
- 10.2. We are uncertain how to respond to the preferred Option 10.3 given that there is still information received from the proposed study by an oncologist.
- 10.3. We maintain that, in the absence of their being any particular direction by Comcare other than the two options that the current system be maintained.

11. Psychiatric Conditions

- 11.1. We defer to the opinion of the only psychiatrist to provide a response, Dr Michael Epstein with respect to the difficulties when reliance is placed upon the AMA Guide to evaluate permanent impairment.
- 11.2. We are uncertain how the discussion regarding the assessment of psychiatric conditions has led to the Options as accepted by Comcare at 11.3 *to increase the threshold for psychiatric condition from 10% to 15%*?
- 11.3. The policy Option therefore means that Veterans will lose the beneficial approach to the legislation as they currently enjoy if the threshold is increased from 10% to 15%. Again we reiterate and distinguish Veterans who are not 'employees' and can not simply refuse to undertake an activity because it may have detrimental effect on their mental health or who are exposed to trauma that would not compare to Commonwealth licensed employees. The only exception are *Australian Federal Police* (AFP) members who's employment within and outside of Australia may expose them to hazardous and dangerous work and are at risk of suffering psychological conditions.
- 11.4. The debate has now changed from the appropriate table to assess the psychiatric condition to increasing the threshold from 10% to 15%. This effectively reduces the significant benefit that Veterans' have to obtain compensation if the level of impairment is assessed at 10% in accordance with the first edition Guide or ten impairment points in accordance with GARP (MOD 5) under the MRCA.

12. Comcare Permanent Impairment Guide Tables and the 10% threshold

- 12.1. We refer to the body of our submission with respect to exempting Veterans from any proposed Guide subject to the Guide firstly being modelled and subject to the same trial testing that the second edition Guide received.
- 12.2. In the unlikely event that any proposed new Guide is somehow more beneficial when looking at the same injuries and conditions as assessed under the first edition Guide. However we may be in a position to accept the proposed new Guide if and when the appropriate modelling takes place.

13. Review of percentage amounts – Comcare Tables

- 13.1. We agree that, in theory it would be of benefit for there to be a "range" used within the first edition Guide as it is currently inflexible and prescriptive.
- 13.2. The beneficial approach as identified by Comcare is that the first edition Guide is inflexible by prescribing impairments set at a particular scale i.e. 5%, 10% and so forth.

13.3. This review should seize upon the opportunity to amend the first edition Guide and allow Veterans the benefit of a “range” of impairments within the current assessments contained in all tables of the first edition Guide.

14. Movement to future editions of the AMA Guide

14.1. We reiterate that there should be clear direction by DVA that they intend the Comcare Review to include, modify or abolish the first edition Guide as it applies to Veterans who currently enjoy the assessment under that Guide by any future Guide.

14.2. In the event that DVA intend that Veterans be covered under any proposed new Guide the working party referred in Option 14.3 include legal and other representatives who deal directly with Veterans covered under the SRCA whose injuries, considerations of assessing impairments under particular tables and so on is significantly different to Commonwealth employees and licensees (with the potential exception of AFP employees).

15. Ongoing training package

15.1. We note our comment with respect to paragraph 14 above and that any training includes specific training of ESO advocates who currently receive training through the “TIP” training regarding the SRCA, MRCA and VEA.

CONCLUSION

- I. We remain committed to working with Comcare to ensure that, in the event Veterans who currently have the benefit of the first edition Guide and are subject to any new Guides that they together with their ex-service organisations and legal and other representatives have significant input into to any proposed changes.
- II. This input should go beyond responding to options papers but include clear representation on any working party and be subject to DVA considering whether, as with the first edition Guide, that Veterans be exempt from any proposal if it is likely to be less beneficial than what is currently available to Veterans under the SRCA.
- III. This approach is not, in our view anomalous but distinguishes Veterans given their service is entirely different to the civilian Commonwealth and Licensed employees’ “employment conditions” by the recognition of a beneficial approach to assessing impairments that should be maintained or enhanced. This is not a new concept but one that was accepted when the second edition Guide was proposed and implemented that did not include Veterans.

Greg Isolani
KCI LAWYERS