

Lawyers

for the People

**AUSTRALIAN
LAWYERS
ALLIANCE**

Submission to the policy review of Comcare's permanent impairment guides

Contact:

Geoff Wilson & Walter Hawkins
Pamela Coward Higgins Lawyers

Angela Sdrinis
Ryan Carlisle Thomas

Tilda Hum, Legal and Policy Officer

Australian Lawyers Alliance

Phone: +61 (02) 9258 7700

tilda@lawyersalliance.com.au

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

www.lawyersalliance.com.au



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

Australian Lawyers Alliance Ltd 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 twelve 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 2009. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for educational activities, exchanging information, developing 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 keeping lawyers and other professionals up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

Introduction

The Australian Lawyers Alliance would like to thank Comcare for the opportunity to comment on its permanent impairment guide.

The Australian Lawyers Alliance approaches this submission through its Comcare special interest group, which consists of practitioners and other professionals who specialise in the area of commonwealth compensation claims.

The Lawyers Alliance intends to address only the questions outlined by Comcare's discussion paper and understands that Comcare will consider past submissions in relation to the *Safety, Rehabilitation and Compensation Act 1988* (herein 'SRC Act').

Executive Summary

In relation to Comcare's permanent impairment guide, the Lawyers Alliance respectfully submits the following:

- The introduction of the 2nd edition guide has resulted in a drastic reduction of lump sum compensation payable to injured workers who have suffered permanent impairment. Consequently, the 2nd edition guide requires urgent and radical amendment so as to implement a more beneficial and equitable approach to the assessment of permanent impairment.
- In the absence of radical amendments to the 2nd edition guide referred to above, the Comcare 1st edition guide should be applied.
- There should be no threshold (10 per cent or otherwise) in relation to permanent impairment.
- If a threshold is to be retained, it should be reduced to allow injured workers to be properly compensated.
- If such a percentage threshold were to remain, exceptions should continue to be allowed to cover specific permanent impairments.
- If thresholds are to remain, each table of the relevant guide should clearly identify whether a rating is below, at, or above the relevant threshold.
- Comcare's 2nd edition guide is unnecessarily long and complex, incurring prohibitive costs for injured workers who need to have specialist assessments.
- The language in the 2nd edition guide can also be somewhat contradictory and confusing.
- Assessments for permanent impairment should be made by the employee's treating general practitioner, psychologist and/or psychiatrist.

- The current methodology for determining permanent impairment prevents injured workers from receiving adequate compensation and discriminates against those who suffer multiple permanent impairments.
- If AMA guides are to be used as a basis for assessing permanent impairment, they must be modified to recognise Australian conditions and to provide a more beneficial and equitable basis for assessing impairment.
- Criteria for assessing permanent impairment compensation payable for slow onset conditions cannot be developed until such time as these conditions are identified and considered on an individual basis.

Terms of reference

Should we be compensating injured employees for permanent impairment? If so, why is it not sufficient to reimburse weekly benefits, medical benefits and the like? If not, why not?

Why is there a threshold for permanent impairment claims? What are the positive and negative aspects of having a threshold for permanent impairment claims? If the threshold for permanent impairment claims was to be reduced, what should the threshold be?

Should there be different thresholds for, for example, for different injury types?

If the threshold was reduced to be the minimum measurable level of impairment, what would the impact of this change be?

The Lawyers Alliance submits that employees should continue to be compensated for permanent impairment and non-economic loss resulting from workplace injuries. It should be noted that such compensation is separate to an employee's proper entitlement to receive weekly incapacity payments, medical treatment, household expenses, rehabilitation expenses and the like. The entitlement to lump sum compensation is a recognition of the multiple losses experienced by workers when they suffer permanent injuries which cannot be adequately compensation through payment for direct economic loss.

Further, lump sum compensation is available to workers throughout all Australian jurisdictions and it would be inappropriate for the Commonwealth jurisdiction to have a system which does not allow for recognition of non-economic loss.

The arbitrary imposition of any permanent impairment threshold (10 per cent or otherwise), before sections 24 or 27 SRC Act compensation becomes payable, prevents an employee from properly receiving his or her entitlement to compensation for an accepted injury that has resulted in a permanent impairment. The Lawyers Alliance respectfully submits that there should be no threshold.

If a threshold is to remain, then there should continue to be exceptions retained and possibly expanded for specific permanent impairments (that is, as presently done for impairment for loss of use of a finger or toe).

If a threshold is to remain in place (regardless of what the threshold percentage is), each table of the guide should identify the criteria that would attract:

- rating (or ratings) below that threshold;
- rating at that threshold; or
- rating (or ratings) above that threshold.

A reduction of the threshold to the minimum measurable level of impairment would produce a positive result in that employees would be properly compensated when they suffer an injury resulting in permanent impairment. The Lawyers Alliance therefore submits that the 10 per cent threshold referred to in sub-section 25(4) of the SRC Act should also be reduced, or abolished entirely, to allow employees to be properly compensated for additional permanent impairment resulting from an accepted injury.

As a separate issue to Comcare's review of the guide, an increase in the section 30 SRC Act maximum weekly amount for redemption of incapacity payments would be sensible and welcomed.

How useful is Comcare's 'stand-alone' guide – does it add complexity to the assessment of permanent impairment?

What is the fairest and most equitable basis for assessing the permanent impairment associated with psychological conditions?

Comcare's approved guide (2nd edition) does add complexity to the assessment of permanent impairment.

Applying the guide correctly to the assessment of a spinal injury and resulting impairment would arguably necessitate the separate use of a specialist orthopaedic surgeon, neurologist, neurosurgeon and/or radiologist (presumably each of whom would have undergone Comcare training on the guide). The Lawyers Alliance notes that such Comcare training has been offered only on a limited basis since the introduction of the guide in March 2006.

The complexity of the permanent impairment guide makes obtaining required specialist assessments prohibitively expensive. Workers are therefore denied their entitlement because they are unable to obtain the medical evidence that Comcare requires, using its guide, for permanent impairment that has resulted from an accepted injury.

The guide has been expanded from its 1988 1st edition version of 65 pages to its 2006 2nd edition of 142 pages, making any decision on payments to the injured a more difficult and lengthy process. The 1988 1st edition guide gave medical

practitioners 38 tables to consider when classifying an employee's impairment, where the 2006 2nd edition provides 151 tables.

The guide also contains, in places, unhelpful and seemingly contradictory introductory paragraphs to various tables; for example, the first and ninth paragraphs of Table 9.7.

The fairest and most equitable basis for assessing the permanent impairment associated with psychological conditions is to rely on the assessments provided by the employee's treating GP, psychologist and/or psychiatrist. Comcare places too much emphasis on its own medico-legal psychiatric opinions, which are often based on a brief single examination and selective history.

Should permanent impairment compensate holistically, by combining all impairments resulting from multiple injuries which arise from a single occurrence (for example, a motor vehicle accident or a fall), or compensate separate injuries arising from a single occurrence separately?

What are the impacts to claimants of each of these options? Are there any other options which should be considered?

The present post-*Canute*¹ methodology of assessing permanent impairment resulting from each individual accepted injury produces a number of artificial and improper barriers to employees being properly compensated for permanent impairment.

¹ *Canute v Comcare* (2006) 229 ALR 445

This methodology discriminates against employees who have suffered multiple permanent impairments that are each assessed at 0-9 per cent under the guide. Such employees are not entitled to permanent impairment compensation, despite being significantly permanently impaired from multiple work-related injuries.

Any negative impact of such methodology would, and should, be eliminated with the removal of an arbitrary percentage threshold before section 24 and 27 compensation is payable for permanent impairment resulting from an accepted injury, or for additional permanent impairment resulting from an accepted injury.

Are the AMA guides the most effective way of assessing permanent impairment? What other options are available?

If an AMA guide is regarded as the most effective assessment tool, to what extent does it need to be modified to reflect Australian conditions?

Should the permanent impairment benefit package for slow onset conditions differ to the package offered for other conditions? If so, what do you consider the differences to be?

The Lawyers Alliance submits that the AMA guides are presently a more familiar guide to assessments for practitioners nationally than the Comcare guide. However, the AMA guides, where they have been introduced for the purposes of determining compensation, have resulted in a reduction of benefits to claimants. Comcare's own statistics show that the introduction of the 2nd edition guide has resulted in a drastic reduction of successful claims and a similarly drastic reduction in compensation paid to injured workers for non-economic loss.

Indeed, the authors of the AMA guide have stated that these guides should not be used for the purpose of determining monetary compensation. The Lawyers Alliance submits that Comcare should move away from the use of these guides for the purpose of determining an injured worker's entitlement to lump sum compensation.

If AMA guides are to be used however, it is beyond the scope of the present submission as to how these guides would need to be modified to reflect Australian conditions and the needs of Australian workers. A detailed submission could be made in this regard if Comcare were to move towards such a 3rd edition guide. In the alternative, the 1st edition guide should be applied in all cases until a suitable alternative is found.

Permanent impairment compensation payable for slow onset conditions should not differ from the treatment of other conditions. It may be that the Comcare guide should be expanded to specifically include conditions of slow onset which are not catered for in the current guide. It is unclear from the question raised in the Issues Paper as to how the terms 'slow onset conditions' and 'other conditions' are to be defined and until there is agreement on the specific conditions being referred to, it is difficult to address this issue in any detail.

Conclusion

The Australian Lawyers Alliance, as the peak national body representing the rights of injured workers, again wishes to thank Comcare for the opportunity to comment on its permanent impairment guides.

Should the review panel wish to seek any further information from the Alliance in regard to this, or any other issues relevant to Comcare, please do not hesitate to contact our Legal and Policy Officer, Tilda Hum, on 02 9258 7700 or tilda@lawyersalliance.com.au.