

# ACTU

## POLICY REVIEW OF COMCARE'S PERMANENT IMPAIRMENT GUIDE - OPTIONS PAPER

### SUBMISSION OF

### AUSTRALIAN COUNCIL OF TRADE UNIONS

28 August 2009

#### Introduction

The ACTU is committed to ensuring the availability of equitable compensation to injured workers who have sustained impairments as a result of employment. The requirement for an equitable and adequate impairment payment scheme is critical particularly due to the changing injury profile of Comcare entitlement recipients as a result of the growth of national self insurance.

#### Part I – Overview

The Options Paper details that:

*'The decision to examine the Guide and the supporting legislative framework is based on:*

- *Threshold issues being raised that are associated with compensation for PI in general.*
- *Feedback on the operation and application of the current Guide, highlighted by submissions received during the review of the Comcare Scheme conducted in 2008 by the Department of Education, Employment and Workplace Relations (DEEWR).*
- *Recent court decisions that have changed or clarified the operation of the Guide.'*

We note that a report on the Comcare permanent impairment payment regime has not been specifically requested by Government. Therefore, notwithstanding the possibility that Comcare and the social partners may agree on recommendations to the Government that will improve permanent assessments and payments, we note there is no commitment from Government to act on those recommendations.

As we submitted when commenting on the Issues Paper in April 2009, any assessment of the adequacy of the Comcare Guide and the resultant rates of compensation must involve a comparison of the amounts payable nationally for impairments. This assessment must not only have regard to the various maximum levels of compensation payable in each jurisdiction; but to the general distribution of the level of impairment payments.

It is our position that the only accurate basis upon which a comparison can be determined is to create a schedule of the most common impairments suffered by workers and to determine the comparative levels of compensation payable for those specific impairments in each Australian jurisdiction.

We previously suggested that:

- This would require the development of the schedule of perhaps 20-30 most common pathologies giving rise to impairment.
- In turn this would enable comparative assessments to be undertaken using the first and second editions of the Comcare guide and the various additions of the AMA guides.
- When a schedule of common impairments has been developed it would enable study of individual impairment assessment based on multiple assessments from a single medical examination to be developed.
- The development of an adequate Comcare guide for the assessment impairment would also require a careful analysis of the effect of the movement of Comcare from the first edition to the second edition of its Guide. Whilst some data is available in respect of the total amount paid for impairment prior to and after the change, more detailed data is necessary to examine the effect of the change. The data would require disaggregation into injury years and specific injury types. An analysis based on a schedule of most common impairment types would also be necessary.

The matters considered by this policy review will potentially have a great effect on injured workers' and therefore need to be exposed to forensic examination with the support of all relevant information.

## Part II - Legislation

### 1. The adequacy of current impairment benefits

Comcare's preferred option is to increase the maximum amount payable for PI/NEL to 90 per cent of the death benefit, that is \$360 000 (to be indexed annually) but not to increase the maximum amount available under common law.

- 1.1. The ACTU submits that the maximum benefit for permanent impairment and non-economic loss should be the same as the maximum death benefit. We establish this position on the simple logic - death would be 100% whole person impairment.
- 1.2. Comcare has determined that it is preferable to re-establish an approximate relativity between death benefits and the maximum combined PI/NEL payments to that which was set when the SRC Act commenced, while ignoring the fact that exactly the same relativity was established between death benefits and maximum common law amounts when the SRC Act commenced.
- 1.3. Comcare makes the point that *the limited access to common law and a capped maximum amount are fundamental to the design of the legislation*. When designing the legislation the Parliament purposely capped common law damages at the same maximum as the maximum combined PI/NEL benefits - \$110,000. The designers of the legislation had the option of abolishing access to common law damages which they did not do. The designers narrowed access to common law and capped the maximum award.
- 1.4. It is detailed in the Options Paper that *'Employer 1 stated: "The legislation specifically fixed this amount [max. common law damages] at \$110,000 to dissuade employees from instituting common law action"*. At the time of the commencement of the SRC Act the Legislature decided that the maximum common law award should be approximately 90% of the available death benefit. If the designers of the legislation have deliberately constructed a disincentive for workers' to pursue common law claims by narrowing access to actions and capping the maximum, this disincentive would not be disrupted by maintaining the relativity between the maximum death benefit and the maximum common law benefit.

### 2. Separate payments for PI and NEL

Comcare's preferred option is that the s24 benefit be increased to include the previous NEL component and, by consequence, s27 of the SRC Act be repealed.

- 2.1 We assume that the purpose of reviewing the permanent impairment guide is not to deny compensation to eligible injured workers'. Comcare's preferred option would seem a sensible amendment and would ease an administrative burden. However, the ACTU would only agree to the combining of s.24 and s.27 if it can be demonstrated that injured workers' will not be financially worse off.

### 3. The irrevocable election between PI and common law

Comcare's preferred option is that the irrevocable election between permanent impairment and common law be maintained.

- 3.1 As we have previously submitted, access to common law damages is a fundamental element of any workers compensation system. Awards at common law can more closely reflect community standards and expectations with regard to proven employer negligence. Awards at common law also provide scope for those more seriously injured as a result of the negligence of their employer to exit the workers compensation system while maintaining financial surety.

The maximum amount of award available under common law should equal the maximum amount available under s24 and s27 of the Act as was the case when the Act commenced.

While actions under common law can take considerable time to progress through the Court system, this should not deny injured workers' access to compensation of their permanent injury or incapacity, or for any non-economic loss. Workers' should be able to pursue a common law action while concurrently seeking permanent impairment compensation. If successful in their common law case the permanent impairment amount should then be deducted from the common law award.

- 3.2 Comcare has stated that an additional issue to consider is that by allowing concurrent or subsequent common law action, there would be an increase in scheme administration and legal costs, and this may well be an outcome of removing the irrevocable election.

However, we submit that an increase in scheme administration and legal costs is of no relevance where employers have healthy and safe workplaces and workers' have no need to pursue compensation benefits.

#### 4. The reasonableness of current impairment thresholds

On balance, and in consideration of the recommendation to increase maximum payable for PI, Comcare's preferred option is that the threshold of 10 per cent be retained and that the threshold for deterioration of impairment be reduced to five per cent.

- 4.1 A straight comparison of minimum threshold before permanent impairment compensation is available across the states and territories, with the Comcare minimum threshold is problematic. As Comcare has identified in the Options Paper: '*Currently, there are different guides in use in Australia to assess PI, the majority based on the 4<sup>th</sup> or 5<sup>th</sup> edition of the AMA guide*' (our underlining). Considering thresholds in isolation from the relevant assessment methods is similar to stating that the maximum speed limit is 100 without specifying whether that is measured in miles or kilometers per hour.
- 4.2 Comcare has stated that in considering the issues of impairment thresholds, '*the balance between equitable and fair benefits and the financial viability of the scheme has been kept in mind*'. Comcare also acknowledges that impact of the ACTU's position (i.e. that PI benefits should apply for all permanent impairment that has occurred as a result of a workers' employment) has not been considered by the schemes actuaries and the exact impact of such a change on scheme finances is unknown.
- 4.3 An informed decision on balancing between equitable and fair benefits and the financial viability of the scheme cannot be made in the absence of actuarial estimates on different models.

#### 5. Multiple injuries (Canute)

Consistent with the 'whole person impairment' approach, Comcare's preferred option is that, for each employee, all impairments resulting from all injury occurrences under the SRC Act be combined.

- 5.1 Since the introduction of the 2<sup>nd</sup> Edition Permanent Impairment Guide there has been a significant decrease in accepted permanent impairment claims (see 7. below). The number of accepted claims has been even further decreased since the decision of *Canute v Comcare*.
- 5.2 We do not resile from our position that permanent impairment benefits should apply for all permanent impairment that has occurred as a result of a workers' employment.

- 5.3 The ability to join impairments, in line with Comcare preferred option, would be necessary if harsh and unreasonable minimum impairment thresholds remain part of the Statute.

The drafting of a legislative amendment to give affect to the Comcare preferred option must include consultation with the ACTU.

- 5.4 We reserve the right to make further comment on this matter.

## 6. Pre-existing conditions

Comcare's preferred option is that a clear legislative mechanism be introduced for the discounting of pre-existing conditions.

- 6.1 As we have previously submitted, the ACTU position is that permanent impairment benefits should apply for all permanent impairment that has occurred as a result of a workers' employment.

- 6.2 Injured workers should not be penalised simply because they have an underlying condition. Where a worker has an asymptomatic condition which has been made symptomatic by a work related injury, there should be no allowance for Comcare to reduce the level of impairment.

To do so would not reflect the true nature of the impairment and be at odds with the purpose of the SRC Act, namely that any interpretation of the legislation should be in favour of the worker.

- 6.3 We do not agree with the Comcare preferred option.

## Part III – The Guide

### 7. General review of Guide

Comcare base the next edition of the Guide on the 5th edition of the AMA Guide and complete an in depth analysis of the appropriateness of a transition to AMA6

- 7.1 In Attachment 2 to the Submission of the ACTU to the Comcare Review, February 2008, we detailed the impact of the use of the 2<sup>nd</sup> Edition Permanent Impairment Guide for the determination of an injured workers' impairment.

At the time of making our Submission we detailed that we had requested, through our legal representatives, comparative statistics from Comcare regarding claims that were accepted for permanent impairment compensation under:

- The 1<sup>st</sup> Edition Guide for the 2 years leading up to and including 28 February 2006; and
- The 2<sup>nd</sup> Edition Guide for the period 1 March 2006 to date.

Comcare supplied this information in April 2008 and after analysis of these statistics revealed the following:

- A 68% reduction in accepted permanent impairment claims from 2004/06 to 2006/08. This reduction in accepted claims has meant a reduction of more than \$6million in payments to injured workers'.
- Total permanent impairment compensation payments for the period 1March 2006 to 29 February 2008 are around 65% less than the total payments for the period 1 March 2004 to 28 February 2006 at \$3,406,000.

The reduction in making claims in the experience of our legal representatives is a result of the 2<sup>nd</sup> Edition Guide having made it far more difficult to get a claim accepted and therefore, on the advice

of workers' lawyers, claims are simply not being made. We note that the costs associated with unsuccessful claims are borne by the injured worker.

7.2 The recommendation from our submission to the Comcare review was that:

*That the Minister takes urgent steps to revoke the 2<sup>nd</sup> Edition Guide and re-implement the 1<sup>st</sup> Edition Guide under s.28 of the SRC Act.*

*If the Minister approves a further Guide, it should be on the proviso that if compensation would have been payable under the 1<sup>st</sup> Edition Guide, it should also be payable under any further version of the Guide*

7.3 We are disappointed that despite the criticism of the 2<sup>nd</sup> edition guide in submissions to the Comcare review (other than just the submission of the ACTU) and the evidence of the effect of the use of the 2<sup>nd</sup> edition guide on compensation paid to injured workers', as supplied by Comcare, the 1<sup>st</sup> edition guide has not been reinstated. Further we are disappointed that Comcare has refused to consider the affect of our call for the 1<sup>st</sup> edition to be reinstated.

7.4 While the AMA Guides attract significant criticism, they do constitute an acceptable basis for the development of satisfactory impairment assessment methods in Australian compensation jurisdictions. Any guides adopted by Comcare should be the subject of constant stakeholder review and the adoption of Comcare Guides should be accompanied by the establishment of a tripartite working group to discuss, consider and recommend changes to the Guides to take account of the latest medical knowledge or the Australian context.

## 8. Stand alone guide

Comcare to ask NSW for permission to develop a modifier guide based on the NSW Workcover Guides for the Evaluation of Permanent Impairment.
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8.1 When commenting on the development of a national guide, Comcare states that '*Safe Work Australia is responsible for harmonisation of workers' compensation arrangements and as such it may consider this idea further.*' Part of the justification of the Comcare preferred option above, however, is that '*if Comcare was to base its guide on the NSW Guide, Australian workers' compensation jurisdictions would be moving to a more harmonised approach to the assessment of PI.*'

A similar view was put by Comcare in detail in the options paper about the previous item – General Review of the Guide. In commentary on the Comcare preferred option it is stated that '*in the interest of pursuing a harmonised approach to workers' compensation, the next edition of the Comcare Guide could continue to be based on AMA5.*'

8.2 It is our long held position that an Australian version of impairment assessment guides should be developed. We agree that these guides should be developed through the processes of Safe Work Australia.

In pursuing a harmonised approach to workers' compensation, Comcare should begin discussions with the ACTU about other progressive workers' compensation matters across the State/Territory jurisdictions that would have a positive affect for workers' if implemented in the Commonwealth scheme.

8.3 We submit that the 2<sup>nd</sup> Edition Guide is discredited and should be immediatley revoked and that the 1<sup>st</sup> Edition Guide be reimplemented as an interuim measure. We submit that a stand alone guide should be developed, with consideration of the experience of State/Territory specific modifications, on the proviso that if compensation would have been payable under the 1<sup>st</sup> Edition Guide, it should also be payable under any further version of the Guide

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

Comcare proposes to amend the Guide to instruct that where an impairment is a kind which cannot be assessed in accordance with the provisions of the Guide, that assessment is made under the edition of the AMA Guides upon which that provision was based.

9.1 We agree with this Option.

**10. Slow onset conditions**

During the review of the PI Guide, Comcare proposes to work with an oncologist to consider diseases, other than lung cancer and mesothelioma, (that is, malignant or terminal diseases), that can be compensated for PI upon diagnosis.

10.1 Where a worker suffers from a significant life altering disease, a move to granting a lump sum award for satisfying a diagnosis without the need to satisfy a further threshold is welcomed and as such we agree with this Option.

The discussions and ultimate outcomes of the work of the oncologist should be overseen by the impairment guides tri-partite working group suggested in 7.4 above.

**11. Psychiatric conditions**

Comcare proposes to adopt the Psychiatric Rating Impairment Scale (PIRS) for the assessment of psychiatric conditions (including 15 per cent WPI threshold for psychiatric conditions)

11.1 There is no sound basis to reduce this level of impairment.

11.2 The extension of the exclusionary provisions outlined in section 5A of the SRC Act has already resulted in a dramatic costs saving for Comcare. There is no basis for further cost savings.

Additionally, comparison with other jurisdictions such as NSW that have a higher threshold for psychological impairments should not be done in isolation. In the case of NSW, while there is a higher threshold for psychological conditions there is no threshold for physical impairments.

**12. Comcare PI Guide tables and the 10 per cent threshold**

In reviewing the guide, Comcare proposes to work with relevant medical bodies to consider whether tables in the Guide can be created to enable most, if not all conditions, to be assessed at the relevant threshold.

12.1 The ACTU will actively participate in the impairment guides tri-partite working group on the development of impairment guides and will consider all matters of relevance to the work of this group on their merits.

**13. Review of percentage amounts – Comcare tables**

Comcare proposes to review all tables to incorporate the 'ranges' used in edition 5 of the AMA Guide.

13.1 The ACTU will actively participate in the impairment guides tri-partite working group on the development of impairment guides and will consider all matters of relevance to the work of this group on their merits.

#### **14. Movement to future editions of the AMA Guides**

Comcare proposes to establish a Permanent Impairment Working Party to consider topical permanent impairment issues such as the appropriateness of moving to future editions of the AMA Guides.

14.1 The ACTU will actively participate in the impairment guides tri-partite working group on the development of impairment guides and will consider all matters of relevance to the work of this group on their merits.

14.2 The composition of the Permanent Impairment Working Party as proposed by Comcare is unacceptable.

Unions will always seek the advice of their specialist lawyers on technical legal matters and specialist medical practitioners on medical issues with regard to workers compensation regulation. While lawyers and medical practitioners have an interest in and may be affected by amendments to legislation or changes in impairment assessment guides or methodology, it seems to us self evident that workers and employers are likely to be more directly affected, than their legal representatives or medical providers.

14.3 We submit that the impairment guides tri-partite working group suggested in 7.4 above is appropriate to deal with all matters pertaining to the impairment assessment guides and impairment assessment benefits. It is acknowledged that specialist medical or legal advice should be available to assist the participants of this working group.

#### **15. Ongoing training package**

Comcare proposes to structure an ongoing training schedule on the guide. Comcare also proposes to develop a training package for non-medical practitioners to obtain an 'understanding' of the Guide. Comcare also proposes to issue regular bulletins to trained medical practitioners on topical issues relating to the assessment of PI.

15.1 The ACTU will actively participate in the impairment guides tri-partite working group on the development of impairment guides and will consider all matters of relevance to the work of this group on their merits.