



Customer Circular

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Compensation and Third Party claims

1. PURPOSES

The purposes of this Circular are to explain:

- how, in certain circumstances, the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), allows Comcare to recover the amount of compensation payments from an employee's third party damages;
- how recovery of compensation from third party damages affects premiums; and
- the employer's role in compensation claims where there is also third party action.

2. BACKGROUND

The introduction of the SRC Act limited the circumstances in which an employee could sue his or her employer for damages for work-related injuries (see section 44 of the SRC Act). However, the employee's right to sue a third party remained essentially unchanged.

The term "third party" generally means that two parties were involved in an accident for which damages are claimed or awarded. A common example is a third party damages claim for injuries that arise from a motor vehicle accident. In this type of example the claim for damages is made against the owner of the vehicle involved, and the third party in this instance is the other person's insurance company.

This Circular only applies to cases where the claim for damages from a third party occurred on or after 1 December 1988. This Circular does not deal with claims for damages against the Commonwealth. For information regarding pre-December 1988 third party claims or other common law matters please call Comcare's Claims Helpline on 1800 150 555, or email, claims.help@comcare.gov.au

3. THE SRC ACT

The SRC Act includes provision for Comcare, in certain circumstances, to recover the amount of compensation payments from third party damages.

Relevant sections of the SRC Act are:

Section 4 – Definition of damages.

Section 48 – This section deals with Comcare's powers of recovery in relation to compensation that has been paid, and the consequences of recovery of damages, where the claim for damages is conducted by the employee.

Section 50 – This section deals with Comcare's powers of recovery in relation to compensation that has been paid, and the consequences of recovery of damages, where Comcare conducts proceedings in the name of the employee

Section 51 – This section allows Comcare to obtain the "compensation payback" directly from the third party when the third party has agreed to pay damages, or been ordered to do so, rather than Comcare having to recover the compensation payback from the employee after they have recovered the damages themselves.

Section 119 – This section deals with compensation (i.e., under the SRC Act) where compensation is also payable under specified State legislation.

Please refer to the copy of the SRC Act on Comcare's Internet site for details of these sections:

<http://www.comcare.gov.au>

4. PROCEEDINGS AGAINST THIRD PARTIES

Proceedings against third parties can be instituted by the injured employee or by Comcare.

Proceedings instituted by employee

An injured employee may institute proceedings against a third party for an injury for which compensation under the SRC Act is also payable. If an employee chooses to institute proceedings:

- the employee must notify the Safety, Rehabilitation and Compensation Commission in writing as soon as practicable, but not later than seven days after first becoming aware that the proceedings are instituted; and
- where compensation is payable under the SRC Act and damages are recovered, an employee is required to notify Comcare in writing of the recovery of damages not later than 28 days after the day on which the damages were recovered.

Employees may recover damages from a third party without commencing proceedings, for example, by way of a “letter of demand”. In this situation the provisions of the SRC Act still apply.

Proceedings instituted by Comcare

Section 50 of the SRC Act allows Comcare to institute proceedings in the name of the injured employee, or alternatively Comcare may take over the conduct of proceedings that have been instituted by the employee (where the proceedings have been discontinued or not properly prosecuted). Comcare does not need the employee’s consent to institute or take over proceedings.

Comcare is liable to pay the costs of proceedings pursuant to section 50 of the SRC Act, and such costs are then deducted by Comcare from any damages recovered. It should be noted that these costs can include reasonable costs which have already been incurred by the employee prior to Comcare’s involvement.

5. RECOVERY IN RELATION TO COMPENSATION

Once damages have been agreed or awarded, Comcare is able to recover compensation payments from the damages. The amount recovered is commonly called “compensation payback”.

The compensation amount that Comcare can recover from the damages includes incapacity payments and medical and out-of-pocket expenses. Legal costs and costs related to rehabilitation and medical examinations requested by Comcare are not “compensation”, and so they are not recoverable as part of the compensation payback. However, costs in connection with proceedings pursuant to section 50 of the SRC Act are deducted by Comcare from damages recovered.

6. COMPENSATION – WHAT HAPPENS AFTER RECOVERY OF DAMAGES?

The action taken by Comcare in relation to ongoing compensation payments, differs depending on whether the damages recovery was conducted by the employee, or by Comcare in the employee’s name.

Section 48 – injured employee conducts recovery

Following recovery of damages, the employee is liable, by subsection 48(3) of the SRC Act, to pay Comcare the lesser of:

- (a) the amount of compensation that Comcare has paid to the employee, before damages are recovered, in respect of the injury for which damages are recovered; or
- (b) the amount of damages.

Compensation is not payable to the employee, in respect of the injury for which damages are recovered, after the date on which damages are recovered by the employee.

Example 1: Harry is an employee covered by the SRC Act. While he was driving to work, Harry’s car met Sally’s in an MVA. Comcare subsequently paid \$20,000 in compensation to Harry. Later, Harry successfully sued Sally, and received damages of \$30,000. Subsection 48(3) of the SRC Act requires Harry to pay Comcare

\$20,000. Harry is no longer eligible for compensation in respect of the MVA (by virtue of subsection 48(4) of the SRC Act).

Example 2: Miss Daisy, while being driven to work, was involved in an MVA, and Comcare subsequently paid \$20,000 in compensation. She successfully sued the driver of the other vehicle involved in the MVA, and received \$15,000. Sub-section 48(3) of the SRC Act requires Miss Daisy to pay Comcare \$15,000. Miss Daisy is no longer eligible for compensation in respect of the MVA (by virtue of subsection 48(4) of the SRC Act).

Please note that the usual practice in each of the above examples would be for Comcare to issue a Section 51 notice to the third party (when the third party has agreed to pay damages, or been ordered to do so), rather than wait for Harry or Miss Daisy to recover the damages themselves and then recover the compensation payback from him or her respectively.

Section 50 – Comcare conducts proceedings in the name of the employee

In the case of section 50 proceedings, any damages are paid directly to Comcare in the first instance:

- Comcare then deducts an amount equal to the compensation paid to the employee by Comcare under the SRC Act;
- any legal costs awarded, or agreed to be paid, to Comcare are paid to Comcare, and other legal costs are deducted by Comcare from the damages;
- any balance of the damages is paid to the employee;
- the balance (if any) of the damages is offset against future compensation payments that would have otherwise been payable to the employee; and
- if the balance is offset entirely then the employee becomes eligible again for compensation.

Example 1: If Harry decided not to institute proceedings and Comcare institutes proceedings in Harry's name under section 50 of the SRC Act, and Comcare subsequently recovers \$30,000, then Comcare would deduct the amount of compensation (\$20,000), deduct legal costs, and pay Harry the balance (if any). Harry could then continue to submit claims for time off work and

medical expenses to Comcare until such time as the balance had been offset. Harry would then be eligible again for compensation.

Example 2: For Miss Daisy, the result of Comcare instituting proceedings in her name under section 50 of the SRC Act is that, although all the damages would still be paid to Comcare, she would remain eligible for compensation.

The key difference between the operation of sections 48 and 50 of the SRC Act is that the injured employee can become eligible again for compensation following recovery of damages if section 50 applies, but not if subsection 48(4) applies.

7. COMCARE'S THIRD PARTY RECOVERY UNIT

Comcare has a unit that looks at claims where a third party may be liable, and then writes to the employee advising them of their obligations under the SRC Act. Our Third Party Recovery Unit also follows up on compensation claims where there is third party action, to ensure the correct compensation payback is recovered.

8. HOW RECOVERY OF COMPENSATION FROM A THIRD PARTY AFFECTS PREMIUMS

It is important that Comcare knows about these cases as third party recoveries reduce premiums charged. In the 1998-99 year, Comcare recovered \$4.7m. from third party settlements compared with total payments of \$172.8m.

9. EMPLOYER'S ROLE IN THIRD PARTY CASES

It is important that Comcare becomes aware, as soon as possible, of claims that may relate to recovery of damages from a third party. Most third party cases involve motor vehicle accidents. However, examples of other situations where a third party claim could arise are:

- a fall outside the workplace, e.g. in a supermarket, or shopping centre;
- a lunch-time sporting injury where some party other than the employer, or another employee, is involved;

- injury arising from a dog bite; or
- accidents involving equipment supplied and/or serviced by a person other than the employer or its employees.

Case Managers can help by ensuring any details regarding possible third party action are included on claims submitted to Comcare. Also, if a Case Manager or Human Resource Manager subsequently becomes aware of a claim on which third party action has been initiated or is successful, please let the relevant Claims Manager know.

10. FURTHER INFORMATION?

If you would like more information on this topic, please call the Third Party Recovery Unit on 1300 366 979, or call our Claims Help Line on

1800 150 555; (or email: claims.help@comcare.gov.au).

11. DISCLAIMER

The contents of this Circular are provided for general information. Please contact Comcare before any action or decision is taken on the basis of the contents of this Circular. Also, advice from an appropriately qualified professional person should be obtained before relying on the contents of this Circular.

Comcare, the Commonwealth of Australia, their officers, servants and agents, will not be liable for any loss howsoever caused whether due to negligence to otherwise arising from any use or reliance on any of the contents of this publication.

STREET ADDRESSES FOR COMCARE'S OFFICES

CLAIMS MANAGEMENT CENTRES

Canberra Claims Management Centre
Level 5, CFM Centre, 12 Moore Street,
Canberra ACT 2601

Melbourne Claims Management Centre
Level 8, 84 Flinders Lane, Melbourne VIC 3000

CUSTOMER SERVICE CENTRES

New South Wales
Level 2, 92 Parramatta Road, Camperdown NSW 2050

South Australia
Level 18, 25 Grenfell Street, Adelaide SA 5000

Western Australia
Level 18, Exchange Plaza, 2 The Esplanade,
(entry via Sherwood Court), Perth WA 6005

Queensland
Level 14, Samuel Griffith Place, 340 Adelaide Street,
Brisbane QLD 4000

Tasmania
Level 4, ANZ Centre, 22 Elizabeth Street, Hobart
TAS 7000

MAILING LIST

If you would like to be on the mailing list for future issues of the Customer Circulars, please call Dave Byers:

- on (02) 6275 0090; or
- email: byers.dave@comcare.gov.au

PREVIOUS ISSUES

Copies of all the Customer Circulars are available on our web site:

<http://www.comcare.gov.au>

MORE INFORMATION?

For any other information please contact a National Business Manager, State Account Manager or Claim Manager through our Worker's Compensation Enquiry Line:

1300 366 979

OHS Hotline 1800 642 770