



DAL/misc-dxl  
T: (03) 9605 2897  
F: (03) 9258 9621

24 April 2009

Director  
Permanent Impairment Project  
Comcare  
GPO Box 9905  
**CANBERRA ACT 2601**

**By facsimile: 02 6274 8567**

Maurice Blackburn Pty Limited  
ABN 21 105 657 949

Level 10  
456 Lonsdale Street  
Melbourne VIC 3000

PO Box 523  
Melbourne VIC 3001

DX 466 Melbourne

T (03) 9605 2700  
F (03) 9258 9600

Dear Sir/Madam,

**Re: Policy review of Comcare's permanent impairment guide**

We enclose submissions on behalf of Maurice Blackburn.

Yours faithfully

**Damian Lynch** (*Enquiries: Brooke Goring - (03) 9605 2897*)  
**MAURICE BLACKBURN**

Encl

(1695534\_V1)  
(DAL(DAL)/MISC-DXL/VCC\_NPC/BYG)

**Maurice Blackburn Submissions - Policy review of Comcare's permanent impairment guide – April 2009**

1. ***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?***

Yes. Firstly, "**Impairment**" is defined under the Act to mean the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function. Permanent Impairment is therefore a separate category of loss different and distinct from all other losses which are compensable under the SRC Act 1988.

Because it is a separate category of loss it requires separate consideration from medical expenses (section 16), incapacity benefits (section 19) and so on.

Secondly, Permanent Impairment benefits are commonly found in other statutory schemes operating in Australia. It would be fundamentally unjust for an injured worker to not be entitled to Permanent Impairment benefits just because he/ she falls under the SRC Act 1988 when an injured worker under the state system has such an entitlement.

2. ***Why is there a threshold for permanent impairment claims?***

This appears to be to reduce the impost on the Commonwealth and Licencees operating under the SRC Act for permanent Impairments below a notional level

3. ***What are the positive and negative aspects of having a threshold for permanent impairment claims?***

With few exceptions section 24 of the SRC Act requires a degree of permanent impairment of at least 10 % before any compensation is payable.

Clearly the biggest adverse impact is where an injured worker whose claim is accepted falls under the threshold for a particular injury and is disentitled to compensation for permanent impairment. For example, we have seen many examples since the introduction of the Comcare Guide to the Assessment of the degree of permanent impairment - Second Edition where injured workers with work related spinal injuries have fallen below the 10 % threshold despite disabling and permanent symptoms which cause significant pain, suffering and restrictions in sporting, recreational and social activities.

Spinal injuries that would have given rise to an entitlement to permanent impairment benefits under the Comcare first Edition permanent impairment Guides don't rate high enough under the Second Edition Guides. For example, many significant disc injuries rate only 8 %.

4. ***If the threshold for permanent impairment claims was to be reduced, what should the threshold be?***

Other than the current exceptions to the 10 % threshold under section 24 (8) (fingers, toes, hearing, taste and smell) We submit that 5 % is appropriate but this is a matter more appropriate for medical experts to address. See also the comments in answer to question 7 below.

5. ***Should there be different thresholds, e.g. for different injury types?***

This a question for medical experts to address.

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

This question is a little unclear. Is the minimum level 1 %? If so, more injured workers suffering permanent impairment would be properly compensated whatever their level of loss without the imposition of a threshold. As the level of remuneration varies in direct proportion to the percentage level assessments under 10 % will likely be relatively modest compared to the amount paid for 10 % assessments at present.

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

The first edition more fairly compensated injured workers. The Second edition has drastically reduced the number of injured workers now able to claim permanent impairment benefits as they are much harder to satisfy. The second edition guides are potentially invalid as there are many tables that fail to advise what is required to achieve a 10 % impairment rating for that body part, despite 10 % being the threshold level required under section 24 for most injuries.

The second edition should be replaced with the first edition, with the exception of retaining parts of the second edition that deal with medical conditions not widely recognised when the first edition was drafted e.g. chronic regional pain syndrome

8. *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?*

Yes. The effect of Canute's case is to greatly restrict access to permanent impairment benefits where an injured worker suffers more than one injury that results in permanent impairment. Any assessments under 10 % are not compensated, unless it is accepted that multiple impairments stem from the same injury and that when combined they reach 10 % or more.

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

Refer to answer to question 7 above.

10. *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?*

The preamble to the Permanent Impairment Guide at paragraph 1.8 states:

"Impairment percentages derive from the *Guides*, criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on the whole person functioning and account for basic activities of basic living, not including work. The complexity of work activities requires individual analysis. Impairment assessment is a necessary *first step* for determining disability."

It is made clear that the Guides may provide a useful tool in evaluating a persons impairment to perform basic activities, however, the Guides do not have any particular reference to work activities.

A common example of a work injury is a person who suffers from a back injury which involves a disc herniation with radiculopathy. Such an injury is serious and should the person be in manual work, which is quite often the case, such an injury will quite often end that persons career in that employment. Applying the Guides, such an injury would more than likely fall within DRE Lumbar Category 2 which provides an assessment of 5% to 8%, falling short of the current threshold of 10%. On this basis, a person may suffer a spinal injury which ends their career, but yet be ineligible to claim compensation for permanent impairment and/or pain and suffering.

On this basis, should it be the intention to adequately compensate injured workers for loss of function and associated pain and suffering, then these objectives are failed should AMA 5 be applied to the current threshold.

**11. 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 should be?**

This is a question for medical experts to address.

**12. Irrevocable election between Permanent Impairment benefits and Common Law damages**

Common Law damages are extremely limited at \$110,000 maximum for general damages for pain and suffering with no damages claimable for economic loss.

This is an unjust deficiency in the SRC Act as we argued in our submissions to the Comcare Review in 2008.

Under Comcare, access to common law is restricted to non-economic loss and requires injured workers to waive their rights to a lump sum under the statutory benefits scheme. Common law damages are capped at \$110,000 for non-economic loss and that cap has not changed since the scheme began in 1988. Thus Comcare has lost parity with the other Common Law jurisdictions around the country with respect to amounts awarded for pain and suffering, and does not offer any remedy with respect to damages for loss of earning capacity or medical and like expenses.

Workers are required to make an election between receiving permanent impairment benefits and seeking common law damages under Comcare. The election is irrevocable. If you choose one, you cannot pursue the other. However the election is, for practical purposes, illusory due to Comcare's prohibition on claiming economic loss as a component of common law damages. This is out of step with other State schemes and oppressive.

Access to meaningful Common Law rights helps produce, promote and create a culture of safety in the workplace. In the absence of Common Law rights, a negligent employer cannot be held responsible for their negligent acts or omissions. In the absence of responsibility, poor safety cultures thrive. Common law has been a powerful tool in improving workplace safety, such as exposure to asbestos, second-hand tobacco smoke and machine guards.

There have always been different entitlements between states but now two workers doing the same job on the same site with the same injury will receive different payments because of who employs them. For example, a Comcare worker's pain and suffering is worth less than a quarter of the maximum \$462,720 payment available to a colleague insured by Victoria's WorkCover scheme.

In our submission permanent Impairment must be considered in conjunction with common law rights.

Firstly, there should be no requirement for an irrevocable election. In Victoria for example neither the VWA nor TAC require this. Both may be claimed. It is unnecessary and can lead to unjust results to require such an election if for instance a client with an accepted physical injury accepts common law damages only to later develop psychological symptoms as a result of the physical injuries. Those psychological symptoms will not be compensated under either common law damages or permanent impairment.

Secondly, the cap on general damages should be increased to bring it into line with the more generous state schemes. Then it should be indexed.

Thirdly, compensation for economic loss should be claimable at common law.

Maurice Blackburn April 2009