

Changes to workers' compensation legislation effective from 1 October 2001

1. PURPOSE

The purpose of this Circular is to provide advice on changes to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) which took effect from 1 October 2001.

2. BACKGROUND

On 1 October 2001 the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* (SRCOLA Act) received royal assent. The SRCOLA Act amends the SRC Act in a number of areas including workers compensation access and benefits, approved rehabilitation providers, the premium process and licensing arrangements.

This Circular provides advice on changes relating to:

- incapacity payments to employees aged over 63;
- compensation payable for hearing loss under section 24;
- common law remedies for dependants of a deceased employee;
- Normal Weekly Earnings for "former employees"; and
- claims for non-economic loss in respect of permanent impairments which occurred before 1 December 1988.

3. INCAPACITY PAYMENTS TO EMPLOYEES AGED OVER 63

Previous provisions

The original subsection 23(1) provided that compensation for incapacity was not payable to a person who had reached the age of 65. In 1999, the SRC Act was amended with the addition of subsection 23(1A). This provided employees covered by the *Public Service Act 1999* with a maximum of 104 weeks incapacity for an injury sustained after reaching the age of 63.

Section 30 of the SRC Act provides for the redemption of weekly incapacity payments where certain criteria are met. That section contains a formula for calculating the redemption amount based on weekly incapacity payments ceasing at age 65.

Amendment

This entitlement, to 104 weeks incapacity for injuries sustained after age 63, is now extended to all employees covered by the SRC Act, regardless of *Public Service Act 1999* coverage.

Policy Issues

- (a) Any employee injured after the age of 63 may receive incapacity payments for up to 104 weeks, (whether consecutive or not). If the employee was injured before the age of 63, incapacity payments continue to be available up to the age of 65.
- (b) The number of days for the purposes of paragraph 30(3)(b) is calculated by subtracting the number of days' incapacity since the injury from the total number of days in 104 weeks.

New provisions

Subsections 23(1) and 23(1A) have been amended to read as follows:

Subsection 23(1)

Compensation is not payable under section 19, 20, 21, 21A or 22 to an employee who has reached 65.

Subsection 23(1A)

However, if an employee who has reached 63 suffers an injury (whether before or after the commencement of this subsection):

- a) subsection (1) does not apply; and
- b) compensation is payable under section 19, 20, 21, 21A or 22 in respect of the injury:
 - i) to the extent that this Act (other than subsection (1)) allows; and
 - ii) for a maximum of 104 weeks (whether consecutive or not) during which the employee is incapacitated.

Part of subsection 30 (3) has been amended as follows:

n means the number worked out using the formula:

$$\frac{\text{Number of days}}{365}$$

where:

number of days means the number of days in the period beginning on the day after the day on which the determination is made and ending:

- (a) if the employee is injured before reaching 63 years of age - on the day immediately before the day on which the employee reaches 65 years of age; and
- (b) if the employee is injured on or after reaching 63 years of age - on the day immediately before the employee would cease to be entitled to receive compensation under section 19, 20, 21 or 21A of this Act.

Date of effect

The amendments to sections 23 and 30 apply to relevant employees:

- (a) whose date of injury is after 1 October 2001; or
- (b) who have reached 63 years of age and who are receiving compensation under section 19, 20, 21, 21A or 22 of the SRC Act, or who are eligible to apply for such compensation at that date.

4. HEARING LOSS

Previous provisions

Subsection 24(7) provided that an employee must suffer a permanent impairment of at least 10% for compensation to be payable. The only exceptions to this were contained in subsection 24(8) which provides that a lesser degree of permanent impairment may apply to the loss, or loss of the use, of a finger or toe and the loss of the sense of taste or smell.

The *Guide to the assessment of the degree of permanent impairment* (the Guide) specifies that for hearing loss claims the percentage whole person impairment is calculated by dividing, by two, the percentage binaural loss of hearing. This meant that an employee had to have a binaural hearing loss of at least 20% to qualify for a permanent impairment.

Subsection 25(4) provides that no further amounts of compensation for permanent impairment are payable to an employee unless there is a subsequent increase of at least 10% whole person impairment, i.e. a further 20% binaural hearing loss.

This requirement represents a significant hearing loss and was the highest threshold of all Australia's workers' compensation jurisdictions.

Amendment

Section 24 of the SRC Act has been amended so that a binaural hearing loss of 5% or more (i.e. 2 .5% whole person impairment) attracts a permanent impairment award.

New provisions

Subsection 24(7) has been replaced, and a new sub-section 24(7A) has been inserted, as follows:

- (7) Subject to section 25, if:
 - (a) the employee has a permanent impairment other than a hearing loss; and
 - (b) Comcare determines that the degree of permanent impairment is less than 10%;
 an amount of compensation is not payable to the employee under this section.
- (7A) Subject to section 25, if:
 - (a) the employee has a permanent impairment that is a hearing loss; and
 - (b) Comcare determines that the binaural hearing loss suffered by the employee is less than 5%;
 an amount of compensation is not payable to the employee under this section.

Section 25 has been amended so that a further permanent impairment award can be made if there is a subsequent increase in the binaural hearing loss of 5%. Sub-section 25(4) has been amended and a new sub-section 25(5) has been inserted, as follows:

Subsection 25(4)

After "permanent impairment of an employee", insert "(other than a hearing loss)".

At the end of section 25

Add:

- (5) If Comcare has made a final assessment of the degree of permanent impairment of an employee constituted by a hearing loss, no further amounts of compensation are payable to the employee in respect of a subsequent increase in the hearing loss, unless the subsequent increase in the degree of binaural hearing loss is 5% or more.

The Guide still specifies that for hearing loss claims, the whole person percentage is calculated by dividing, by two, the percentage loss of hearing.

Date of effect

The new provisions only apply where the date of injury is after 1 October 2001. Claims resulting from injury suffered before that date will continue to be assessed under threshold provisions which existed until 1 October 2001.

5. COMMON LAW REMEDIES FOR DEPENDANTS OF A DECEASED EMPLOYEE

Previous provisions

Section 44 provides that, subject to section 45, an action for damages does not lie against the Commonwealth in respect of an injury suffered by an employee in the course of employment. However, the section can be read as excluding a common law remedy for dependants of a deceased employee.

Amendment

Although as a matter of policy dependants of deceased employees have been given the option to take action for damages, a technical amendment was required to clarify the original intention of section 44, and ensure that dependants of a deceased employee are not barred from taking action at common law.

New provisions

Section 44 has been amended by inserting new sub-sections as follows:

(3) If:

(a) an employee has suffered an injury in the course of his or her employment; and

(b) that injury results in that employee's death; subsection (1) does not prevent a dependant of that employee bringing an action against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee in respect of the death of the first-mentioned employee.

(4) Subsection (3) applies whether or not the deceased employee, before his or her death, had made an election under subsection 45(1).

Date of effect

This amendment takes effect from 1 October 2001.

6. NORMAL WEEKLY EARNINGS (NWE) FOR FORMER EMPLOYEES

Previous provisions

The transitional provisions apply, in part, to people:

- who were receiving incapacity payments when the SRC Act commenced on 1 December 1988; and
- who had ceased to be employed before that day (i.e. were "former employees").

Section 131 allows for the weekly compensation for a former employee under age 65 to be reduced in line with increases in their superannuation payments (to provide a combined total of 70% of NWE). This is normally adjusted annually.

The transitional provisions intended that former employees under age 65 would continue to receive weekly compensation based on 70% of their NWE.

However, section 131 did not provide for weekly compensation to be adjusted in line with increases in a former employee's NWE. The weekly compensation rate could have fallen below 70% until it was adjusted at the time of the annual superannuation increase.

Amendment

Section 131 has been amended to ensure that the weekly compensation rate is adjusted whenever increases in the NWE occur.

Amendments have also been made to sub-section 8(9) of the SRC Act to enable the NWE of ex-employees to be updated by a prescribed index. It is intended that the index be prescribed early in 2002 for application from 1 July 2002. Further advice will be issued when the rate of adjustment for 2002 has been calculated.

New provisions

Section 131 has been amended by inserting new sub-sections as follows:

After subsection 131(2)

Insert:

(2A) If, as a result of an increase in the amount of a former employee's normal weekly earnings, the amount of combined benefit payable to the former employee under subsection (2) is less than 70% of those increased normal weekly earnings, the amount of compensation must be increased or further increased (as the case may be) until it is equal to 70% of those increased normal weekly earnings.

After subsection 131(3)

Insert:

(3A) If, as a result of an increase in the amount of a former employee's normal weekly earnings, the amount of compensation payable to the former employee under subsection (3) is less than 70% of those increased normal weekly earnings, the amount of compensation must be increased or further increased (as the case may be) until it is equal to 70% of those increased normal weekly earnings.

Also, to correct a technical error in sub-sections 131(5) and (6) and 132(5) the following amendment has been made to each of the sub-sections:

Omit "or (3)", substitute ", (3) or (4)".

Date of effect

These amendments take effect from 1 October 2001.

7. CLAIMS FOR NON-ECONOMIC LOSS IN RESPECT OF PERMANENT IMPAIRMENTS WHICH OCCURRED BEFORE 1 DECEMBER 1988

Comcare's *Jurisdictional Policy Advice*, JPA 2001/04 set out the policy for the management of the non-economic loss component of claims for permanent impairments which commenced before 1 December 1988, which had been lodged on or after 7 December 2000. The approach was that this component of the claims should not be determined pending passage of the amendment.

As the amendment has now been passed, Comcare will notify those claimants whose claims in respect of non-economic loss have been held in abeyance that payment for this component of permanent impairment claims will not be available. A formal determination to this effect will be made and the claimant advised of his or her appeal rights.

Amendment

This subsection clarifies the operation of section 27 so that it expressly excludes employees who suffered a permanent impairment before 1 December 1988.

However, an employee is entitled to compensation if an application for compensation for non-economic loss has been made before the date of introduction of the Bill.

New provision

Section 27 has been amended by inserting a new sub-section as follows:

(3) This section does not apply in relation to a permanent impairment commencing before 1 December 1988 unless an application for compensation for non-economic loss in relation to that impairment has been made before the date of introduction of the Bill for the Act that inserted this subsection.

Date of effect

Subsection 27(3) takes effect from 7 December 2000, the date of introduction of the Bill into Parliament.

8. ADVICE TO CLAIMANTS

Comcare will be contacting claimants whose entitlement to compensation may be affected by any of these amendments to the SRC Act.

9. OTHER AMENDMENTS

As other amendments take effect, further advice will be issued:

Subject	Commencement date of provision
Definition of "ability to earn"	1 April 2002
Compensation during first 45 weeks of incapacity	1 April 2002
Definition of "medical treatment"	1 October 2001 (effective after Ministerial notice)
Indexation of normal weekly earnings for ex-employees	1 October 2001 (first indexation date 1 July 2002)
Premium process and coverage changes	1 July 2002

10. LICENSING ARRANGEMENTS

Changes in licensing arrangements will take effect no later than 1 April 2002, either on proclamation or six months after royal assent, whichever is the earlier. Separate advice will be issued on these amendments.

11. APPROVED REHABILITATION PROVIDERS

Amendments concerning the approved rehabilitation provider approval process will be proclaimed as soon as possible, and separate advice issued. For further information on these changes, please contact Janit Gardner, in the Rehabilitation Policy and Advice Group on (03) 9691 6718.

12. FURTHER INFORMATION

If you would like more further information on any of these changes, please call 1300 366 979.

13. DISCLAIMER

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