

## Section 45 and new section 52A - changes to the SRC Act and relevant procedures

### Purpose

Comcare has written this Circular to provide you with details about some recent changes. These changes are to do with the procedures dealing with the funding and management of common law actions for damages for non-economic loss.

These changes follow recent amendments to the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

This circular follows on from Customer Circular number 43 *SRC Act amendments to the process for setting, reviewing and paying charges*.

### Background

The SRC Act restricts an employee's access to common law, except as provided for under sections 44, 45 and 46.

Section 45 provides employees with the option of either

- i accepting the compensation payable to them under sections 24, 25 or 27
- ii electing to sue the Commonwealth or a Commonwealth authority for damages for any non-economic loss they have suffered. The maximum amount a court can award to an employee is \$110,000, (plus any costs).

In May 1999, Comcare advised agencies that

- i for injuries occurring after 1 July 1999, Comcare would not indemnify

Commonwealth departments and agencies for damages and costs arising from common law claims brought by employees and dependants relating to those injuries. Comcare advised that, from that date, it would not cover claims allowed by section 44 of the SRC Act. This included claims made pursuant to an election under section 45

- ii departments and agencies should arrange their own insurance cover from that date as Comcare premiums would not cover damages and costs arising from such claims.

### Recent amendments

The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* amended the SRC Act with effect from 1 July 2002 as follows

- i section 97B of the SRC Act requires relevant agencies to pay a *special premium* to cover the funding and management of claims under section 45, where the date of injury is between 1 July 1999 and 30 June 2002 (inclusive) and where agencies did not make arrangements for their own insurance cover during this period
- ii section 97A of the SRC Act allows Comcare to include, in all future premiums, provision for the funding and management of claims for non-economic loss under section 45.

## Special premium

In January 2002, Comcare wrote to the CEOs of premium-paying agencies and asked them to advise Comcare whether or not their agency had arranged insurance cover for common law actions pursuant to a section 45 election, for injuries suffered between 1 July 1999 and 30 June 2002 (inclusive).

Based on the responses received, Comcare has set a special premium for each agency that

- i paid a premium to Comcare for the period 1 July 1999 and 30 June 2002 (inclusive)
- ii **did not** arrange their own insurance cover for possible liability for non-economic loss actions.

The SRC Act requires Comcare to collect the special premiums in the 2002 - 2003 financial year.

## Reimbursement for damages paid

Comcare will reimburse agencies for the following payments if the agency has since paid a special premium for those years

- i where agencies have already paid out damages and legal costs in relation to common law actions instituted pursuant to a section 45 election and where the date of injury was between 1 July 1999 and 30 June 2002 (inclusive).

Comcare will *not* reimburse agencies in respect of cases where they arranged their own insurance cover in relation to those cases or where they have not paid Comcare a special premium.

## What has not changed?

Arrangements relating to payments made under section 44 (death claims) to dependants has not changed. Comcare will NOT reimburse agencies for these types of claims.

Conduct and funding of claims for damages pursuant to section 45 elections and other common law actions.

The attached *New Arrangements For Funding And Managing Common Law Actions For Non-Economic Loss Against The Commonwealth* sets out in detail the funding and management arrangements for common law actions for non-economic loss. It also deals with injuries which occurred between 1 July 1989 and 30 June 1999 (inclusive) and injuries which occurred prior to 1 July 1989. This advice replaces previous advices given in relation to these matters.

## Further information

If you want to request reimbursement of damages already paid on relevant cases or provide Comcare with details of relevant, unresolved cases, then please contact

- i the Manager Comcare Recoveries Unit.

If you would like further information on special premiums, please contact

- ii the Manager, Scheme Funding at Comcare.

The telephone number for these contacts is 1300 366 979.

The postal address for these contacts is

Comcare  
GPO Box 9905  
Canberra 2601

## 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 how ever caused whether due to negligence to otherwise arising from any use or reliance on any of the contents of this publication.

# Attachment - Legal services circular

New arrangement for funding and managing common law actions for non-economic loss against the Commonwealth

## Introduction

Section 44 of the *Safety, Rehabilitation And Compensation Act 1988* (iSRC Act) limits access to common law actions for injuries occurring on or after its commencement, 1 December 1988. However, section 45 of the SRC Act allows employees to make an election to sue the Commonwealth or a Commonwealth authority as employer for common law damages for non-economic loss, as an alternative to claiming permanent impairment benefits under the SRC Act.

In the past, the relevant Commonwealth employer assisted by its legal advisers would defend such actions for non-economic loss (iNEL actions) and Comcare would fund any damages awarded and the employer's legal costs.

## Purpose

The purpose of this circular is to

- i advise agencies that (with the exception of some existing cases), from 1 July 2002, Comcare will take over the defence of NEL actions on behalf of the Commonwealth and Commonwealth authorities who are premium payers;
- i advise agencies of new funding arrangements for NEL actions; and
- i provide information on the new procedures that will apply to the defence of NEL actions.

## Background

Under section 45 of the SRC Act, where an employee has an injury or disease that is compensable under the SRC Act, the employee may elect to sue his or her employer for common law damages in relation to any NEL arising from that injury or disease.

From 1 July 1989 to 30 June 1999 (inclusive), Comcare collected premiums from relevant Commonwealth agencies to cover any damages awarded arising from NEL actions in respect of injuries occurring during this period. Comcare itself was not directly involved in the running of these cases. The employing agency would defend the action and instruct its own lawyers. Comcare funded any damages awarded and the employer's legal costs in defending the action.

Because Comcare was funding the action, Comcare would be kept informed of the progress of the action and was consulted before any settlement was reached.

Following advice from the Attorney-General's Department, collection of premiums for common law damages ceased in respect of the 1999-2000 financial year and indeed subsequent years.

The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* (iSRCOLA Act) amended, among other things, the SRC Act in relation to the funding and management of NEL actions. From 1 July 2002, the SRC Act specifically allows Comcare to collect premiums from agencies for this purpose and the option of managing these actions.

In addition, the SRCOLA Act validates Comcare's actions in collecting premiums and funding matters arising from injuries occurring between 1 July 1989 and 30 June 1999 (inclusive) as well as authorising the collection of special premiums to cover the period 1 July 1999 to 30 June 2002 (inclusive) – see Item 80 of Schedule 2 to SRCOLA Act and new section 97B of SRC Act. Comcare has provided separate advice on this matter (see *Premium Changes* below).

## New Process for NEL actions from 1 July 2002

New section 52A of the SRC Act provides that where an employer has paid Comcare a premium to cover NEL actions (including special premiums and premiums collected between 1989 and 1999) and action is taken against the employer, Comcare may, at any time, take over the action on behalf of the employer. If the action is already before a court, Comcare may apply to the court to join any other person. *Please note that section 52A also provides for funding arrangements where Comcare does not take over an action.*

It is Comcare's policy that it will take over all NEL actions **instituted on and after 1 July 2002** in respect of any injury occurring on or after 1 July 1989. Comcare will make a decision, on an individual basis, on whether it will take over cases which have already been instituted in respect of injuries occurring on or after 1 July 1989. Depending on the stage the case has reached, Comcare may decide to leave the conduct of particular cases with agencies (see *Notification of Current NEL Cases on Hand* below).

Please note the definition of *action for non-economic loss* in subsection 4(1) of the SRC Act

*action for non-economic loss* means any action (whether or not it involves the formal institution of a proceeding) to recover an amount for damages for non-economic loss sustained by an employee as a result of an injury suffered by that employee

- (a) that is taken by the employee against the employer, whether it is the Commonwealth, a Commonwealth authority or a licensed corporation, or against another employee; and
- (b) that follows an election made by the first-mentioned employee under subsection 45(1).<sup>i</sup>

## New Procedures

In order to facilitate the early involvement of Comcare in NEL cases, agencies must advise Comcare's Legal Services Group as soon as a letter of demand, statement of claim, writ or other initiating process is served on them and provide Comcare with relevant details and documents.

Where, as part of the normal permanent impairment claims process, Comcare receives an election, Comcare will advise the relevant agency.

Also, agencies must advise Comcare immediately if they receive a **subsection 45(1) election** from an employee (see *Notification Requirements and Contact Details* below). Once made, such an election is irrevocable.

Comcare will formally advise agencies and the plaintiff that a matter has been taken over. Normally a member of Comcare's legal panel firm will be engaged to conduct the defence of the case and, accordingly, agencies should expect to be contacted by Comcare's solicitors. Comcare will advise the name of the relevant legal firm when informing an agency that Comcare is taking over a case.

## Comcare's Obligations

On taking over a case, Comcare is liable to pay all the employer's reasonable costs incurred in defending the action and it may

- i take appropriate steps to bring the matter to a conclusion;
- ii settling any court proceedings with or without obtaining judgment;
- iii enforce the judgment.

Irrespective of whether or not Comcare takes over a case, if damages are awarded against the employer or the case is settled, Comcare is obliged to pay the damages on behalf of the employer (including any costs awarded against the employer) or any amount agreed under the terms of settlement.

It is essential, therefore, that in cases not taken over by Comcare. Comcare is informed at all times of the progress of the case and consulted on any proposed settlement as is the present practice.

Where Comcare takes over a case, Comcare or its solicitors will keep the employer informed of progress of the case and will consult the employer as necessary on matters relevant to the conduct of the case. Please note, however, that Comcare's solicitors are authorised to receive instructions only from Comcare's Legal Services Group.

## Employer's Obligations

Although Comcare may take over a case, the employer (whether it is the Commonwealth or a Commonwealth authority) still remains as the defendant and the action is defended on behalf of the employer by Comcare.

Notwithstanding the fact that Comcare may have taken over an action, Comcare and Comcare's solicitors will need the employer's cooperation to properly defend the case. It is the employer who has the fullest background to any alleged incident, access to documents, witnesses and other relevant matters. Note subsection 52A(5) requires employers to

comply with any reasonable requirement of Comcare for the purpose of the action including signing any document relevant to the conduct or settlement of the action.

When advising Comcare that an employee has commenced an action, it will be important that agencies nominate a contact officer for the duration of the action so that requests are processed through one central point (see *Notification Requirements and Contact Details* below).

## Premium Changes

The SRCOLA Act amendments to the SRC Act now clarify Comcare's powers to set and collect premiums in relation to NEL actions.

Comcare Customer Circular No. 30 *Payment of damages and costs in common law matters*, issued in May 1999, outlined certain difficulties that Comcare had encountered in relation to collecting premiums to cover common law actions. These difficulties have now been removed by relevant SRCOLA Act amendments to the SRC Act. Details about the new premium regime were given in Comcare Customer Circular No. 43 *SRC Act amendments to the processes for setting, reviewing and paying charges*, issued in January 2002.

Briefly, the amendments to the SRC Act now

- i make Comcare financially liable for NEL actions brought by employees for injuries that will be suffered on and after 1/7/2002 and retrospectively validate Comcare's indemnity coverage for injuries occurring during the period 1 July 1989 to 30 June 1999 (inclusive)
- i require Comcare to collect special premiums from agencies that did **not** arrange insurance cover for possible liability for NEL actions from injuries suffered by their employees during 1999-2000, 2000-2001 and 2001-2002; and

- i make Comcare liable retrospectively for NEL actions from injuries suffered in 1999-2000, 2000-2001 and 2001-2002 by employees of agencies that did **not** arrange their own insurance cover for such actions.

Comcare's Scheme Funding Group has already contacted premium paying agencies in an attempt to identify all agencies that paid for insurance coverage for NEL actions for one or more of the gap years. If your agency arranged for such coverage and has not advised the Scheme Funding Group, would you please do so as soon as possible.

Funding of common law actions involving injuries sustained prior to 1 December 1988 and between 1 December 1988 and 30 June 1989 (inclusive)

Where the date of injury occurs **prior to 1 December 1988**, employees may sue Commonwealth agencies for workplace injuries because of the High Courts decision in *Georgiadis v Australian And Overseas Telecommunications Corporation* (1994) 179 CLR 297 (iGeorgiadis claims).

Georgiadis claims against **on-budget** agencies are funded by Comcare via a special appropriation. In such cases, Comcare will meet the damages component and the plaintiffs costs where the court judgement stipulates the amount to be awarded to be inclusive of costs or where the case is settled on that basis. Comcare will not pay the plaintiffs costs where the judgement/settlement stipulates the amount to be awarded as being 'plus costs' or where no provision is otherwise made for such costs. The employer's costs in defending Georgiadis claims are met by the employer.

There is no funding for Georgiadis claims for **off-budget** agencies.

In all Georgiadis cases, regardless of funding, Comcare will seek to recover payments of compensation made to the employee in respect of the claimed injury.

Where actions relate to injuries occurring **between 1 December 1988 and 30 June 1989 (inclusive)**, such actions will necessarily involve NEL actions pursuant to subsection 45(1) elections and on-budget agencies will be funded on the same basis as Georgiadis claims.

## Actions by Dependants

Section 44 of the SRC Act does not exclude actions by the dependents of deceased employees against the Commonwealth and Commonwealth authorities – see new subsection 44(3). Such actions are not funded by Comcare unless they involve on-budget agencies and the injuries occurred before 1 December 1988.

## Failure to Make s45 Election

An employee cannot institute an NEL action if the employee has not made an election pursuant to subsection 45(1) **prior to** the institution of such action. The High Court has decided that the making of an election is a substantive matter and not a procedural matter: *Austral Pacific Group Limited (in liq) v Airservices Australia* (2000) 173 ALR 619. If proceedings are instituted before an election is made, agencies should seek to have the matter struck out. Note, however, that Comcare's premium does not cover funding for this purpose and Comcare's powers to take over NEL actions under section 52A do not arise until a valid election under subsection 45(1) is made.

## Notification requirements and contact details

Notifications to Comcare about NEL actions should be addressed initially to the **Comcare's Legal Services Group** as follows

Ms Susan Mihalic  
Legal Services Group  
GPO Box 9905  
Canberra ACT 2601

Email [helpdesk-legal@comcare.gov.au](mailto:helpdesk-legal@comcare.gov.au)

Fax 02-62489833

Phone 02-62750601

## Notification of Current NEL Cases on Hand

Comcare will make a decision on what current cases it will take over on an individual basis. Depending on the stage the case has reached, Comcare may decide to leave particular cases with agencies. In order to enable Comcare to make an appropriate decision, would agencies please advise

- i the number of NEL cases on hand;
- i brief details of each case including what stage the case reached;
- i the name and contact details of the solicitor handling each case;
- i contact officer for your agency and contact details.

Please provide this information as soon as possible to Comcare's Legal Services Group at the above contact addresses.

## Notification of NEL Cases on after 1 July 2002

For new cases received on or after 1 July 2002 would agencies please provide

- i letter of demand, statement of claim, writ or other initiating process;
- i election under subsection 45(1), if received;
- i if not clear from the documents provided, brief details of the case;
- i contact officer for your agency and contact details.

## Further Information

If you would like more information on any of the matters contained in this circular, please call Richard Rushall on (02) 6275 0674

Comcare Legal Services Group  
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