



Australian Government

Comcare

Policy review of Comcare's
permanent impairment guide

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Comcare is reviewing its permanent impairment guide and seeks comments from stakeholders as part of the review process. The review will examine and report on the efficiency of the permanent impairment (PI) guide and the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) legislative framework to deliver fair and equitable compensation for permanent impairment and non-economic loss in the Comcare scheme.

The review will concentrate on the public policy issues associated with the assessment and payment of compensation for permanent impairment; however other issues associated with the compensation of non-economic loss from injuries resulting in permanent impairment will also be considered.

Written submissions need to be provided by **24 April 2009**.

Comments can be provided by:

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Fax: **(02) 6274 8576**

Mail: **Director, Permanent Impairment Project, Comcare,
GPO Box 9905, Canberra, ACT, 2601.**

For more information on the terms of reference, please contact Denise Lowe-Carlus on **1300 366 979** or email piguide@comcare.gov.au

Issues paper

Policy review of Comcare's permanent impairment guide

Background

Legislation

The *Safety, Rehabilitation and Compensation Act 1998* (the Act) provides for compensation benefits for employees who suffer a permanent impairment with a degree of at least 10 per cent. This is set out at section 24 of the Act which requires that the degree of permanent impairment shall be determined under the provisions of an approved Guide. This section also stipulates the maximum amount payable for permanent impairment which is indexed yearly by the consumer price index (CPI). The current indexed maximum is \$150 396.

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?

Why is there a threshold for permanent impairment claims? What are the positive and negative aspects of having a threshold for permanent impairment claims? If the threshold for permanent impairment claims was to be reduced, what should the threshold be?

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

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

Where a permanent impairment is payable under section 24, a further lump sum benefit is payable under section 27 of the Act for any non-economic loss suffered by the employee as a result of the permanent impairment. The current indexed maximum amount payable for a section 27 benefit is \$56 399.

The Act gives Comcare the function under section 28 to prepare a 'Guide to the Assessment of the Degree of Permanent Impairment' (the Guide). Any Guide must be approved by the Minister and is subject to disallowance by Parliament.

Both the permanent impairment benefit and its associated non-economic loss benefit are paid to injured employees as lump sums. They are paid in addition to ongoing economic loss benefits such as wages, medical, rehabilitation, household and attendant care, aids and modifications and such costs.

Where a permanent impairment benefit is payable, the employee is able to make an irrevocable election to institute an action or proceedings for damages for non-economic loss under section 45 of the Act. No statutory permanent impairment (s24) or non-economic loss (s27) benefits are payable after the date of such an election. The Act caps the quantum of damages at \$110 000. This amount is *not* indexed.

This legislative framework of access to permanent impairment and non economic loss benefits of at least 10 per cent, based on the provisions of an approved Guide, replaced the previous Act's more limited regime of statutory payments for impairments based on a 'table of maims'. However, the previous Act provided unrestricted (un-capped) access to common law damages action.¹

Current Guide

In the Second Reading Speech introducing the Bill for the 1988 Act, the Minister said:

Under the [1971 Act], lump sum payments are made on the basis of a table of maims, with the level of payment being determined having regard to the loss, or loss of the efficient use, of various parts of the body. That approach has been abandoned and the level of payments in future will be determined using a 'whole person' approach, similar to that used under the *Veterans' Entitlements Act 1986*.

The whole person approach allows the degree of impairment to be assessed on a more accurate basis and expressed as a percentage loss of the use of the ability of the person to undertake normal living activities. A guide to the assessment of amounts of compensation payable in cases of permanent impairment will be prepared by the Commission for the purposes of the Bill...

The Guide enables determining authorities (Comcare and licensees) to determine an injured employee's degree of 'whole person impairment' (WPI), expressed as a percentage. The Guide is organised into bodily systems chapters which encompass a wide variety of systemic injuries and diseases. Each chapter is then organised into bodily sub-system impairment tables which provide values of whole person impairment expressed as a percentage against medically verifiable criteria.

The current Guide (2nd Edition) was published in 2005 and was the result of extensive consultation with medical experts and stakeholder groups. It is a stand alone Guide but is largely based on the 5th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides). Chapter five – Psychiatric Conditions is based on the 2nd edition of the AMA Guides. The chapters on the Visual System (Chapter 6) and the Hearing Loss part of Chapter 7 – Ear, Nose and Throat Disorders, depart from the AMA Guides due to the requirements of Australian clinical practice.

1 Hansard, Minister's Second Reading Speech – Commonwealth Employees' Rehabilitation and Compensation Act 1988, Wednesday, 27 April 1988 "In addition to the weekly benefits which I have already outlined, the Bill will provide for the payment of lump sums for permanent impairment and non-economic loss. These payments will replace awards of damages at common law for losses of a non-economic nature." . . . " There will be a minimum threshold of 10 per cent impairment under which compensation will not be payable, except where the impairment resulted from the loss of a finger or toe."

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

What is the fairest and most equitable basis for assessing the permanent impairment associated with psychological conditions?

The Guide instructs that where an impairment is of a kind which cannot be assessed in accordance with the provisions of the Guide, that assessment is to be made under the relevant part of the AMA Guides current at the time of assessment.

Comcare provides training for medical specialists across all disciplines in the use of the Guide generally and in specific chapters of the Guide. A list of these trained doctors is available on the Comcare website. Comcare does not 'approve' medical assessors nor mandates that only Comcare trained doctors can provide permanent impairment assessments under the Act.

In assessing employees who apply for a permanent impairment benefit, it is the practice of Comcare and licensee claims managers to arrange for a doctor trained in the Guide to conduct PI assessments on employees who apply for a permanent impairment benefit. The claims managers base their s24 and s27 decisions on the assessment reports produced by the doctors.

Review of guide

Comcare has decided to undertake a review of the Permanent Impairment Guide in the first half of 2009. The review will concentrate on the public policy issues associated with the assessment and payment of compensation for permanent impairment. Other issues associated with the compensation of non-economic loss from injuries resulting in permanent impairment will also be considered.

The possible need for any legislative amendments to ensure consistency between the outcomes of the PI Guide review and legislative provisions regarding the payment of compensation for non-economic loss for permanent impairment will need to be identified.

As a consequence of this review, Comcare plans to publish a new PI Guide towards the end of 2009 (subject to the passage of any legislative changes identified during the course of the review).

Comcare review

Submissions made to the Review of the Comcare Scheme conducted in 2008 by the Department of Education, Employment and Workplace Relations highlighted a number of issues associated with compensation for permanent impairment in general and the current guide in particular.²

² See Table 2 for a summary of issues raised by the review

Other issues

A number of court decisions have changed or clarified the operation of the Guide. The High Court of Australia case, *Canute v Comcare* [2006] HCA 47, found that each impairment arising from a single injury occurrence had to be assessed and compensated for separately. This means that injuries to multiple bodily parts or systems from a single injury occurrence, (e.g. a motor vehicle accident or a fall), cannot be combined but must be added – providing each meets the 10 per cent threshold requirement.

This application of the *Canute* decision disadvantages an employee who might have nine per cent impairment to their foot, seven per cent impairment to their ankle and seven per cent impairment to their wrist. Such values are unable to be compensated as each injury fails to achieve the required 10 per cent threshold. However, before *Canute*, the separate impairments were combined to achieve a combined impairment value. In this example, nine per cent, seven per cent and seven per cent achieved a combined value of 21 per cent using the combination tables in the Guide.

The application of the law in accordance with *Canute* does advantage a small group of employees—those with multiple ‘above threshold’ impairments. These individual impairments are able to be added – e.g. 15 per cent, 12 per cent and 10 per cent impairment is now added to achieve a 37 per cent impairment as opposed to being combined, via the Guide’s combination tables, to achieve a 33 per cent impairment.

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?

A federal court case, *Jordan v Australian Postal Corporation* [2007] DFCA 2028, found that where there was a pre-existing (non compensable impairment), it is necessary to isolate the compensable effects (where this is possible) before a value is assigned to the impairment, rather than discounting for the pre-existing impairment after a value is assigned. This approach, which is required by the Guide, is seen as cumbersome.

Permanent impairment frameworks in other jurisdictions

The other Australian workers' compensation jurisdictions also provide for permanent impairment as part of statutory benefits. The following table summarises these frameworks against:

- the edition of the AMA Guides upon which an assessment is predominantly based
- whether it is
 - a 'stand-alone' Guide
 - a 'designator' Guide (where an edition of the AMA Guide is designated as *the* Guide to be followed)
 - a 'modifier' Guide (where the framework designates an edition of the Guide but also provides a separate Guide which acts to modify the AMA Guides or chapters)
- the extent to which the framework applies any qualifying thresholds for
 - PI generally
 - PI for hearing loss
 - PI for psychological/psychiatric impairments
 - a separate threshold for access to a non-economic loss benefit
- the maximum statutory PI and/or non-economic loss (NEL) benefit provided.

Table 1 –

Summary jurisdictional comparison of permanent impairment frameworks

Jurisdiction	Based on AMA Guide edition	Stand alone Guide/ Designator Guide/ Modifier Guide	Thresholds (expressed as WPI) G – General H – Hearing P – Psychological N – NEL	Max benefit PI or <u>NEL/Pain and suffering</u> combined
Comcare	5th AMA	Stand alone	G – 10% H – 5% P – 10% N – 10%	PI \$150 369 NEL \$56 300 <hr/> \$209 795
New South Wales	5th AMA	Modifier	G – 1% H – 6% P – 15% N – 10%	PI \$231 000 P&S \$50 000 <hr/> \$281 000
Victoria	4th AMA	Designates	G – 10% H – 10% P – 30% N – N/A	PI \$396 690
Queensland	4th AMA	Designates	G – 1% H – 5% P – 1% N – N/A	PI \$227 575 If PI >15% additional gratuitous care up to \$257 785 If PI is >30% additional sum up to \$227 575 Latent onset diseases – \$477 890 – But all prior compensation/damages to be repaid
South Australia	5th AMA *starting April 2009	Modifier	G – 5% H – 5% P – N/A ³ N – 5% * starting April 2009	Currently \$230 982 From April 2009, \$400 000
Western Australia	5th AMA	Modifier	G – 1% H – 6% P – 15% N – N/A	PI \$168 499
Tasmania	4th AMA	Modifier	G – 5% H – 5% P – 10% N – N/A	PI \$223 824 369 x full-time average weekly ordinary earnings for Tasmania [currently \$606.57] (maximum entitlement for injuries > 70%)
ACT	4th and 5th AMA	Designates	G – no threshold H – 3.9% (approximately) ⁴ P – N/A ⁵ N – N/A	\$100 000 – 1 injury \$150 000 – 2 or more injuries * subject to CPI increase
Northern Territory	4th AMA	Designates	G – 5% H – 5% P – 5% N – N/A	PI \$231 254 208 x full-time adult persons weekly ordinary time earnings for Northern Territory [currently \$1111.80] (maximum entitlement for injuries > 85%)

3 In SA an entitlement does not arise for permanent impairment in relation to a psychiatric impairment.

4 Not directly comparable – the threshold is 6% hearing loss (not 6% WPI). Hearing loss is 65% of total amount payable for a single impairment. 6% of 65% = 3.9%, so therefore 3.9% WPI is an approximate comparison

5 There is no permanent impairment benefit payable for psychological injury in the ACT private sector.

South Australia has decided to adopt the NSW framework as has Western Australia and the ACT. The NSW framework effectively designates the AMA 5th edition as the basis of PI assessments, but also provides a Guide which modifies some of the AMA 5th edition chapters to better conform with Australian medical opinion and clinical practice. The NSW Guide also replaces the psychiatric chapter in its entirety with an Australian based system of rating psychiatric and psychological impairments. It also replaces the hearing chapter and the part on vision due to major variations in Australian clinical practice in assessing impairments related to these two bodily systems. These modifications or replacements are a result of consultations with doctors nominated by Australian clinical colleges of medicine, the AMA and Unions NSW.

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

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?

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?

Process

- The review will take account of the views of stakeholders as already expressed by submissions to the Comcare review and will also consider subsequent stakeholders views on the PI Guide. Stakeholders, including scheme employers, employees, unions, medical practitioners and their professional colleges, lawyers and their professional associations, and other Australian jurisdictions will be given an opportunity to provide their views to the review.
- Stakeholders, including scheme employers, employees, unions, medical practitioners and their professional colleagues, lawyers and their professional associations, and other Australian jurisdictions will be given an opportunity to provide their views to the review.
- Submissions in response to the questions raised in this Issues Paper are sought by 24 April 2009.
- As part of the review, Comcare intends to publish an Options Paper following consideration of submissions and an analysis of relevant research.
- The review is expected to take six months to complete.
- It should identify a possible process for the development of any new PI Guide/legislative changes resulting from the review outcomes.

Table 2 –

Issues with the Guide and the Act in relation to permanent impairment as mentioned in submissions to the Comcare review

PI Guide issues	Act issues
There appears to be a reduction in eligibility for PI benefits in moving from the 1st to the 2nd edition of the Guide, particularly relating to the revised criteria used to assess impairment levels.	The requirement to have a WPI of 10 per cent or more before compensation for permanent impairment is payable needs to be addressed.
Overall, it appears that Comcare scheme permanent impairment benefits have become more restrictive than state and territory benefits.	Some respondents to the review stated that Comcare pays low entitlements for permanent impairment, by comparison to State jurisdictions.
Respondents to the review criticised the Guide as complex and lacking alignment between the Guide and 10 per cent threshold.	Value of common law benefit for general damages (fixed at \$110 000) has been eroded.
Establishing a 10 per cent impairment was made more difficult when the 2nd Edition of the Guide was implemented, particularly with respect to spinal injuries.	The requirement to make an irrevocable election between permanent impairment and common law ought to be removed from the SRC Act.
	Consideration should be given to being able to aggregate impairments arising from one incident (pre-Canute situation).
	The Comcare scheme does not provide any further or additional compensation for latent onset diseases.

