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KCI Lawyers Submission into Policy Review of Comcare's Permanent Impairment Guide*

1. Introduction

- 1.1 Greg Isolani, Partner of KCI Lawyers has practiced exclusively in Commonwealth and Military Compensation since 1992. We have experience in the operation of the principle legislation governing the Military Compensation and Rehabilitation Scheme (MRCS) based on the *Safety Rehabilitation and Compensation Act 1988 (SRC)* and the *Military Rehabilitation and Compensation Act 2004 (MRCA)* and the *Veteran's Entitlement Act 1986, (VEA)*.
- 1.2 Our experience in the jurisdiction of Military and Commonwealth Compensation is drawn from not only our experience as lawyers practicing in the jurisdiction but also from acting on behalf of and in consultation with the key Ex-Service Organisation (ESO) stakeholders and their members including the Vietnam Veteran's Federation (VVF) the Injured Service Person's Association (ISPA) the Australian Peacekeepers Peacemakers and Veteran's Association (APPVA), various State RSL offices and the former Armed Forces Federation of Australia (ARFFA).
- 1.3 We have been active lobbyists and involved in the significant legislative, policy and review and Inquiries into the Military Compensation Scheme including in the Tanzer and Clarke Review, various Senate Inquiries into the operation of the Military Compensation schemes as well as the introduction of the MRCA as the legal representative for ARFFA,. We participated in the *ESO – Working Group* together with the national ESO stakeholders and representatives from DVA and Defence discussing and making submissions regarding the MRC Bill between approximately 2001 up to the enactment of the MRCA in 2004.(See attachment **GI-1**)
- 1.4 We believe our submission is based not only our practical experience of the legislation and interpretation of cases in the *Administrative Appeals Tribunal (AAT)* and the Federal Court but in particular how the Guide impacts on current and former members of the Australian Defence Force (ADF).
- 1.5 A consistent theme in our written and oral submissions to the Commonwealth on behalf of and together with ESO's based on our experience is with respect to the complexity of the legislation and commentary by the courts regarding the administration and determination of entitlements to Commonwealth compensation.
- 1.6 The particular difficulties we have identified have been with respect to claims for permanent impairment under the 1st edition Guide (and the proposed 2nd edition that did not ultimately extend to ADF members) together with the transitional provisions of the SRCA regarding injuries that arise prior to December 1988 which effect a significant number of former ADF members.
- 1.7 Whilst we welcome any review into the anomalies of the first edition guide we are cautious as to whether a proposed review into the Guide will result in the enhancement of entitlements to current and former ADF members or will result in yet another attempt by the Commonwealth of trying to reduce its financial liability to apply the SRCA beneficial

2. Basis for Review

- 2.1 We note that it is approximately three (3) years since the inception of the Second edition Guide for permanent impairment which ultimately did not extend to current and former members of the ADF who may have entitlements determined pursuant to the SRCA. We attach our submission to Comcare in March 2005 (**GI-2**) that identified significant anomalies arising from the proposed Guide based on Comcare's own case study into how the proposed Second edition Guide, if implemented, would largely deny compensation to current and former ADF members in particular for muscular skeletal injuries under tables 9.1 to 9.6 of the first edition Guide.
- 2.2 We note the ESO's together with our office are now facing a further review into the *Military Compensation Scheme* announced by the responsible Minister for Veterans' Affairs, the Honourable Alan Griffin, MP regarding all legislation governing current and former members of ADF ie VEA, SRCA, MRCA and Commonwealth Superannuation (MSBS - DFRDB). The timing of Comcare's Review into the First edition Guide and the significant pressure that it is placing upon ESO's and together with the limited time frame to respond is, in our view, unreasonable.
- 2.3 We are also uncertain whether any review of the First edition Guide should take place by Comcare now and to continue over the next 6 months as opposed to Comcare referring the matter to DVA to be one of the terms of reference in to the review of the Military Compensation Scheme?
- 2.4 We also highlight and reiterate the fundamental basis for any review of current benefits payable should be done in the manner required by Comcare to do so in accordance with "*equity, good conscience, and the substantial merits of the case*" (s72- SRCA) as opposed to the all too familiar reliance upon legal and other technicalities that we and the ESO community currently experience when claims for permanent impairment are determined under the SRCA.
- 2.5 Therefore, in our submission the basis for a review should take into account the beneficial nature of the legislation and ensure that if, the proposed review of the First edition Guide which is in accordance with Comcare's powers pursuant to s28 of the SRCA goes beyond that object then, in our view it is clearly outside of the scope of the SRCA and **not** a function that Comcare is required to undertake pursuant to s69 of the SRCA. Nor should any review be allowed to restrict in any way the beneficial nature of legislation by effecting the current legislative provisions ie threshold questions, common law limits and so forth which is the responsibility of Parliament.
- 2.6 We are also concerned that any basis for review should make reference to and draw upon the current (or any other edition) of the *American Medical Association's Guide to the Evaluation of Permanent Impairment (AMA Guide)*. It is obvious that Comcare's current – Second edition Guide that used the AMA Guide as a template failed to maintain or enhance the beneficial nature of the SRCA given the significant reduction for those who made claims for permanent impairment under that Guide (See supplementary submission of ACTU to Comcare Review showing a 68% reduction in claims payable for permanent impairment in the first 2 years of the Second edition Guide).
- 2.7 We take pride in knowing that that the ESO community and ADF members generally were not subjected to the Second edition guide with the resultant loss of entitlements taking into account the submissions at that time which clearly identified how the proposed Second Edition guide would effect ADF members when applying for compensation for permanent impairment.

Specific Comment

3. *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?*

- 3.1 We highlight at the outset that it is Parliament and not the Comcare Commission who enacted the SRCA to provide the benefits payable under the SRCA including but not limited to lump sum payments.
- 3.2 We are uncertain why we or the ESO's should, as part of this review into a potential new Guide, be required to comment on the philosophy, nature and type of benefits payable under a compensation scheme generally and with enhanced benefits payable to ADF members ie the "Severe Injury Adjustment" (SIA) pursuant to the *Defence Act* 1903 as part I a review into the Guide to assess permanent impairment?
- 3.3 It would be, in our review repugnant and offensive to consider whether, at a minimum current and former ADF members who are entitled to benefits under the SRCA should remain entitled to a lump sum payment for permanent impairment which reflects a payment for a person's loss of use of the ability for a person to undertake their normal living activities.¹
- 3.4 The lump sum payment is for not only the permanent impairment arising from the injury or disease but also for the non economic loss associated with their condition. Whilst it is true that generally, no amount of money will ever restore a person to their pre injury state, a lump sum payment may and generally does provide a person with the opportunity to at least reduce some of the loss of quality of life through the payment.

4. *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?*

- 4.1 We note that the threshold is contained in s24(7)(b) of the SRCA and is not a matter that Comcare in itself can regulate which is a function for Parliament as opposed Comcare's function that it can, from time to time, prepare a written document to be called the "Guide" in accordance with s28(1) of the SRCA.
- 4.2 However, for the purpose of this review and in response to the question posed we refer to "Table 1" of Comcare's Policy Review and note that Victoria is the only State or Territory that has set a threshold at 10 percent before compensation is payable.
- 4.3 The other States and Territories have established a threshold that ranges from 0 to one (1) up to five (5) percent. If, there was the need to consider what the threshold should be then, commonsense would dictate that it should range between one (1) percent and five (5) percent. Even when an average is taken of all of the thresholds ie by adding twenty eight (28) percent for all State and Territories and dividing them by eight (8) the average is three point five (3.5) percent threshold.

¹ See Hansards Minister second readings speech introducing the bill for the 1988 Act.

- 4.4 Therefore, at a minimum and to the use the other State and Territories as a reasonable indicator of what a threshold should be it could be argued that the Comcare threshold should be three point five (3.5) percent.
- 4.5 The issue of whether there should be any threshold is vexed. Obviously a person who suffers impairment should be entitled to compensation whether the impairment can be assessed at one (1) or two (2) percent or greater than three point five (3.5) percent or possibly ten (10) percent. This is recognised when, for example a person has injured a toe or finger however but under s24 (8) of the SRCA there is no requirement to satisfy a minimum ten (10) percent. This is due to Parliament acknowledging that, it would be unfair and inequitable ie contrary to the objects of the SRCA and to the general beneficial nature of legislation to deny anyone compensation for suffering an impairment to their toe or finger by requiring that they first meet a threshold.
- 4.6 As Comcare is well aware ADF members have had to constantly litigate as to whether they do or not satisfy a minimum ten (10) percent whole person impairment and when the condition arising prior to December 1988 ie before the inception of the SRCA became permanent. There could be a significant reduction in litigation and of competing medico legal opinions if there was no threshold but only an issue as to the level impairment prior to compensation being paid.
- 4.7 We also note that while maintaining a threshold at 10 percent denies a person the ability to issue Common Law Proceedings if they fail to meet the threshold. A Common Law Claim is the single most effective means for the Commonwealth to be made aware of an act or omission that is negligent or for example evidence of a defective product, system of work and so forth that has caused an injury. The common law mechanism has the potential to and should reduce the incident for further injuries occurring in similar circumstances.
- 4.8 How many potential negligent claims have not been able to be pursued and thereby highlighting to the Commonwealth the issue of negligence if a person's ability to issue Common Law Proceedings is denied due to a ten percent (10) threshold? The issue of Occupational Health and Safety is also an intrinsic part of the threshold given the potential to reduce further injuries and possible future deaths if the threshold was lowered and common law claims were issued to highlight the negligence.

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

- 5.1 We again refer to our previous submission to Comcare (GI-2) regarding the proposed introduction of the Second edition Guide and the complexity that it sought to introduce to current and former ADF members seeking assessment for permanent impairment.
- 5.2 We have had the benefit of representing civilian Commonwealth employees who are covered by the Second edition Guide and note the difficulty to find Doctors who may be able to undertake the impairment assessments, in particular for spinal injuries using the current tables.
- 5.3 Based on our experience, a treating specialist is now generally unwilling or unable to undertake the impairment assessments, for example, as contained in the musculo skeletal section of the Second edition Guide when compared to the First edition Guide. To date we have not been able to find any treating specialist who, considering the requirements of the Second edition Guide is willing or in their view competent to undertake such a complex impairment assessment.
- 5.4 Whilst the First edition Guide has had its criticism with respect to certain tables contained therein, which are capable of being remedied through a reasonable and beneficial review of a particular table or tables in accordance with s28 of the SRCA, the First edition Guide remains familiar and practical for treating doctors and specialists to undertake assessments and apply the Tables.

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

- 6.1 Interestingly we note that the Second edition Guide adopted Table 5.1 of the First edition Guide to assess psychological conditions. In part, this may have been due to the complexity to assess separate diagnosable psychiatric conditions that many Veterans suffer from ie: post traumatic stress disorder (PTSD), anxiety disorder, reactive depression, depression, co morbid conditions including substance abuse and so forth.
- 6.2 We are cautious to propose what might be the “fairest and most equitable” basis for assessing a psychological condition other than saying that it should be a table, possibly the existing table 5.1 with simple modifications to make the assessment reasonable and without requiring Veteran’s to continually see psychiatrists and re tell their circumstances to establish the criteria contained in Table 5.1. We also note the cumbersome requirement to satisfy the ‘Activities of daily Living’ section of the guide for psychiatric conditions that does not adapt to a psychological condition as opposed to some physical conditions.
- 6.3 In our submission Table 5.1 should be amended to ensure that, for example like the assessment for the permanent impairment of a spinal condition in Table 9.6 or table 9.5 with respect to mobility that there is an easier range of questions to determine to the reasonable satisfaction of a delegate that the impairment of a psychological condition is readily identified at each particular level ie 10 percent, 15 percent. There should not be the complicated requirement to consider each and every circumstance with their “Activities of Daily Living” that, in many cases, makes it difficult for a veteran to establish when determining a psychiatric condition.
- 6.4 We also note that the current AMA Guide does not assist a Veteran seeking to have the effects of their substance abuse condition, which in a lot of cases is secondary to their psychological condition being assessed and at least combined with their psychiatric condition under table 5 of the first edition Guide.

7. The guide instructs that where impairment is of a kind which can not be assessed in accordance 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.

- 7.1 We are uncertain how to comment on a Guide that is not in existence at this point in time and to say that it is reasonable or otherwise? For example, if the Obama Administration introduces a new edition of the AMA Guide that may be fair and equitable when assessing psychiatric conditions compared to that introduced by the former Republican Party can we insist that it be implemented?
- 7.2 We reiterate that based on the Second edition Guides’ premise of drawing heavily upon the current AMA Guide and how it has lead to a significant erosion of lump sum benefits payable to Civilian Commonwealth employees as demonstrated by the 68 percent reduction in viable permanent impairment claims under the Second edition Guide in its first two (2) years of operation, we can not place any faith in the AMA Guide honouring the beneficial nature of the legislation or the power of Comcare to act in manner that is in accordance with “*equity, good conscience and the substantial merits of the case without regard to legal technicality*” (s72 SRCA).

8. Review of Guide – Proposed publication of a new guide toward end of 2009.

- 8.1 We again note the requirement of ESO's to comment on and participate in the review of the Military Compensation Scheme. We suggest that the review of the First edition Guide, if deemed necessary, should be a term of reference under that review and should not require the ESO's to (again) comment on a proposed Guide that may or may not apply to them if the First edition of the Guide remains.
- 8.2 With respect to the other issues raised and contained in Table Two and on behalf of the ESO's organisation with whom we have made representations to and on their behalf we highlight the current anomalies and suggested remedies to the common law amount and total permanent impairment amount be calculated as follows:
- (a) That compensation for ADF members as calculated pursuant to s24 of the SRCA should be significantly higher than that of Commonwealth employees by using the amount payable for the "Severe Injury Adjustment" (SIA) with the maximum amount being \$271,079.73 (indexed annually).
 - (b) We submit that a ten (10) percent impairment payable pursuant to s24 of the SRCA should be ten (10) percent of the SIA ie \$27,107.97. Alternatively it could be ten (10) percent impairment payable pursuant to s24 of the SRCA of the proposed increase to the death benefit that we understand to be \$400,000 ie \$40,000.00 as opposed to the current amount of \$225,594.30.
 - (c) The Common Law Statutory maximum should be the equivalent of the Severe Injury Adjustment (SIA) being \$271,079.73 and not the current ie 1988 rate of \$110,000.00.
 - (d) That Comcare can seek a legislative change to s45 (4) of the SRCA whereby the Common Law maximum of \$110,000.00 set in December 1988 that, if it had been indexed thereafter the current value would now be a approximately \$202,748.00. This amount is also comparable to the current Death Benefit of \$225,594.00. which could also be the new Common law maximum.

10. *Should permanent impairment compensate holistically by combining all impairments resulting from multiple injuries which arise from a single occurrence or compensate separate injuries arising from single occurrences separately. What are the impacts to claiming of each of these options? Are there any other options that should be considered?*

- 10.1 We submit that this question has been made complex by the threshold requirement of 10 percent. If the premise of compensation is to compensate where a person who suffers an injury results in a permanent impairment, why should the person's permanent impairment not be compensated because it has to attract a minimum of say 5 percent, 7 percent, 8 percent etc?
- 10.2 The reference to the High Court Case of *Canute* has raised more questions than it has answered. For example it has placed lawyers in the difficult position of trying to either argue for a combining of impairment assessments to establish a threshold if, "*equity, good conscience and the substantial merits of the case*" would indicate that such an approach is reasonable and beneficial to a Veteran.
- 10.3 However, when for example an injury results in a number of impairments and those impairments can be assed at the 10 percent threshold then, a Veteran should not be disadvantaged by not having each and every impairment assessed and compensation paid for not only the 10 percent impairment but also for the pain and suffering associated with each condition. We note that Comcare's jurisdictional policy advice No.2007/05 provides little guidance on this issue.

11. The case of *Jordan –v- APC* [2007] VFC 2028. - 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.

- 11.1 We are heartened that Comcare acknowledge the approach to try and, in effect dissect a compensable from a non compensable condition affecting, for example a particular limb or organ is quite cumbersome. It has also been, in our experience a useful tool by Military Compensation to try and discount or deny a permanent impairment payment due to a component of the “non compensable condition”.
- 11.2 In a significant number of cases medical attention is drawn to the alleged non compensable condition which in many cases is very hard to determine medically, factually and legally.
- 11.3 For example, in the case of an ADF member who suffers a ‘back injury’ and has an X Ray revealing disc degeneration that may arguably be due to significant ‘wear and tear’ from many years of arduous military service that the ADF member has undertaken or may be considered to be ‘age related’. However a medico legal practitioner may deem the ‘age related’ disc degeneration to be the cause of ongoing pain and not due to a specific episode of back pain experienced.

Therefore the ADF member’s back pain and the impairment is now some how not due to “the injury” and compensation for permanent impairment can be denied.

- 11.4 There has also been significant common law authorities that date back to the turn of the 20th century establishing principles such as that a person must be taken as to how they are found ie: the “egg shell skull” rule or that if an asymptomatic condition is rendered symptomatic due to a work related event then the ongoing condition is compensable.
- 11.5 To try and split up what a persons’ underlying condition is as opposed to what their current condition may be due to a defence related injury or disease is, in our view, contrary to the beneficial nature of the legislation that has evolved from over a century of common law principles and the manner in which Comcare are to determine claims in accordance *with “equity, good conscience and the substantial merits of the case without regard to legal technicality”*.
- 11.6 The approach of *Jordan* is made even more perverse when dealing with mental health issues that confront a significant number of current and former ADF members. For example, how useful or necessary is it to delve into the ADF member’s childhood to try and glean any personality trait or disorder or some other “pre-existing condition” to then somehow deny any or some liability for a persons mental health condition following an event whilst serving or after years of chronic pain due to an ADF injury?

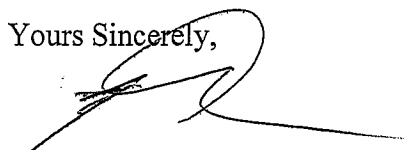
Conclusion

Whilst the review process raises interesting questions for debate and discussion for the Commonwealth Employees who unfortunately have been denied compensation due to the Second edition Guide, the requirement for ESO's to be now drawn into a review into a proposed new Guide as opposed to perhaps modifying the First edition guide to remove anomalies is unwarranted and unnecessary.

If Comcare feel that there is the need for such a review we urge that the review be a term of reference within the Military Compensation scheme as referred to herein.

If you would like to discuss any issues raised herein please do not hesitate to contact Greg Isolani.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Greg Isolani', with a large, stylized flourish extending to the right.

Greg Isolani