



## Provisions under the SRC Act to prevent double payment of compensation

### Purpose

To provide scheme guidance on the provisions under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) that prevent an employee or a dependant of a deceased employee (dependant)<sup>1</sup> from receiving double payment of compensation.

### Background

The SRC Act prevents an employee or a dependant from receiving double payment of compensation for:

- > the same injury (whether or not the injury results in the employee's death)
- > the loss of, or damage to, property used by the employee.

This scheme guidance explains the sections of the SRC Act that prevent the double payment of compensation. It also outlines the rights and responsibilities of the relevant authority<sup>2</sup> to recover an excess amount where an employee or dependant receives compensation under the SRC Act and also from a:

- > third party damages claim (sections 46, 48 and 50)<sup>3</sup>
- > state workers' compensation scheme (section 118)
- > state compensation scheme (section 119).

1 'Dependant' is defined in subsections 4(1) and 4(2) of the SRC Act.

2 'Relevant Authority' is defined in subsection 4(1) of the SRC Act. It is defined as either a licensee (in relation to an employee who is employed by a licensee) or Comcare (in relation to any other employee). Subsections 4(10) and 4(10A) of the SRC Act provide that, for the purposes of the application of this Act in relation to employees of, or the dependants of employees of, licensed authorities or licensed corporations, a reference in this Act (other than in section 28 or Part III, V, VI, VII or VIII) to Comcare is a reference to that authority or corporation unless a contrary intention appears.

3 Section 51 of the SRC Act allows Comcare to recover damages directly from a third party.

# Guidance

## Third party damages

In circumstances where a third party may be liable to pay damages, an employee or dependant may make a common law claim against a third party. They may also claim compensation benefits under the SRC Act for:

- > an injury
- > the loss of, or damage to, property used by the employee
- > an injury resulting in the death of an employee.

Circumstances that may give rise to a common law claim against a third party include:

- > motor vehicle accidents where the employee is injured by an at-fault driver
- > injuries sustained while at third party premises
- > injuries because of machinery malfunction
- > injuries due to medical negligence
- > criminal injuries or assaults by a third party.

Sections 46, 48 and 50 of the SRC Act set out the requirements where an employee or dependant recovers damages from a common law claim against a third party.<sup>4</sup>

### Definition of 'damages'

'Damages'<sup>5</sup> are defined under subsection 4(1) of the SRC Act to include any amount paid under a compromise or settlement of a claim for damages, whether or not legal proceedings have been instituted. Damages do not include an amount paid for the cost of legal proceedings.

The term 'damages' under section 48 means damages that involve establishing common law negligence where the injury is the subject matter of the cause of action.<sup>6</sup> Statutory damages as a result of unlawful discrimination flow from discrimination, rather than an injury, and are not considered damages for the purposes of the SRC Act.<sup>6</sup>

### Employee or dependant must notify the relevant authority of their intent to claim damages and after damages are received

If an employee or dependant decides to pursue a common law claim for damages against a third party, they must inform the relevant authority in writing as soon as practicable, and within 7 days of becoming aware of the claim.<sup>7</sup> Failure to notify the relevant authority is a strict liability offence under subsection 46(2) of the SRC Act.<sup>8</sup>

Once damages have been recovered, the employee or dependant must notify the relevant authority in writing within 28 days. The notification must confirm that damages have been recovered and specify the amount received.<sup>9</sup> Failure to notify the relevant authority is a strict liability offence under subsection 48(2A) of the SRC Act.<sup>8</sup>

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4 Section 49 of the SRC Act outlines the obligations of a prescribed dependant who has received damages (that is, through legal proceeding or settlement) for the death of an employee but has not made a claim for compensation under the SRC Act.

5 Subsection 48(9) provides that 'damages' does not include an amount of damages paid to the Commonwealth under section 76 of the *Veterans' Entitlement Act 1986*.

6 *Comcare v Friend* [2024] FCAFC 4 [79].

7 Subsection 46(1) of the SRC Act.

8 Section 6.1 of the *Criminal Code Act 1995* schedule 1 provides that where an offence is one of strict liability, the fault elements of an offence, such as knowledge, intention or recklessness, are not required to be proved in order for liability to be found.

9 Subsection 48(2) of the SRC Act.

## Compensation is not payable when an employee or dependant seeks and receives damages from a third party (section 48)

### Relevant authority must stop paying SRC Act compensation when third party damages are recovered

Where an employee or dependant chooses to recover damages from a third party, the relevant authority is no longer liable to pay compensation under the SRC Act.<sup>10</sup> This applies after the date the employee or their dependant recovers damages.<sup>10</sup>

The relevant authority should inform an employee or their dependant that compensation under the SRC Act will not be payable after the date they recover damages from a third party.<sup>11</sup>

### When third party damages are received, relevant authority can recover previously paid SRC Act compensation

Where an employee or dependant recovers damages<sup>12</sup> from a third party,<sup>13</sup> the relevant authority can recover compensation<sup>14</sup> from the employee or their dependant – except for damages that were recovered in an action for non-economic loss (including by settlement).<sup>15</sup>

This recovery applies where either:

- > the employee recovers damages from a third party for an injury (or for the loss of or damage to property used by the employee) for which compensation is payable under the SRC Act
- > a dependant recovers damages from a third party for an injury that has resulted in the death of an employee for which compensation is payable under the SRC Act.

For the relevant authority to recover damages, the injury (including the injury resulting in death) for which the employee or dependant recovers damages must be the same injury for which compensation was received under the SRC Act.<sup>16</sup>

#### **Example one: Third party damages recovered for a different injury than the injury for which SRC Act compensation was received – *Telstra Corporation Limited v Barrow* [1994] FCA 1412**

In the case of *Telstra Corporation Limited v Barrow* [1994] FCA 1141, the employee was seeking compensation for a neck condition that had been aggravated by working on a rock-cutting machine. The employee also suffered a prolapsed disc from of a motor vehicle accident and recovered damages for that injury. In the common law action, the District Court had specifically excluded any symptoms arising from the 'known injury to the cervical spine'.<sup>17</sup>

The Federal Court was satisfied that the employee had received damages for their lumbar spine injury only, not for their cervical spine injury. Therefore, the employee could claim compensation for the injury to the cervical spine by virtue of section 48 of the SRC Act.<sup>18</sup>

A subsequent appeal to the Full Federal Court in *Telstra Corporation Limited v Barrow* [1994] FCA 1412 did not disturb the findings about the application of section 48.

10 Subsection 48(4) of the SRC Act.

11 This is subject to the exceptions outlined in subsection 48(5) of the SRC Act.

12 Under section 10 of the SRC Act damages are taken to be recovered when the payment is made to the employee or dependant for their benefit.

13 Subsection 48(8) of the SRC Act specifies that if a claim for damages was instituted before the commencement of the SRC Act on 1 December 1988, then the provisions of section 99 of the *Compensation (Commonwealth Government Employees) Act 1971* apply.

14 Compensation refers all amounts paid to an employee under Part II of the SRC Act and does not include claim administration costs.

15 Subsection 48(4A) of the SRC Act.

16 *Telstra Corporation Limited v Barrow* [1994] FCA 1141 [45].

17 [44].

18 [45].

## Dependants may still claim death benefits if the deceased employee received third party damages for the injury

Section 48 does not stop a dependant from making a claim for benefits under the SRC Act for the death of the employee where the employee had personally received third party damages for an injury that later resulted in their death.<sup>19</sup>

### **Example two: Death benefits payable to the dependant of a deceased employee – *Withenshaw and Department of Defence* [1999] AATA 37**

The employee was diagnosed with malignant mesothelioma from exposure to asbestos at work. The employee took common law action against the Commonwealth of Australia in the Dust Diseases Tribunal of New South Wales for malignant mesothelioma, and was awarded damages.

The employee later died from the malignant mesothelioma. Their dependant sought compensation for the employee's death and funeral expenses under the SRC Act.

The Tribunal found that compensation under the SRC Act was payable to the dependant because the damages recovered by the employee before their death were separate from the dependant's statutory claims for compensation for the death of the employee. The Tribunal was satisfied that section 48 of the SRC Act did not preclude the dependant from later claiming death and funeral benefits under the SRC Act.

## Repayment is the lesser of SRC Act compensation paid or the third party damages

Where an employee or dependant recovers damages for the same injury, loss, damage or death that they received compensation for under the SRC Act, they must repay the relevant authority the lesser of:

- > the compensation paid under the SRC Act
- > the third party damages.<sup>20</sup>

The relevant authority does not need to compare or match the SRC Act sections under which compensation was paid with the reasons for which the common law damages were paid. If an employee or dependant recovers damages from a third party for the same injury, loss, damage or death, compensation paid under every section in Part II<sup>21</sup> of the SRC Act is recoverable – except for weekly compensation payments that were paid for the benefit of a prescribed child under section 17(5) of SRC Act.<sup>22</sup>

The relevant authority should inform an employee or their dependant wishing to seek damages from a third party that it can recover all SRC Act compensation paid for the same injury (with the exception outlined above).

## Relevant authority can make or take over a claim for third party damages (section 50)

The relevant authority may start or take over a common law claim for damages against a third party on behalf of an employee or a dependant. The relevant authority can choose whether to pursue a third party claim for damages in the name of the employee or dependant.<sup>23</sup>

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<sup>19</sup> *Re Comcare v Starkey* [2017] FCAFC 151 [35]-[36]; *Withenshaw and Department of Defence* [1999] AATA 37 [25].

<sup>20</sup> Subsection 48(3) of the SRC Act.

<sup>21</sup> Payments made under Part III (Rehabilitation) are not recoverable from third party damages.

<sup>22</sup> Subsection 48(6) of the SRC Act.

<sup>23</sup> Subsection 50(9) of the SRC Act prevents the relevant authority from seeking recovery of damages from the Commonwealth, a Commonwealth Authority, a licensed corporation or an employee.

Under section 50 of the SRC Act, the relevant authority<sup>2</sup> may make a claim against a third party (or take over an existing claim) where the following conditions are met:

- > SRC Act compensation is paid to either an employee for an injury or for the loss of or damage to property; or for the benefit of a dependant for an injury that resulted in the death of the employee
- > the injury, loss, damage or death occurred in circumstances that appear to create a legal liability in a person to pay damages for the injury, loss, damage or death
- > the employee or dependant has not already made a claim against the person to recover such damages, or if they have, it has not yet been prosecuted.

### **Example three: Third party claim taken over by Comcare – Kiiver and King [2013] ACTSC 142**

The employee was involved in a rear-end motor vehicle accident on their way home from work in 2007. The employee submitted a claim for workers' compensation and the claim was accepted by Comcare for a neck and lumbar sprain. The employee received payment for medical and incapacity benefits under the SRC Act.

In 2010, the employee began third party proceedings for damages against the driver of the vehicle involved in the accident. In 2012, Comcare took over the prosecution of the existing third party claim, with the employee's consent, pursuant to section 50 of the SRC Act.

The employee was awarded third party damages and would be required to repay the monies that Comcare had paid to them for their workers' compensation claim or the total of the settlement amount, whichever is less.

### **Relevant authority pays associated costs**

Where the relevant authority begins a claim for third party damages, it pays all costs incurred in running the proceedings. If the relevant authority takes over the conduct of an existing claim for damages, it becomes responsible for reasonable costs incidental to the claim.<sup>24</sup>

### **Employee or dependant remains the plaintiff**

Where the relevant authority starts or takes over a claim for damages against a third party, the employee or their dependant remains the plaintiff in the third party action.<sup>25</sup>

The relevant authority may do whatever is appropriate to bring the third party claim to a conclusion, including:

- > settling a claim with or without obtaining judgement
- > taking steps to enforce a judgment obtained in favour of the employee or their dependant.<sup>26</sup>

### **Employee or dependant must sign documents and comply with reasonable requirements**

Once the relevant authority decides to start or take over a third party claim, the employee or their dependant is required to sign any documents relevant to the proceedings, including the settlement of the claim or any proceedings arising out of the claim.<sup>27</sup>

If they do not, the relevant authority can apply to the court or tribunal (or the Federal Court if the claim is not before a court or tribunal) to direct that the document be signed on behalf of the employee or their dependant by a person appointed by the relevant authority.<sup>28</sup> The relevant authority must tell the employee or their dependant that it intends to do this, and the employee or their dependant has the right to representation at the hearing.<sup>29</sup>

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24 Subsection 50(2) of the SRC Act.

25 *Re Burns v Crispino* [2006] ACTSC 74 [16-7].

26 Subsection 50(3) of the SRC Act.

27 Subsection 50(4) of the SRC Act.

28 Subsection 50(4A) of the SRC Act.

29 Subsection 50(4B) of the SRC Act.

The employee or their dependant must also comply with any reasonable requirements of the relevant authority for the purpose of the claim for damages.<sup>30</sup> This may include making a statement or providing information or documents.

If an employee or their dependant does not comply, the relevant authority can suspend their rights to compensation under the SRC Act until they comply. However, the employee's right to compensation for medical treatment under section 16 is not suspended.<sup>31</sup>

Compensation can only be suspended if it is in connection with the injury, loss, damage or death that is subject to the third party recovery and is not payable for the period of the suspension.<sup>32</sup>

A decision to suspend an employee's compensation should not be taken lightly. Before suspending compensation, the relevant authority should make every attempt to consult with, support and assist the employee or their dependant to comply with the request.

Once the employee or their dependant complies with the request, their entitlement to compensation is reinstated.

### **Damages awarded are paid to the relevant authority**

When the relevant authority starts or takes over a claim for damages and a settlement is reached in favour of the employee or their dependant, any damages awarded are paid to the relevant authority.

The relevant authority must then deduct a portion of the settlement to cover the compensation expenses of the claim paid from date of injury to the date of settlement, including any costs incidental to the claim (such as legal costs). The remaining damages (if any) must be paid to the employee or their dependant.<sup>33</sup>

### **Compensation only paid when entitlement exceeds third party damages recovered**

If an employee or their dependant receives money from the relevant authority pursuant to a third party claim run by the relevant authority, they only receive compensation for the injury, loss, damage or death under the SRC Act when the amount they are entitled to under the Act exceeds the amount they received from the relevant authority.<sup>34</sup>

If no third party damages are recovered or if no settlement monies remain after the relevant authority has made its deductions, the employee or their dependant continues to be entitled to compensation under the SRC Act, subject to the usual eligibility tests.<sup>35</sup>

#### **Example four: Third party recovery**

A Commonwealth employee submits a workers' compensation claim after they are hit by a vehicle while walking across a pedestrian crossing on their lunch break. The claim is accepted by Comcare for a fractured wrist and lumbar sprain. The employee decides not to seek third party damages from the driver of the vehicle.

Comcare makes the decision to pursue third party damages in the name of the employee pursuant to section 50 of the SRC Act. The employee is required to participate in the third party recovery process by signing documents, attending a medical assessment and being involved in proceedings.

The matter is settled prior to hearing and the employee is awarded \$100,000 in third party damages. Comcare recovers \$50,000 for incapacity payments and medical treatment that has been paid against the workers' compensation claim from date of injury to the date of settlement (including costs associated with pursuing the third party damages claim). The employee is paid the remaining amount of the settlement money and is not able to claim any further compensation under the SRC Act until the amount they are entitled to under the SRC Act exceeds the amount they have received from Comcare under the third party settlement.

30 Subsection 50(5)(a).

31 Subsection 50(5)(b) and subsection 50(5A) of the SRC Act.

32 Subsection 50(6) of the SRC Act.

33 Subsection 50(7) of the SRC Act.

34 Subsection 50(8) of the SRC Act.

35 This only applies to section 50 damages and not section 48 damages, which is a permanent bar to future compensation.

## State workers' compensation and state compensation

The SRC Act prevents an employee or dependant from receiving compensation under both the SRC Act and a state or territory-based scheme for the same:

- > injury
- > loss of, or damage to, property used by the employee
- > injury resulting in the death of an employee.

An employee or dependant may be entitled to compensation under a state or territory-based scheme in circumstances such as:

- > work-related injuries are covered by a state-based workers' compensation scheme
- > criminal injury or victims of crime
- > injury, loss, damage or destruction caused by aircraft
- > injury or death as a consequence of a motor vehicle accident.

Sections 118 and 119 of the SRC Act set out the requirements where an employee or their dependant has received workers' compensation or compensation from a state or territory scheme.

### State workers' compensation (section 118)

Section 118 of the SRC Act prevents an employee or dependant from receiving double payment by accessing state workers' compensation in addition to compensation under the SRC Act. 'State workers' compensation' is defined under section 118(6) of the SRC Act as compensation recoverable under a law of a state or of a territory, or of a foreign country, relating to workers' compensation.

Under section 118(1), where an employee recovers state workers' compensation for an injury (or for the loss of, or damage to, property used by the employee), they cannot also receive compensation under the SRC Act for the same injury, loss or damage. Similarly, where a dependant recovers state workers' compensation for an injury that resulted in the death of the employee, compensation is not payable under the SRC Act for the employee's death.

Section 118 does not prevent a dependant from making a claim for benefits under the SRC Act for the death of the employee where the employee had personally received state workers' compensation for an injury that later resulted in their death.<sup>36</sup>

#### **Example five: State workers' compensation received for the same injury – *Butler and Australian Postal Corporation* [1992] AATA 361**

The employee began working at Australia Post as a cleaner in 1981, working 27 hours per week. They later started a second part-time job with the Australian Greek Society at the Pronia Hostel, where their duties included preparing medication, assisting with meals, and overseeing patients at night.

While on duty at the hostel in 1988, the employee injured their right arm while lifting a mattress off a patient who had fallen out of bed. The employee lodged a successful application for compensation with the Accident Compensation Commission. They received periodical state workers' compensation benefits for incapacity relating to the right arm injury, as well as a lump sum payment for the permanent loss of use of their right and left arm.

The employee then submitted a workers' compensation claim under the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (CERC Act), now known as the SRC Act, claiming for an injury to their left arm because of their duties at Australia Post.

The Tribunal found that the injury to the left arm for which the employee had received a lump sum payment under state workers' compensation was identical to the injury they were claiming workers' compensation for under the CERC Act (SRC Act). The Tribunal found that the employee's claim was barred by section 118 of the CERC Act (SRC Act) because the employee had already received state workers' compensation for the same injury.

<sup>36</sup> Re Comcare v Starkey (2017) FCAFC 151.

## Relevant authority can recover the whole amount of SRC Act compensation

If an employee or dependant is paid compensation under the SRC Act and later receives compensation under a state workers' compensation scheme, the relevant authority may recover the whole amount of the SRC Act compensation<sup>37</sup> from the employee or their dependant.<sup>38</sup>

If the employee or their dependant receives less state workers' compensation than what was paid under the SRC Act, the relevant authority does not have discretion to recover a lesser amount.

## Relevant authority can request statutory declaration from claimant

A relevant authority may ask a claimant to make a statutory declaration stating whether any state workers' compensation has been paid for an injury (or loss of, or damage to, property used by the employee) for which they are claiming compensation under the SRC Act.<sup>39</sup>

If the claimant refuses or fails, without reasonable excuse, to provide a statutory declaration, their right to compensation under the SRC Act for that injury (or loss of, or damage to, property) is suspended. This suspension includes instituting or continuing any proceedings and continues until the statutory declaration is provided.<sup>40</sup> A reasonable excuse must relate to the employee being unable, rather than unwilling, to comply with the request (for example, due to 'physical or practical difficulties in complying').<sup>41</sup>

A decision to suspend an employee's compensation should not be taken lightly. During the suspension period, all types of compensation related to the specific claim for which the statutory declaration was requested are not payable to the claimant.

## Other state compensation (section 119)

Section 119 of the SRC Act allows the relevant authority to recover compensation where the employee or their dependant receives double payment of compensation under the SRC Act and a 'state compensation' scheme in specified circumstances.

'State compensation'<sup>42</sup> is defined as compensation recoverable under a 'specified law.' 'Specified law'<sup>42</sup> is defined as a law of a state or territory that provides for the payment of compensation other than workers' compensation. The Minister declares which state and territory laws are specified in the [Safety, Rehabilitation and Compensation \(Specified Laws\) Declaration 2017](#).

Section 119 applies to:

- > an employee who recovers state compensation for the same injury (or for the loss of, or damage to, property used by the employee) for which compensation is payable under the SRC Act
- > a dependant who recovers state compensation for an injury that resulted in the death of the employee for which compensation is payable under the SRC Act.

## Relevant authority only liable to pay SRC Act compensation that exceeds state compensation

If an employee or a dependant claims compensation under the SRC Act and state compensation has been received for the same injury, loss or damage, or death, the relevant authority is only liable to pay for the amount of compensation (if any) that exceeds the total state compensation paid.<sup>43</sup>

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37 Payments made under Part III (Rehabilitation) are not recoverable under section 118 of the SRC Act.

38 Subsection 118(2) of the SRC Act.

39 Subsection 118(3) of the SRC Act.

40 Subsection 118(4) of the SRC Act.

41 *Re Corporate Affairs Commission v Yuill* [1991] 172 CLR 319

42 Subsection 119(7) of the SRC Act.

43 Subsection 119(2) of the SRC Act.

### Example six: State compensation received for the same injury – Roberts and MRCC [2011] AATA 430

The employee was a Royal Australian Air Force member who was injured when assaulted by a fellow employee. The employee received compensation of \$7,680 under the *Victims Compensation Act 1996* (NSW) (now known as *Victims Support and Rehabilitation Act 1996*) for the injuries sustained from the assault.

The employee lodged a claim for compensation under the SRC Act for the injuries related to the assault. Comcare accepted liability for the employee's injuries, but found that because the *Victims Compensation Act 1996* was a specified law for the purposes of section 119 of the SRC Act, the amount of compensation awarded pursuant to the *Victims Compensation Act 1996* would need to be offset against any future benefits payable under the SRC Act. That is, once the benefits determined under the SRC Act exceed what was paid under the *Victims Compensation Act 1996*, then the benefits claimed under the SRC Act would become payable, subject to the requisite legislative tests being met.

The employee argued that future compensation for medical costs under the SRC Act should not be offset as the compensation payment under the *Victims Compensation Act 1996* was for non-economic loss, and did not include compensation for medical treatment.

The Tribunal found that section 119 of the SRC Act should be interpreted as requiring a comparison of the amount of state compensation and the amount of compensation payable under the SRC Act, without analysing the heads of compensation payable from each source. The Tribunal was satisfied that the employee had received state compensation for the same injury for which they were claiming compensation under the SRC Act, and that section 119 applied in the circumstances.

### Repayment is the lesser of SRC Act compensation or state compensation

If an employee or dependant has already received compensation under the SRC Act and then receives state compensation, the relevant authority can recover from the employee or their dependant the lesser of:

- > compensation paid under the SRC Act<sup>44</sup>
- > state compensation received by the employee or their dependant.<sup>45</sup>

Where compensation is to be recovered, the relevant authority cannot recover weekly compensation payments paid to the benefit of a prescribed child under section 17(5) of SRC Act.<sup>46</sup>

If an employee or dependant can demonstrate to the relevant authority that some or all of the state compensation recovered under subsection 119(2) did not relate to the injury, loss or damage for which compensation is payable under the SRC Act, then only the portion of the recovered amount that relates to an injury, loss or damage for which compensation is payable under the SRC Act, is taken into account.<sup>47</sup>

## More information

For more information, please contact Comcare's Scheme Policy team on 1300 366 979 or email: [SchemePolicyandDesign@comcare.gov.au](mailto:SchemePolicyandDesign@comcare.gov.au).

44 Payments made under Part III (Rehabilitation) are not recoverable under section 119 of the SRC Act.

45 Subsection 119(3) of the SRC Act.

46 Subsection 119(5) of the SRC Act.

47 Subsections 119(3) and (6) of the SRC Act.