



Australian Government

SAFETY, REHABILITATION AND COMPENSATION ACT REVIEW

REPORT—FEBRUARY 2013

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LIST OF ABBREVIATIONS AND DEFINED TERMS

1922 Act	<i>Public Service Act 1922</i>
1971 Act	<i>Compensation (Commonwealth Government Employees) Act 1971</i>
1987 NSW Act	<i>Workers Compensation Act 1987 (NSW)</i>
1998 NSW Act	<i>Workplace Injury Management and Workers Compensation Act 1998 (NSW)</i>
1999 Act	<i>Public Service Act 1999</i>
2011 guidelines	Commonwealth Fraud Control Guidelines 2011
AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
ACIMSS	Attendant Care Industry Management System Standard
ACT	Australian Capital Territory
ACT Act	<i>Workers Compensation Act 1951 (ACT)</i>
Action Plan	<i>National Workers' Compensation Action Plan 2010–13</i>
ACTU	Australian Council of Trade Unions
ADF	Australian Defence Force
AE	Earnings an employee receives from additional employment, to be taken into account by a determining authority
AFP	Australian Federal Police
AHPRA	Australian Health Practitioner Regulation Agency
AMA	Australian Medical Association
AMA5	American Medical Association <i>Guides to the Evaluation of Permanent Impairment</i> , fifth edition
AMA6	American Medical Association <i>Guides to the Evaluation of Permanent Impairment</i> , sixth edition
Approved Guide	Guide to the Assessment of the Degree of Permanent Impairment
APS	Australian Public Service
ATO	Australian Tax Office
AWOTEFA	Average weekly ordinary time earnings for full-time adults
CAC Act	<i>Commonwealth Authorities and Companies Act 1977</i>
CDDA Scheme	Compensation for Detriment caused by Defective Administration scheme
CEO	Chief Executive Officer
CERC Act	<i>Commonwealth Employees' Rehabilitation and Compensation Act 1988</i>
Clinical Framework	Clinical Framework for the Delivery of Health Services
Compensation Arrangements Comparison Report	<i>Comparison of Workers' Compensation Arrangements in Australia and New Zealand</i> , April 2012
Consensus Statement	Australasian Faculty of Occupational and Environmental Medicine, Australian Consensus

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	Statement on the Health Benefits of Work, 2011
CPI	Consumer Price Index
CPM Report	<i>Comparison of work health and safety and workers' compensation schemes in Australia and New Zealand</i> , Comparative Performance Monitoring Report, 14th Edition
CRF	Consolidated Revenue Fund
Criminal Code	<i>Criminal Code Act 1995</i>
CSO	Claims Service Officer
DAKPI	Determining authority key performance indicator
DEEWR	Department of Employment and Workplace Relations
draft regulation policy	<i>Comcare Regulation Policy</i> consultation draft
DVA	Department of Veterans' Affairs
ex-employee	Employee who is no longer employed by the Commonwealth or a licensee
Fair Work Act	<i>Fair Work Act 2009</i>
Finance Circular 2009/09	<i>Finance Circular 2009/09—Discretionary Compensation and Waiver of Debt Mechanisms</i>
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FTE	Full-time equivalent
GP	General practitioner
Grey Areas Paper	<i>Grey Areas—Age Barrier to Work in Commonwealth Laws</i>
Hawke Report	Dr Hawke's Report on the Comcare Scheme's Performance, Governance and Financial Framework
HCTP	Heads of Compulsory Third Party
HOSC Act	<i>Health and Other Services (Compensation) Act 1995</i>
HWCA	Heads of Workers Compensation Authorities
IMR code of practice	Injury management and rehabilitation code of practice
International Classification	International Classification of Functioning, Disability and Health
KPI	Key performance indicator
liable employer	The employer who is liable for claim costs
licensee	A corporation licensed by the Commonwealth
LQMP	Legally qualified medical practitioner
MAT	Medical Assessment Tribunal
MRC Act	<i>Military Rehabilitation and Compensation Act 2004</i>
MRC Act review	Review of Military Compensation Arrangements
MRCC	Military Rehabilitation and Compensation Commission
National Approval Framework	Nationally Consistent Approval Framework for Workplace Rehabilitation Providers

LIST OF ABBREVIATIONS AND DEFINED TERMS

NDIS	<i>National Disability Insurance Scheme</i>
NEL	Non-economic loss
NH	Average number of hours worked
NT Act	<i>Workers Rehabilitation and Compensation Act (NT)</i>
NWE	Normal weekly earnings
NWH	Normal weekly hours worked pre-injury
OHS	Occupational health and safety
PI	Permanent impairment
Position Statement	Australasian Faculty of Occupational and Environmental Medicine and Royal Australasian College of Physicians, <i>Position Statement: Realising the Health Benefits of Work</i> , 2011
proposed National Guide	proposed national permanent impairment assessment guide
Queensland Act	<i>Work Health and Safety Act 2011 (QLD)</i>
Rehabilitation Guidelines	Rehabilitation Guidelines issued by Comcare on 22 May 2012
Review	This review of the SRC Act
RTW Inspectors	Return to work inspectors
SA Act	<i>Workers Rehabilitation and Compensation Act 1986 (SA)</i>
Seafarers Act	<i>Seafarers Rehabilitation and Compensation Act 1992</i>
SGA Act	<i>Superannuation Guarantee (Administration) Act 1992</i>
SIG WC	Strategic Issues Group on Workers' Compensation
SoP	Statement of Principles
SRC Act	<i>Safety Rehabilitation and Compensation Act 1988</i>
SRCC	Safety Rehabilitation and Compensation Commission
SRCOLA 2007	<i>The Safety, Rehabilitation and Compensation and Other Legislative Amendment Act 2007</i>
Superannuation Guarantee Ruling	"Superannuation Guarantee Ruling 2009/2: Meaning of the terms 'ordinary time earnings' and 'salary or wages'..."
SWA	Safe Work Australia
TA Act	<i>Transport Accident Act 1986 (Vic)</i>
Tasmanian Act	<i>Workers Rehabilitation and Compensation Act 1988 (TAS)</i>
Taylor Fry	Taylor Fry Consulting Actuaries
VE Act	<i>Veterans' Entitlements Act 1986</i>
Victorian Act	<i>Accident Compensation Act 1985 (VIC)</i>
WA Act	<i>Workers Compensation and Injury Management Act 1981 (WA)</i>
WHODAS 2.0	World Health Organization Disability Assessment Schedule
WHS	Work health and safety

LIST OF ABBREVIATIONS AND DEFINED TERMS

WHS Act	<i>Work Health and Safety Act 2011</i>
Working with Vulnerable People Act	<i>Working with Vulnerable People (Background Checking) Act 2011 (ACT)</i>
WPI	Wage Price Index

1. INTRODUCTION

- 1.1 On 24 July 2012, the Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, announced a comprehensive review of the *Safety Rehabilitation and Compensation Act 1988* (the **SRC Act**).
- 1.2 The SRC Act underpins the Comcare scheme, which provides for the rehabilitation and compensation of injured employees employed by:
 - (a) Commonwealth Government agencies and statutory authorities that pay premiums to Comcare under the SRC Act;
 - (b) Australian Capital Territory Government agencies and authorities that also pay premiums to Comcare under the SRC Act and;
 - (c) Commonwealth authorities and eligible corporations that have been granted self-insurance licences by the Safety, Rehabilitation and Compensation Commission (the **SRCC**) under the SRC Act.
- 1.3 The SRC Act also applies to members of the Australian Defence Force (the **ADF**) who were injured before 1 July 2004 during non-operational service. The Department of Veterans' Affairs (**DVA**) administers those claims on behalf of the Military Rehabilitation and Compensation Commission (the **MRCC**).
- 1.4 The SRC Act establishes Comcare and the SRCC, which share regulatory responsibility for the SRC Act and the Comcare scheme.
- 1.5 A review of self-insurance arrangements under the Comcare scheme was undertaken in 2008. That review focused on arrangements in the Comcare scheme for corporations that apply for licences, or are licensed, to accept liability for, and/ or manage, claims under the SRC Act. However, a comprehensive review of the SRC Act has not been undertaken since its introduction in 1988.
- 1.6 The Terms of Reference established by the Minister require that this review of the SRC Act (the **Review**) inquire and report on:
 - (a) any legislative anomalies and updates that need to be addressed;
 - (b) the performance of the Comcare scheme and ways to improve its operation; and
 - (c) the financial framework of the Comcare scheme.
- 1.7 The Terms of Reference are reproduced in Appendix A to this Report.
- 1.8 As part of the Review, Dr Allan Hawke AC has considered the performance, financial framework and governance of the Comcare scheme and has made a number of recommendations to address a range of identified issues.
- 1.9 This Report documents the issues that I have considered in undertaking the Review and outlines my recommendations for resolving those issues. My recommendations aim to improve the operation of the Comcare scheme, as defined by the legislation, and place particular emphasis on:
 - (a) a framework that will achieve equitable and cost-effective compensation within the Comcare scheme, and improve the rehabilitation outcomes of injured employees;
 - (b) ensuring fair and equitable financial, medical and rehabilitation support for injured employees and their families;
 - (c) a framework for fair, expedient and cost-effective dispute resolution; and
 - (d) removing age barriers to fair and equitable workers compensation provisions under the Comcare scheme into the future.
- 1.10 This Report also addresses the legislative impacts of the recommendations made by Dr Hawke.
- 1.11 There have been 59 Acts amending the SRC Act since its enactment in 1988. The purpose of those amendments has been largely to address anomalies as they have arisen, as a result of court decisions, or due to changes to the working arrangements, remuneration and employment dynamics of employees covered by the SRC Act. In this context, amendments to the SRC Act have sometimes

been made in isolation and possibly in reaction to singular issues. The resulting evolution of the legislation has led to increasing complexity and inefficiency, and to some inequity in the provisions for employees covered by the scheme. It has also become apparent that the course of legislative amendment has left the SRC Act with rehabilitation processes that could be improved.

- 1.12 As noted in the Terms of Reference for the Review, the Government believes that the Comcare scheme should be exemplary in its scheme design as well as its service delivery. While there is a case for re-writing the SRC Act in order to modernise it in the context of current working conditions, best practice in rehabilitation and ease of administrative application, the process of re-writing the SRC Act needs considerable care and more extensive thought than I could undertake in the limited time available for the Review.
- 1.13 Consequently, the Review recommends a two-stage approach to reforming the SRC Act:
- (a) In the short term, the SRC Act should be amended to accommodate the changes recommended in Chapters 4–10 of this Report and the recommendations made in paragraphs 3.10–3.12 below.
 - (b) In the longer term, the SRC Act should be restructured in line with the principles I have outlined in Chapter 3.

CONSULTATIONS

- 1.14 In the course of the Review, I consulted extensively and engaged with participants in the Comcare scheme to inform my assessment and assist me in developing the most comprehensive recommendations possible in the time allowed.
- 1.15 That consultation was conducted in three stages:
- (a) initial meetings with identified participants to develop a preliminary list of issues and possible recommendations;
 - (b) publication of an issues paper to stimulate and encourage public submissions to the Review; and
 - (c) focus workshops with select participants and participant groups to explore particular issues and matters arising in the submissions.
- 1.16 A list of organisations and individuals who made written submissions to the Review, met with me or attended workshops in the course of the Review appears in Appendix B to this Report.

COSTINGS

- 1.17 Where I considered that the Review's recommendations may have significant cost implications for the Comcare scheme, actuarial consultants were engaged to provide a financial assessment of the changes to help inform the Government when considering whether (and how) my recommendations might be adopted.

THE REPORT'S CHAPTERS

- 1.18 Chapter 3 of this Report provides high-level recommendations on the structure and content of the SRC Act, including principles for future legislative development.
- 1.19 Chapter 4 addresses the legislative considerations arising from Dr Hawke's recommendations to improve the performance of the Comcare scheme, its governance arrangements and the financial framework for the scheme.
- 1.20 Chapter 5 considers issues raised by the way in which the current SRC Act defines eligibility for workers compensation and rehabilitation.
- 1.21 Chapter 6 addresses rehabilitation, including exploring the principal factors that can contribute to good rehabilitation and early recovery from injury. Recommendations made in Chapter 6 deal with early intervention, provisional liability and the rehabilitation system in the SRC Act.
- 1.22 The focus of Chapter 7 is on compensation for incapacity and medical treatment. Chapter 7 considers compensation paid to injured employees for lost income, referred to as income

replacement, and compensation for medical treatment expenses. My recommendations focus on the duration and level of incapacity payments and on the types of treatment for which compensation should be paid.

- 1.23 Compensation for permanent impairment is addressed in Chapter 8. Permanent impairment compensation can be described as compensation for non-economic loss (that is, loss other than lost earnings and expenses incurred because of injury) and is paid to compensate for loss of bodily functions and pain and suffering. I have recommended significant changes to the level and weighting of compensation for permanent impairment.
- 1.24 Chapter 9 considers the administrative mechanisms prescribed by the SRC Act that govern claim determination, and reconsideration and review processes. The chapter includes recommendations about a number of matters such as claims reporting and determination timeframes, the dispute resolution process under the SRC Act, information-gathering processes, fraud control, recovery of incapacity payments and compensation for defective administration.
- 1.25 Chapter 10 considers the availability and relative merits of common law damages for employment-related injuries and liabilities for injuries arising other than under the SRC Act.

MY RECOMMENDATIONS

- 1.26 Chapter 2 of this Report contains a summary of my recommendations and the actuarial assessment of the financial impact of some of those recommendations. The recommendations have been developed after considerable thought, and I wish to stress the importance of considering them as a total package, in which each of the elements complements the other elements.
- 1.27 In addition to the matters emphasised in paragraph 1.9 above, my recommendations for amendments to the SRC Act reflect a number of principles and priorities:
 - (a) First, work is generally good for health and wellbeing. Rehabilitation should be the number one priority of all claims. That is best recognised by an Act that supports and promotes a bio-psycho-social approach to rehabilitation and does not contribute to needless disability. The inclusion of provisional liability will remove the financial stress often generated by an injury and assist in retaining injured employees at work by providing early access to medical treatment and incapacity payments in the most critical phase of injury.
 - (b) Second, improving the way in which permanent impairment is assessed will provide national consistency and ensure that injured employees are entitled to receive compensation in recognition of their whole person impairment. Increasing the amount of compensation paid to injured employees based on severity of injury will provide better recognition of the loss of use of bodily functions and the pain and suffering of injured employees.
 - (c) Third, modernising the provision of incapacity payments will provide for consistently fairer remuneration for injured employees and assist in reducing age barriers to work. Superannuation should only be considered in the context of savings for retirement, and the receipt of workers compensation payments should not affect an employee's savings for retirement or increase the risk of reliance on social security benefits for compensation recipients in the later stages of life.
 - (d) Finally, disputes should be resolved as quickly, economically and fairly as possible. Dispute resolution processes should be flexible and ensure equity for all injured employees. The focus should be on the issues and the outcomes rather than the process.
- 1.28 My recommendations should not be viewed in a disparate or piecemeal manner; and, although there will be modest financial impacts arising from their adoption, they are a package that, in combination, addresses the Terms of Reference for this Review.

ACKNOWLEDGEMENTS

- 1.29 I was greatly assisted in carrying out this Review by counsel assisting, Raelene Sharp of the Victorian Bar, and a Review Secretariat, formed from the DEEWR and Comcare. I could not have completed the Review without the dedication, insight and cooperation of Raelene and the Secretariat.

- 1.30 I wish to record my particular debt to Raelene for the sharp intelligence, willing cooperative approach and analytical rigour that she brought to the Review, as well as the great personal effort she has made to ensure that the Review has been as comprehensive as possible and has finished on time.
- 1.31 The members of the Review Secretariat brought equal commitment and energy to the tasks that faced the Review and enabled me to call on their considerable experience of the practical and policy-related aspects of administering the SRC Act. They also facilitated a most effective consultation and information-gathering process in the time available. I particularly want to acknowledge the expertise and the contributions of Denise Lowe-Carlus, Alan Piira, Ruth Hunt, Seyram Tawia and Phil Hartley. They have all been untiring in their thinking, constructive discussion and drafting of material for my Report.
- 1.32 Paul O'Connor, the Chief Executive Officer of Comcare, has been a constant source of encouragement and stimulating ideas throughout the work of the Review: he has smoothed what could otherwise have been a rocky path and planted many stimulating ideas for me and the Review team to develop. Simone Stevenson of the Minister's staff has greatly helped me in keeping lines of communication open throughout the Review.
- 1.33 I am very grateful to John Kovacic, Deputy Secretary for Workplace Relations and Economic Strategy; Kylie Emery, Group Manager for Workplace Relations Implementation and Safety; and Nikki Armour, then Acting Branch Manager of the Safety and Compensation Policy Branch, for their encouragement and support over the past five months, and to the other staff from DEEWR who have contributed to the Review.
- 1.34 I would also like to record my appreciation of the staff of Comcare for their assistance in providing extensive data, access to further expertise and in enabling the actuarial assessment undertaken by Taylor Fry. DVA has also been extremely supportive in considering and raising aspects of its administration of the SRC Act (and the complementary military rehabilitation and compensation scheme) for inclusion in my Report.
- 1.35 Finally, I must acknowledge the very substantial help that I received from all the people who made the time to talk with me, prepare written submissions to the Review and attend workshops as I developed my thinking and framed my recommendations. Although I take full responsibility for the content of this Report and for its recommendations, I could not have carried out the Review without the focused and constructive participation of so many of the active participants in the Comcare scheme.

2. SUMMARY OF RECOMMENDATIONS

RECOMMENDATIONS ABOUT THE STRUCTURE OF THE SRC ACT

Recommendation 3.1

I recommend that the SRC Act be amended so that:

- (a) the term “Comcare” only be used to mean Comcare the regulator; and
- (b) provisions setting out the powers and obligations of determining authorities, whether Comcare, a Commonwealth authority, a licensed authority or a licensed corporation, should use the term “determining authority”.

Recommendation 3.2

I recommend that the SRC Act include a statement of the Act’s objects and a purpose.

Recommendation 3.3

I recommend that the SRC Act be re-designed with a more rational structure that reflects the priority to be given to rehabilitation, follows the typical course of a claim and then deals with structural aspects—or scheme governance.

RECOMMENDATIONS ABOUT ELIGIBILITY FOR COMPENSATION

Recommendation 5.1

I recommend that the definition of “employee” in s 5(1) of the SRC Act be amended to introduce a deeming provision applicable across the scheme, in relation to contractors.

Recommendation 5.2

I recommend that the effect of the Federal Court’s judgment in *Wiegand v Comcare* should be negated so that an employee’s perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis.

Recommendation 5.3

I recommend that the SRC Act be amended so that incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, spinal disc ruptures caused by degenerative disease and similar phenomena) will be covered for workers compensation purposes on the same basis as a “disease” — that is, where the incident was contributed to, to a significant degree, by the employee’s employment.

Recommendation 5.4

I recommend that DEEWR and DVA examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the SoP regime.

Recommendation 5.5

I recommend that the SRC Act be amended so that the reasonable administrative action exclusion in s 5A(1) operates only where the reasonable administrative action taken in a reasonable manner in respect of the employee’s employment has contributed, to a significant degree, to the disease, injury or aggravation.

Recommendation 5.6

I recommend that s 5A(2) be amended by removing the words “and without limiting that subsection”, so as to make it clear that the list in s 5A(2) is a complete list of the actions that are taken to be “reasonable administrative action”.

Recommendation 5.7

I recommend that, where an employee is “on call”, the employee’s journey to work should be covered by workers compensation. However, there should be a requirement that the journey must only include travel between home, or the place where the employee receives the message to attend work, and the place of work itself.

RECOMMENDATIONS ABOUT REHABILITATION

Recommendation 6.1

I recommend that the SRC Act explicitly provide for early intervention as the primary form of rehabilitation, recognised in the injury management and rehabilitation code of practice proposed in **Recommendation 6.9**.

Recommendation 6.2

I recommend that the SRC Act be amended to include a system of provisional liability that allows an injured employee access to a maximum of 12 weeks of incapacity payments and medical costs of up to \$3,000.

Recommendation 6.3

I recommend that the term “rehabilitation program” in the SRC Act be amended to “workplace rehabilitation plan”, and that the definition of the term should be amended to emphasise the vocational nature of the services and remove reference to other treatment forms.

Recommendation 6.4

I recommend that the language in Part III of the SRC Act should be amended to reflect the focus on occupational or vocational rehabilitation program providers.

Recommendation 6.5

I recommend that the SRC Act be amended to remove the role of the rehabilitation authority and replace it with the concept of the liable employer, which will always have a right, and the responsibility, to arrange rehabilitation.

Recommendation 6.6

I recommend that the SRC Act be amended to include the requirement that the person vested with authority to assist the employer in the discharge of the employer’s rehabilitation responsibilities undertake appropriate training, to be prescribed by regulations.

Recommendation 6.7

I recommend that, where an employee moves between employers (both of whom are covered by the SRC Act), dual rehabilitation responsibilities should be established for both the liable employer and the current employer. Where an employee moves to an employer outside the SRC Act, sole rehabilitation responsibility should revert to the liable employer.

Recommendation 6.8

I recommend that the SRC Act be amended to provide Comcare with an ultimate power to commence and/or take over rehabilitation when the liable employer fails to meet its obligations or ceases to exist.

Recommendation 6.9

I recommend that s 41 of the SRC Act be amended to provide for Comcare to issue an “injury management and rehabilitation code of practice”, including obligations for employers to ensure that:

- (a) a rehabilitation management system is established for the employer’s workers; and
- (b) the establishment, content and implementation of the rehabilitation management system is in accordance with the code of practice.

Recommendation 6.10

I recommend that the SRC Act be amended to provide for the development of an “injury management plan” that is developed by a determining authority for each injured employee who is incapacitated for 28 days or more (either total or partial incapacity).

Recommendation 6.11

I recommend that the SRC Act be amended to provide that:

- (a) the injury management plan must be prepared by the determining authority in consultation with the injured employee, employer and treating practitioner;
- (b) employees and employers must cooperate in the preparation and implementation of an injury management plan;
- (c) if an employee does not cooperate in the preparation or implementation of the injury management plan, the employee’s rights to compensation are suspended (consistent with the obligation currently implicit in s 37(7) of the SRC Act); and

- (d) if an employer does not cooperate in the preparation or implementation of the injury management plan, penalty units may apply.

Recommendation 6.12

I recommend that the SRC Act be amended to require a determining authority to conduct a review of each active claim at 12 and 52 weeks.

Recommendation 6.13

I recommend that s 36 of the SRC Act be repealed.

Recommendation 6.14

I recommend that the current s 37(3) of the SRC Act be removed and replaced with the core requirements that an employer:

- (a) take all reasonable steps to return an injured employee to work as soon as possible; and
- (b) consult as far as practicable with the injured employee and nominated treating practitioner about the injured employee's return to work.

Recommendation 6.15

I recommend that s 57 of the SRC Act be amended to provide that a suitably qualified person may undertake a medical examination and that a medical examination may be undertaken by a panel.

Recommendation 6.16

I recommend that the definition of "suitable employment" be amended so that employment with any employer can be considered "suitable employment".

Recommendation 6.17

I recommend that the SRC Act be amended so that, where the employer's obligation to provide suitable duties under s 40 is not met, penalty units may apply.

Recommendation 6.18

I recommend that the SRC Act be amended to provide for the establishment of a scheme-wide job placement program appropriate to the unique attributes of the Comcare scheme, including a preference for placement with another scheme employer before looking outside the scheme.

Recommendation 6.19

I recommend that the injury management and rehabilitation code of practice provide the opportunity for employees to propose their suitable duties (where appropriate) as a first step.

Recommendation 6.20

I recommend that an inspectorate be developed within Comcare with a supervisory function and information-gathering and sanctioning powers in relation to the activities of employers with rehabilitation obligations, to ensure compliance with those obligations, namely:

- (a) to provide suitable employment;
- (b) to comply with the duties outlined in s 37; and
- (c) to comply with the IMR code of practice.

In addition, the inspectorate can also ensure compliance of approved rehabilitation providers with outcome and service delivery standards.

Recommendation 6.21

I recommend that the SRC Act be amended to provide Comcare with the power to issue improvement notices and to accept undertakings from employers in relation to contravention of employer rehabilitation obligations, including the duty to provide suitable employment. RTW inspectors should be provided with similar information-gathering powers to those provided to the regulator under s 155 of the WHS Act.

RECOMMENDATIONS ABOUT COMPENSATION FOR INJURIES AND DISEASES

Recommendation 7.1

I recommend that the concept of NWE be renamed "average remuneration", which is the average amount paid to the employee in each week of the relevant period and that ss 8(1)–(5) and (8) be repealed and replaced with a definition of "average remuneration".

Recommendation 7.2

I recommend that s 9 of the SRC Act be repealed and replaced with a provision that fixes the relevant period at 13 weeks, with the flexibility to account for employment and remuneration arrangements where a 13-week period would not produce a fair and equitable outcome.

Recommendation 7.3

I recommend that the SRC Act be amended to provide for the annual indexation of an employee's average remuneration, subject to any changes that the determining authority makes on the basis of information provided by the employee or employer (or otherwise obtained by the determining authority).

Recommendation 7.4

I recommend that s 19(6) of the SRC Act be amended to exclude its operation where the employee has been deemed to have an ability to earn.

Recommendation 7.5

I recommend that ss 20, 21 and 21A be repealed in their entirety. If those sections are repealed, ss 114A and 114B will no longer be relevant and should also be repealed.

Recommendation 7.6

If **Recommendation 7.5** is not implemented, I recommend that, as an absolute minimum, the deduction of "5 % of the employee's normal weekly earnings" should be removed from the formula in each of ss 20(3), 21(3) and 21A(3).

Recommendation 7.7

Further, if **Recommendation 7.5** is not implemented, in addition to **Recommendation 7.6**, I recommend that:

- (a) the term "retired" should be removed from ss 20, 21 and 21A; the application of ss 20, 21 and 21A should be enlivened by the employee ceasing employment with the employer, reaching preservation age and being eligible to receive superannuation from the employee's superannuation fund, OR when an employee ceases employment for invalidity reasons and becomes eligible to access superannuation, regardless of whether the employee has reached the preservation age; and
- (b) the powers in s 114B should be amended to include consequences for non-compliance similar to those contained in the HOSC Act.

Recommendation 7.8

Further, if **Recommendation 7.5** is not implemented, in addition to **Recommendation 7.6** and **Recommendation 7.7** I recommend that:

- (a) the mechanism for taking into account deemed income on a lump sum in ss 21(3) and 21A(3) of the SRC Act should be based on the post-tax value of the lump sum (if income tax was paid on the lump sum benefit); and
- (b) the rate at which employees are deemed to earn income on any lump sum should reflect the interest that an employee can realistically expect to earn.

Recommendation 7.9

I recommend that immediate consideration be given to amending the SGA Act so that compensation payments made pursuant to s 19 of the SRC Act are deemed to be "ordinary time earnings" for the purposes of the SGA Act.

Recommendation 7.10

I recommend that the introduction to s 8(10) of the SRC Act be amended by including the words "from time to time", to confirm its ambulatory operation.

Recommendation 7.11

I recommend that s 8(10)(a) of the SRC Act be amended to confirm that an employee who is suspended without pay continues to be employed for the purposes of s 8(10).

Recommendation 7.12

I recommend that s 37(5) of the SRC Act be repealed.

recommendation 7.13

I recommend that weekly compensation be paid at 100 % of an employee's NWE during the first 13 weeks of the employee's incapacity for work, at 90 % of the employee's NWE during weeks 14–26 of incapacity for work and thereafter at 80 % of the employee's NWE while the employee remains incapacitated for work.

Recommendation 7.14

I recommend that compensation be calculated, at the levels recommended in Recommendation 7.13, by reference to the employee's NWE less any earnings the employee receives from additional employment, deleting references to the "adjustment percentage".

Recommendation 7.15

I recommend that the step-down periods be calculated on the basis that time will run for each period during any week when the employee is participating in a return to work program or absent from work for any reason other than undergoing medical treatment, for which compensation is payable under s 16 of the SRC Act.

Recommendation 7.16

I recommend that s 23(1) and (1A) of the SRC Act be amended so that:

- (a) the cut-off age is tied to the qualifying age for the age pension; and
- (b) employees who are injured at any time after five years prior to the age pension qualifying age can receive incapacity payments for a period of 260 weeks.

Recommendation 7.17

I recommend that the SRC Act be amended so that:

- (a) entitlement to weekly compensation is suspended during any period of more than 60 days when an employee is absent from Australia—subject to exceptions where the employee's employment with the Commonwealth or a licensee or "suitable employment" undertaken by the employee require the employee to leave Australia; and
- (b) employees are obliged to notify the relevant determining authority of any absence from Australia that exceeds 60 days.

Recommendation 7.18

I recommend that the SRC Act be amended so that an employee may redeem her or his compensation payments on a voluntary basis.

Recommendation 7.19

I recommend that s 30 of the SRC Act be retained, but that the threshold for its operation be increased to \$150 per week, indexed by reference to the CPI.

Recommendation 7.20

I recommend that definitions of "legally qualified dentist" and "legally qualified medical practitioner" be inserted in s 4(1).

Recommendation 7.21

I recommend that the definition of "medical treatment" in s 4(1) of the SRC Act be amended to ensure that medical treatment is provided by legally qualified health practitioners with the relevant registration or by health practitioners who have been recognised and accredited by Comcare.

Recommendation 7.22

I recommend that the definition of "medical treatment" in s 4(1) of the SRC Act be amended to include treatment provided outside Australia where the determining authority is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare.

Recommendation 7.23

I recommend that s 69 of the SRC Act be amended to insert new paragraphs to include, as the functions of Comcare:

- (a) the recognition, accreditation and monitoring of medical treatment providers who are not subject to AHPRA regulation; and
- (b) the approval of appropriate medical, surgical, dental or other therapeutic treatment for employees outside Australia.

Recommendation 7.24

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to include treatment and maintenance as a resident in a nursing home.

Recommendation 7.25

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended so that “medicines” will be limited to those prescribed by a legally qualified medical practitioner or dentist and dispensed by a registered pharmacist, or provided to a patient at a hospital or resident in a nursing home.

Recommendation 7.26

I recommend that the SRC Act be amended to restrict compensation for Schedule 8 medications to those that are prescribed by the employee’s nominated legally qualified medical practitioner.

I further recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prescribe a form in which an employee would nominate a legally qualified medical practitioner for the purpose of prescribing Schedule 8 medications.

Recommendation 7.27

I recommend that “nurse” and “nursing care” be defined.

Recommendation 7.28

I recommend that the SRC Act be amended so that, in order to be compensable, medical treatment must meet objective standards such as those in the Clinical Framework.

Recommendation 7.29

I recommend that the SRC Act be amended to provide for the referral of practitioners to the appropriate professional regulatory bodies where treatment is provided outside the Clinical Framework or where there are concerns about the adequacy, appropriateness or frequency of treatment—including where an LQMP has recommended the treatment.

Recommendation 7.30

I recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prepare and issue, as a legislative instrument, a table of medical service rates that are to apply throughout the Comcare scheme as the rates at which determining authorities are liable to pay compensation under s 16(1) of the SRC Act. The “appropriate” amount of compensation for medical treatment would be linked to those rates.

Recommendation 7.31

I recommend that any changes that are made to compensation for medical expenses under the SRC Act bear in mind the proposal to provide Repatriation Health Cards to ADF claimants under the SRC Act, so that those changes complement the implementation of Recommendations 24.1 and 24.2 of the MRC Act Review.

Recommendation 7.32

I recommend that a new term, “severe injury”, be defined in s 4(1) of the SRC Act.

Recommendation 7.33

I recommend that s 29 of the SRC Act be repealed and a new legislative model based on a tiered system of services and support provided in the home be implemented. The new model would provide for compensation for three types of services provided in the home:

- (a) household services, payable for three years from the date of injury;
- (b) post-acute care services, payable for three years from the date of injury and for six months after specific events; and
- (c) ongoing household and attendant care services for the severely injured.

Recommendation 7.34

I recommend that the amount payable for ongoing care services for the severely injured be capped at a maximum of 40 hours per week, up to a maximum cost of \$1,700 (indexed).

Recommendation 7.35

I recommend that Comcare establish a formal framework for the assessment of need for services provided in the home, based on the International Classification, with the inclusion of requirements that the assessor:

- (a) liaise with any other interested parties in the course of the assessment; and
- (b) be responsible for recommending any required household services, post-acute services, or ongoing

attendant care services.

Recommendation 7.36

I recommend that any need for household assistance and attendant care services be assessed by an independent party. That assessment could be by any physiotherapist or occupational therapist registered by AHPRA.

Recommendation 7.37

I recommend that the SRC Act be amended to allow Comcare to prepare and issue, as a legislative instrument, a list of approved/registered attendant care providers.

That list should be based on the list of ACIMSS accredited providers and any approved provider lists established by Government departments, such as DVA, and State and Territory workers compensation schemes.

RECOMMENDATIONS ABOUT COMPENSATION FOR PERMANENT IMPAIRMENT

Recommendation 8.1

I recommend that Comcare adopt the proposed National Guide as the Approved Guide, and the proposed permanent impairment assessor document.

Recommendation 8.2

I recommend that the SRC Act be amended so that separate impairments arising from a single injury occurrence can be combined to achieve a combined impairment value.

Recommendation 8.3

I recommend that, following payment of permanent impairment compensation, the permanent impairment threshold under the SRC Act for any worsening of the original or secondary condition (other than a hearing loss) be reduced to 5 %.

Recommendation 8.4

I recommend that the maximum benefit payable for permanent impairment (being the combined amount payable pursuant to s 24 and s 27) be the same amount as the lump sum compensation payable pursuant to s 17 for a death that results from an injury, with the maximum s 24 payment being 72.72 % of the death benefit and the maximum s 27 payment being 27.27 % of the death benefit.

RECOMMENDATIONS ABOUT CLAIM DETERMINATION, RECONSIDERATION AND REVIEW

Recommendation 9.1

I recommend that the SRC Act be amended to allow for electronic notification of injury and electronic lodgement of claim forms.

Recommendation 9.2

I recommend that the SRC Act be amended to require employers to forward claims received to the determining authority within three days.

Recommendation 9.3

I recommend that the SRC Act be amended to include statutory timeframes for the determination of claims and that, on a failure to meet those timeframes, the claim be deemed to be rejected.

The determining authority must determine the claim:

- (a) within 30 days for injury;
- (b) within 60 days for disease; or
- (c) if provisional liability is being met as a result of a previously lodged injury notification, by the end of the provisional liability period;

whichever is the longer.

Recommendation 9.4

I recommend that the SRC Act be amended so that, for liability to pay compensation to continue in respect of a psychological injury after 12 weeks from the date of a claim, the diagnosis must be confirmed by a

psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare—if not initially made by such a practitioner.

Recommendation 9.5

I recommend that the SRC Act be amended to provide for the payment of an employee’s costs at the reconsideration stage, including the cost of obtaining medical support (capped at the cost of obtaining one report, including incidental diagnostic costs) and legal costs (capped at \$1,500, indexed).

Recommendation 9.6

I recommend that regulations be made to prescribe the period within which a decision on a request for reconsideration must be made, for the purposes of s 62(6) of the SRC Act, as contemplated by SRCOIA 2011, and that this prescribed period should be 60 days.

Recommendation 9.7

I recommend that consideration be given to amending the SRC Act and the MRC Act so that determinations made on claims managed by the MRCC under Part XI of the SRC Act are dealt with at the reconsideration stage in the same way as reconsideration of determinations made under the MRC Act.

Recommendation 9.8

I recommend that the AAT be encouraged to explore practical ways to achieve a further, and marked, reduction in the time taken to resolve compensation applications.

Recommendation 9.9

I recommend that licensees be required to follow the model litigant requirements in the Legal Services Directions.

Recommendation 9.10

I recommend that all determining authorities:

- (a) be prohibited from making submissions against the wishes of Comcare;
- (b) be obliged to advise Comcare of any proceedings brought against them; and
- (c) upon request by Comcare, provide Comcare with any documents relating to those proceedings.

Recommendation 9.11

I recommend that Comcare apply to the Attorney-General for permission to settle cases involving Comcare as a determining authority in the AAT on a limited commercial basis, by the payment of an applicant’s legal costs, without an admission of liability.

Recommendation 9.12

I recommend that s 66(1) of the SRC Act be amended to provide that all parties to a matter before the AAT must disclose any evidence to the AAT at least 28 days before the hearing of the matter.

Recommendation 9.13

I recommend that the SRC Act be amended to permit the AAT to hear matters not the subject of a reviewable decision, with the consent of the parties.

Recommendation 9.14

I recommend that:

- (a) immediate consideration be given to identifying those determinations made by the Fair Work Commission that consider and determine the reasonableness or otherwise of an employer’s action that could be a reasonable administrative action within s 5A(1) of the SRC Act; and
- (b) if determinations of that kind can be identified, the employer and the employee should be entitled to rely on that determination when a determining authority or the AAT is determining whether the employer’s conduct amounted to reasonable administrative action for the purposes of s 5A(1) of the SRC Act.

Recommendation 9.15

I recommend that immediate consideration be given to defining a jurisdiction for the Fair Work Commission to review reviewable decisions under the SRC Act that involve workplace issues, with a view to transferring that part of the AAT’s review jurisdiction under the SRC Act to the Fair Work Commission and

defining the relationship between the Fair Work Commission's review jurisdiction and the AAT's review jurisdiction under the SRC Act.

Recommendation 9.16

I recommend that priority be given to defining a review jurisdiction for the Fair Work Commission under Division 3 of Part II of the SRC Act, with a view to giving the Fair Work Commission jurisdiction to review all reviewable decisions relating to rehabilitation programs.

Recommendation 9.17

I recommend that the SRC Act be amended so that:

- (a) information requested under s 58 be provided within the period specified in the request (as with a notice issued under s 71);
- (b) penalties are prescribed for a failure to comply with a s 71 notice;
- (c) determining authorities have the power to request information relevant to a claim from parties other than the employer and the employee (for example, the employee's legal practitioners, a previous employer or an insurer); and
- (d) determining authorities have the power to request information relevant to the administration of liabilities under the SRC Act (for example, information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).

Recommendation 9.18

I recommend that the SRC Act be amended to include an obligation, reinforced by a penalty, to provide information of a change in circumstances.

3. THE STRUCTURE OF THE SRC ACT

- 3.1 As noted in the terms of reference for this Review (see Appendix A), the Government believes that the Comcare scheme should be exemplary in its scheme design as well as its service delivery, the working environments of participants in the scheme.

THE WORKING ENVIRONMENTS OF PARTICIPANTS IN THE SCHEME

- 3.2 The Comcare scheme was designed with one employer in mind—the Australian Public Service (the **APS**)—and it was introduced at a time when employment conditions (including the administrative arrangements around employment, superannuation conditions and other entitlements) were relatively consistent across a workforce that was engaged in generally similar types of work.
- 3.3 The environment in which the scheme now operates has changed significantly over the past 24 years. In the public sector, workplace agreements have replaced industrial awards, employment under individual contract has become far more common and superannuation arrangements are much less standardised and far more flexible than they were in 1988.
- 3.4 In addition, the scheme has been opened to self-insurers—corporations that operate in the private sector. Several provisions in the SRC Act are difficult to apply to private industry employment arrangements.

THE CASE FOR RE-WRITING THE SRC ACT

RECOMMENDATION 3.1

I recommend that the SRC Act be amended so that:

- (a) the term “Comcare” only be used to mean Comcare the regulator; and
- (b) provisions setting out the powers and obligations of determining authorities, whether Comcare, a Commonwealth authority, a licensed authority or a licensed corporation, should use the term “determining authority”.

RECOMMENDATION 3.2

I recommend that the SRC Act include a statement of the Act’s objects and a purpose.

PRINCIPLES TO GUIDE AMENDMENTS TO, AND THE RE-DESIGN OF, THE SRC ACT

- 3.14 3.15 Safe Work Australia as part of its *National Workers’ Compensation Action Plan 2010–13*¹ (the **Action Plan**) states that workers compensation arrangements should be aimed at delivering consistent and improved responses to and management of work-related injuries, illnesses and deaths. Ultimately, modifications to workers compensation arrangements should aim to achieve a reasonable balance between the interests of employers and workers while at the same time:
- (a) supporting effective and early return to work;
 - (b) providing fair compensation for work-related injuries, illnesses and deaths;
 - (c) reducing the overall social and economic costs to the community of work-related injuries, illness and fatalities; and
 - (d) ensuring that employer costs are equitably distributed and contained within reasonable limits.

1 The *National Workers’ Compensation Action Plan 2010–13* was endorsed by all the tripartite SWA members in December 2010

- 3.16 The Action Plan states that Australian workers compensation schemes should aim to provide:
- (a) equity for employees or employers;
 - (b) certainty in the operation and application of the legislation;
 - (c) clarity and consistency of process;
 - (d) clarity of guidance and information for workers and employers; and/or
 - (e) improved relationships between workers, employers and others.
- 3.17 In addition, the *Work Health and Safety Act 2011* (the **WHS Act**) and the National Disability Insurance Scheme (the **NDIS**) overlap in a number of ways with the SRC Act and the Comcare scheme. Even though the title of the SRC Act includes the word “Safety”, it does not deal with work safety matters in any significant way; rather, it concentrates on workplace injury compensation and rehabilitation and the governance of the scheme. When the SRC Act is re-written, it would be beneficial if the SRC Act, the WHS Act and the NDIS legislation could be harmonised to provide for consistency of approach. Consideration should be given to using, as much as possible, equivalent terms, concepts and obligations relating to entitlement, rehabilitation and return to work in these Acts.

5 ELIGIBILITY FOR COMPENSATION

WHO IS COVERED BY THE SCHEME

RECOMMENDATIONS

- 5.39 In order to standardise the definition of “employee” as between premium payers and licensees and clarify the position of contractors working for the Commonwealth, Commonwealth authorities and licensees, I recommend
- (1A) For the purposes of the definition of employee in subsection (1), a person is taken to be employed by the Commonwealth or by a Commonwealth authority or by a licensed corporation if the person is engaged under a contract for services, unless:
 - (a) the person –
 - (i) is paid to achieve a stated outcome; and
 - (ii) has to supply the plant and equipment or tools of trade needed to carry out the work; and
 - (iii) is, or would be, liable for the cost of rectifying any defect in the work carried out; or
 - (b) a personal services business determination is in effect for the person carrying out the work under the *Income Tax Assessment Act 1997*, section 87–60.
- 5.41 no steps should be taken to deem labour hire workers to be employees under the SRC Act. Liability should continue to lie with the labour hire company which employs those workers.
- 5.42 the current provisions in the SRC Act by which volunteers can be deemed employees for the purposes of the Comcare scheme are working satisfactorily.

RECOMMENDATION 5.1

I recommend that the definition of “employee” in s 5(1) of the SRC Act be amended to introduce a deeming provision applicable across the scheme, in relation to contractors.

WHAT IS COVERED BY THE SCHEME

- 5.43 The Comcare scheme provides for the compensation of employees who suffer an “injury” or “disease” in certain circumstances.
- 5.44 An injury is defined as an injury (other than a “disease”) suffered by an employee that is a physical or mental injury arising out of (a causal relationship), or in the course of (a temporal relationship), the employee’s employment: s 5A(1)(b).

- 5.45 A disease is an ailment or aggravation of an ailment that was “contributed to, to a significant degree, by the employee’s employment”: s 5B(1). Section 5B(2) provides a list of matters that may be taken into account in determining whether an ailment or aggravation was contributed to, to a significant degree, by an employee’s employment. Section 5(3) provides that “significant degree” means “a degree that is substantially more than material”.

PSYCHOLOGICAL INJURIES

- 5.46 **Between 2006–07 and 2009–10, psychological injury² claims accounted for 10 % of all claims under the Comcare scheme. However, those claims represented 35 % of the total cost of claims. During 2010–11, psychological injury claims accounted for 12 % of all claims and 32 % of the total cost of claims.³**
- 5.47 **In 2010–11,⁴ the average duration of incapacity for injured employees with claims for psychological injuries was 12.3 months.** By contrast, the duration for other types of injuries was as follows:
- (a) falls, slips and trips: 4.1 months;
 - (b) body stressing: 3.6 months;
 - (c) vehicle incidents: 3.2 months;
 - (d) hitting / being hit by objects: 2.0 months; and
 - (e) other injuries and diseases: 4.2 months.
- 5.48 Psychological injuries can cover a range of conditions, including stress, adjustment disorder, anxiety, post-traumatic stress disorder and depression.
- 5.49 There can be difficulties diagnosing psychological injuries, over and above the difficulties of diagnosis involved with physical injuries; and the diagnosis often involves subjective as well as objective elements. Furthermore, multiple factors often contribute to the onset of psychological conditions (for example, underlying personality disorders, relationship problems and financial pressures, as well as work-related pressures) and it can be difficult to isolate the employment contribution to the injury.
- 5.50 Psychological injuries can also arise from an employee’s perception of and reaction to external events, which can be different to other employees’ perception of and reaction to the same events. In *Wiegand v Comcare*⁵ the Federal Court held that an employee’s perception about something related to her or his employment would be a sufficient basis to connect the employee’s psychological reaction to her or his employment, provided that the perception was a perception about an incident or state of affairs that actually happened and regardless of whether the perception was reasonable or itself reflected reality. (I return to the issue of perception in paragraph 5.64 below.)
- 5.51 **The rate of claims for psychological injuries for premium payers has increased by 30 % in the past three years and is four times higher than the incidence among licensees.⁶** This suggests that psychological injuries may be more of an issue in the public sector than the private sector. In a discussion with the Review, WorkCover Western Australia indicated that psychological injury claims were also more prevalent in the public sector than the private sector in that State.
- 5.52 The increased incidence of psychological injury claims has been attributed to a range of causes, including the increased pressures of work life, employment instability, increases in employee expectations and a more litigious society. It may be reasonable to suggest that a principal explanation for the increased incidence of psychological injury claims can be found in the increasing demands placed on employees through such mechanisms as efficiency dividends, constant performance evaluation and the restructuring of employment arrangements. A further explanation may be found in poor management practices, which might be said to reflect a low priority given to preventing or resolving workplace stress.

2 I use the term “psychological injury” to refer to a psychological ailment that will be classified as a “disease” (and therefore an “injury”) if employment has contributed, to a significant degree, to the ailment or to its aggravation: see ss 5A(1) and 5B(1) of the SRC Act.

3 As supplied by Comcare.

4 As supplied by Comcare.

5 [2002] FCA 1464; (2002) 72 ALD 795 at [24].

6 As supplied by Comcare.

- 5.53 The United Kingdom Civil Service Health and Safety Executive has identified six areas which are central in affecting work-related stress:⁷
- (a) demand—including such things as workload, work patterns and working environment;
 - (b) control—how much say employees have in the way they do their work;
 - (c) support—the encouragement, sponsorship and resources provided by the organisation, line managers and colleagues;
 - (d) relationships—including positive working practices in place to avoid conflict and deal with unacceptable behaviour;
 - (e) role—whether employees understand their role within their organisation and whether their organisation ensures employees do not have conflicting roles; and
 - (f) change—how organisational change (large and small) is managed and communicated.
- 5.54 It might be argued that an employee should not receive compensation if the employee's psychological condition is caused by undertaking normal work duties that the average person with the requisite skills and experience can undertake without suffering a psychological injury. However, such an approach would represent a move away from no-fault compensation, and would discriminate against a type of injury that is already stigmatised. In my view, it is appropriate that an employer bear the cost of appointing an employee to a position which is so stressful that it causes a medically diagnosed psychological injury to the employee.
- 5.55 All State and Territory schemes allow compensation for psychological injuries; although, if psychological injuries are more prevalent in the public sector than in the private sector, the proportion of psychological injuries compared to other injuries would be lower in the State and Territory schemes, where the public sector comprises a smaller component of the respective scheme, than it does in the Comcare scheme.
- 5.56 In New Zealand, workers compensation is only payable for psychological injuries that are an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment (for example, a bank employee witnessing a shooting or a train driver involved in a fatal accident).⁸
- 5.57 Similarly, Canadian provinces provide only limited access to compensation for psychological injuries. In British Columbia and Ontario, for example, a psychological injury must be caused by an acute reaction to a sudden and unexpected traumatic event. In Quebec, the cause of a psychological injury must be beyond the normal scope of the work and outside the normal and foreseeable relationship between the employer and employee. Claims involving interpersonal conflict or involving the employer's right to manage employees will not usually be accepted.⁹
- 5.58 The restrictions in the Canadian provinces were introduced from 2005 in response to a significant increase in psychological injury claims, which was greater than the increase seen in the Comcare scheme. Canada's policy of restricting access to psychological injury claims was also influenced by the experience in parts of the United States that had previously had a non-restrictive approach to psychological injury claims and had seen a huge increase in those claims.¹⁰
- 5.59 It might be argued that many workplace issues resulting in psychological injury claims are, in their genesis, human resource management issues (resulting, for example, from interpersonal conflict and performance management matters) rather than medical issues. That raises the question whether there should be a role for the Fair Work Commission in relation to those workplace issues that result in workers compensation claims. I discuss that idea further in paragraphs 9.157–9.172 below.
- 5.60 However, there seems little doubt that many work-related psychological injuries are significant medical conditions, requiring treatment by psychiatrists or clinical psychologists. There is no straightforward way to distinguish those workplace issues that should be treated as workers compensation matters from those that should be treated as human resource grievances.

7 See: <http://www.hse.gov.uk/stress/standards/step1/index.htm>. Set out in the Management Standards detailed in the leaflet: How to tackle work-related stress. A guide for employers on making the Management Standards work. Available at: <http://www.hse.gov.uk/pubns/indg430.pdf>

8 Accident Compensation Act Review: Final Report, August 2008, p 77.

9 Accident Compensation Act Review: Final Report, August 2008, p 78.

10 Accident Compensation Act Review: Final Report, August 2008, p 78.

5.61 Nor is there any reason to treat psychological injuries differently from physical injuries. Provided that scientific rigour is applied to the diagnosis of psychological injuries, incapacity resulting from those injuries should be compensated in the same way as incapacity resulting from physical injuries.

RECOMMENDATIONS

5.62 I do not recommend any change to the basic approach in the SRC Act that compensation is payable for psychological injuries, just as it is for physical injuries. However, I recommend some changes that would introduce a modest degree of rigour into the payment of compensation for psychological injuries.

5.63 To improve the management of ongoing psychological injuries, in Chapter 9 I recommend that the SRC Act be amended to require that compensation in respect of psychological injuries will continue beyond 12 weeks only where the diagnosis of those psychological injuries has been made or confirmed by a psychiatrist, a clinical psychologist or a general practitioner who has completed mental health training to a standard approved by Comcare: see paragraphs 9.39–9.47 and **Recommendation 9.4** below.

5.64 I also recommend that the effect of the Federal Court’s judgment in *Wiegand v Comcare* (referred to in paragraph 5.50 above) be negated so that an employee’s perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis. It is an unfair burden on employers to make them liable to pay compensation for a psychological injury that is caused by an employee’s fantasising rather than by any aspect of employment.

5.65 I recommend that new subsections be added to s 5A immediately after s 5A(2), and to s 5B immediately after s 5B(2), as follows:

5A(3) For the purposes of subsection (1), a mental injury will only arise out of the employee’s employment if any perception on which the injury is based has a reasonable basis.

5B(2A) For the purposes of subsection (1), a mental ailment or the aggravation of such an ailment will only be taken to have been contributed to, to a significant degree, by the employee’s employment by the Commonwealth or a licensee if any perception on which the injury is based has a reasonable basis.

RECOMMENDATION 5.2

I recommend that the effect of the Federal Court’s judgment in *Wiegand v Comcare* should be negated so that an employee’s perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis.

HEART ATTACKS, STROKES AND SIMILAR INJURIES

RECOMMENDATIONS

5.80 The SRC Act should be amended so that all incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, aneurisms, spinal disc ruptures caused by degenerative diseases and similar phenomena) will be covered for workers compensation purposes on the same basis as a “disease”—that is, where the incident was contributed to, to a significant degree, by the employee’s employment. An employee may still be able to establish that employment made a significant contribution to the development or aggravation of the underlying disease process or to the particular incident; in either case, the incident would qualify as a disease and therefore an injury for the purposes of the SRC Act.

5.81 5.82 I recommend insertion of a new subsection into s 5A, immediately after s 5A(1), as follows:

5A(1A) For the purpose of subsection (1), a heart attack, stroke, aneurism, spinal disc rupture or other manifestation of an underlying disease process, including a degenerative disease process, shall be taken to be a disease and not an injury (other than a disease).

RECOMMENDATION 5.3

I recommend that the SRC Act be amended so that incidents that are a manifestation of an underlying disease (such as heart attacks, strokes, spinal disc ruptures caused by degenerative disease and similar phenomena) will be covered for workers compensation purposes on the same basis as a “disease”—that is, where the incident was contributed to, to a significant degree, by the employee’s employment.

- 5.84 For claims under the *Military Rehabilitation and Compensation Act 2004* (the **MRC Act**) and the *Veterans’ Entitlements Act 1986* (the **VE Act**), Statements of Principles (**SoPs**) are used to determine liability for injuries, diseases and deaths. SoPs are legislative instruments that define the factors that establish a connection between a medical condition and service in the ADF—that is, they are instruments to determine the causation or work-relationship of injuries, diseases and deaths. SoPs are prepared by the Repatriation Medical Authority according to “sound medical-scientific evidence”, and their aim is to provide an equitable, efficient and non-adversarial system of dealing with claims for liability.
- 5.85 However, under the SRC Act, the work-relationship of injuries, diseases and deaths is determined on a case-by-case basis using evidence provided by medical practitioners.
- 5.86 In its submission to the Review, the MRCC proposes that investigation be undertaken into the possibility of allowing claims for ADF members under Part XI of the SRC Act to be determined by reference to SoPs. The MRCC notes, however, that there are a number of issues that would need to be discussed in greater detail between DEEWR and DVA before such an arrangement could be considered.¹¹
- 5.87 Under the MRC Act there are two SoPs for each condition, because there are different standards of proof required for operational service and peacetime service.
- 5.88 A claim for liability arising out of operational service must be accepted by the MRCC unless it is satisfied “beyond reasonable doubt” that the injury, disease or death does not (or did not) relate to service.
- 5.89 A claim for liability arising out of peacetime service will be accepted only where the MRCC has a reasonable satisfaction—that it is “more likely than not”—that the injury, disease or death does (or did) relate to peacetime service.
- 5.90 The Review of Military Compensation Arrangements (the **MRC Act Review**) reported that ex-service organisation representatives supported the SoP regime. However, those organisations also claimed that SoPs are not keeping up with advances in medical science.¹²
- 5.91 The MRC Act Review accepted that the system had improved equity and efficiency and reduced the adversarial nature of the veterans’ disability pensions system since its introduction in 1994.¹³
- 5.92 An independent review of the SoP system in 1997 concluded that the standard of proof applying in the veterans’ system was far less onerous than that applying in civil proceedings. It assessed that, on average, there was a 5–10 % chance that a successful claim was actually related to operational service. That is, 5–10 successful claims out of every 100 were justified by true causal connection while the remaining 90–95 successful claims were not.¹⁴
- 5.93 However, submissions to the MRC Act Review argued that the MRC Act liability provisions (supported by the SoP regime) had also brought about unintended limitations on compensation coverage in claims involving peacetime service for some medical conditions which are caused by ongoing wear and tear over a significant period.¹⁵
- 5.94

11 Military Rehabilitation and Compensation Commission, Submission to the Review, at “Final Comments”.

12 *Review of Military Compensation Arrangements*, February 2011, Volume 2, p 17, paragraphs 5.10–5.14. Available at: http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx

13 *Review of Military Compensation Arrangements*, February 2011, Volume 2, p 21. Available at: http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx

14 D Pearce and D Holman, *Review of the Repatriation Medical Authority and the Specialist Medical Review Council*, Department of Veterans’ Affairs, 1997.

15 *Review of Military Compensation Arrangements*, February 2011, Volume 2, p 17, paragraphs 5.10–5.14. Available at: http://www.dva.gov.au/pensions_and_compensation/Military%20Compensation%20Review/report/Pages/default.aspx

RECOMMENDATIONS

- 5.96 While there is considerable support among the military community for the SoP regime applying under the VE Act and MRC Act, it is also clear there are some concerns about certain aspects of the operation of the SoP regime in practice. It has not been practicable, in the time I have had available to conduct my review, to consider in detail the workings of the SoP regime or how to address the concerns with the current arrangements.
- 5.97 I therefore recommend that the Government direct DEEWR and DVA to examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the Repatriation Medical Authority's SoP regime and, if so, how such a proposal might address the concerns with the current SoP arrangements.

RECOMMENDATION 5.4

I recommend that DEEWR and DVA examine whether there is merit in allowing claims by ADF members under Part XI of the SRC Act to be determined by reference to the SoP regime.

WHAT IS NOT COVERED BY THE SCHEME

- 5.98 There are a number of exclusions in the SRC Act. They are:
- (a) wilful and false representations by an employee;
 - (b) serious and wilful misconduct and self-inflicted injuries;
 - (c) injuries or diseases suffered as a result of a "reasonable administrative action"; and
 - (d) injuries suffered during journeys from home to work and work to home.

SERIOUS AND WILFUL MISCONDUCT AND SELF-INFLICTED INJURIES

- 5.101 Compensation is not payable in respect of an injury that is intentionally self-inflicted: s 14(2) of the SRC Act. Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted: s 14(3). However, s 14(3) does not apply if the injury results in death, or serious and permanent impairment. That is, in such instances compensation is still payable.

REASONABLE ADMINISTRATIVE ACTION

- 5.103 An injury (including a disease) suffered as a result of "reasonable administrative action, taken in a reasonable manner, in respect of the employee's employment" is excluded from compensation: s 5A(1). The exclusion is aimed at psychological injuries sustained in the workplace as a result of particular circumstances. That was acknowledged in the *Explanatory Memorandum to the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006*.¹⁶
- 5.104 Section 5A(2) contains a non-exhaustive list of what constitutes "reasonable administrative action". It includes, but is not limited to:
- (a) a reasonable appraisal of the employee's performance;
 - (b) a reasonable formal or informal counselling action;
 - (c) a reasonable suspension action;
 - (d) a reasonable formal or informal disciplinary action;
 - (e) anything reasonable done in connection with any of the above; and
 - (f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit.
- 5.105 The reasonable administrative action exclusion was introduced in April 2007 to replace a more narrowly expressed exclusion that focused on "reasonable disciplinary action" and "failure ... to

¹⁶ Part I, p 4.

obtain a promotion, transfer or benefit in connection with employment”. It also brought the SRC Act closer in line with most workers compensation schemes in Australia.

- 5.106 The exclusion has been the subject of a considerable volume of litigation, for the most part in the AAT but also in the Federal Court, including in *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21; (2012) 199 FCR 463, which is discussed in paragraphs 5.111–5.115 below.
- 5.107 The difference between the exclusionary provisions applying with regard to “reasonable action” or “reasonable administrative action” in the various workers compensation schemes in Australia is now relatively minor. The relevant exclusionary provisions across the Commonwealth and the State and Territory schemes are set out in Table 3.13 of the Compensation Arrangements Comparison Report, “Exclusionary provisions for psychological injuries”.¹⁷
- 5.108 The provisions primarily affect psychological injury claims, and are intended to protect employers’ capacity to manage their staff by undertaking “legitimate human resource management actions ... in a reasonable manner”. The exclusionary provisions are an exception to the standard approach in workers compensation legislation, whereby most aspects of coverage are “no-fault”.¹⁸

DISCUSSION

- 5.111 The Full Federal Court judgment in *Commonwealth Bank of Australia v Reeve*¹⁹ has provided important guidance on the scope of the provision, by drawing a distinction between “administrative” and “operational” actions of an employer. An instruction to an employee to perform work at a particular location, or to perform particular duties, is not administrative action but would be regarded as operational and would not trigger the exclusionary provision, so that any injury to an employee resulting from an operational action is compensable.
- 5.112 The Full Court concluded that weekly teleconferences held by the Commonwealth Bank to discuss the performance of the Bank’s Perth branches, including the results of customer satisfaction surveys, were operational actions, which were intended to assess the performance of CBA branches across a range of customer services, and were not an assessment of the performance of branch managers (including Mr Reeve). The actions were not taken “in respect of the employee’s [namely, the branch manager’s] employment”.
- 5.113 Although some employers have expressed concern that the Reeve decision has narrowed the reasonable administrative action exclusion beyond what was intended by Parliament, I am not persuaded that the decision had that effect. By November 2012, the Reeve decision had been considered in 12 AAT cases and in two Federal Court cases (one of which was a Full Court judgment). Seven of those cases affirmed the decision to exclude liability on the basis that an injury was caused as a result of reasonable administrative action, one case merely discussed the exclusion but did not apply it because the injury in question pre-dated the introduction of the exclusion, and only six cases set aside a decision that had been based on the exclusion.
- 5.114 The Reeve decision has certainly clarified the meaning of “reasonable administrative action in respect of an employee’s employment”. While the exclusion gives protection to managers in the management of staff, the requirement that the administrative action be reasonable and that it be taken in a reasonable manner provides a significant corrective against a too stringent application of the exclusion, and imposes an appropriate standard of care on managers.
- 5.115 However, there are several aspects of the exclusion that justify some attention:
- (a) the degree of contribution to the claimed injury that is required before the “reasonable administrative action” will operate to exclude an injury from the SRC Act;
 - (b) the list of reasonable administrative actions in s 5A(2); and
 - (c) the relevance of determinations of the Fair Work Commission.

THE REQUIRED DEGREE OF CONTRIBUTION

- 5.116 The reasonable administrative action provisions of the SRC Act were introduced in their current form in April 2007; and the Reeve decision was handed down in March 2012, so it may not be possible to

17 Compensation Arrangements Comparison Report (referred to at paragraph 5.13 above), pp 85–87.

18 Beasley Legal goes further and suggests that this provision “places undue hardship on employees, is legally inconsistent and morally unjust”: Beasley Legal, Submission to the Review, p 5.

19 [2012] FCAFC 21; (2012) 199 FCR 463.

assess their full implications at this stage. It could be said that the 14 cases decided since the Reeve decision (see paragraph 5.113 above) suggest that the exclusion has allowed decisions on compensation liability to reflect an appropriate balance between allowing employers to manage the quality of workforce performance (including by sanctioning activities that threaten other employees' safety and wellbeing) and protecting the health of employees.

- 5.117 However, there are two reasons why s 5A(1) should be amended to define the required connection between "reasonable administrative action" and the injury (almost always the disease) that will trigger the exclusion.
- 5.118 First, substantial disagreement has emerged within the AAT as to the required connection.
- (a) For example, in *Re Wang and Comcare* [2012] AATA 242 at [54], the AAT said that the administrative action relied upon must be shown to contribute to the disease to a significant degree before the exclusion can operate. See also *Re Beasley and Comcare* [2012] AATA 411 at [81] and [82].
- (b) On the other hand, in *Re Ferguson and Commonwealth Bank* [2012] AATA 718 at [125]–[126], the AAT said that nothing in s 5A(1) required the reasonable administrative action to make a significant contribution to the employee's condition; all that was required was an operative causal relationship between the relevant "reasonable administrative action" and the relevant "disease". See also *Jablonka and Comcare* [2012] AATA 627 at [31]; *Re Silk and Comcare* [2012] AATA 638 at [68]; and *Re Dunstan and Comcare* [2012] AATA 567 at [280].
- 5.119 I believe that the view expressed in, for example, *Re Ferguson and Commonwealth Bank* [2012] AATA 718 at [125]–[126] accurately reflects the ruling made by the Full Federal Court in *Hart v Comcare* [2005] FCAFC 16; (2005) 145 FCR 29. That view is confirmed by the Full Court's recent discussion in *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21; (2012) 199 FCR 463 at [54]–[55]; and in *Drenth v Comcare* [2012] FCAFC 86 at [34]. However, in view of the disagreement, a definitive statement would be useful.
- 5.120 Secondly, there is an element of unfairness about the results of the ruling in *Hart v Comcare* [2005] FCAFC 16; (2005) 145 FCR 29. Although a psychological ailment will only be regarded as a disease, and therefore an injury, for the purposes of the SRC Act where employment has made a significant (that is, substantially more than material) contribution to the ailment, the same ailment may be denied classification as an injury for the purposes of the SRC Act where "reasonable administrative action" is no more than one of many operative causes of the ailment.

THE LIST OF REASONABLE ADMINISTRATIVE ACTIONS IN s 5A(2)

- 5.121 The current list in s 5A(2) of the SRC Act, which is non-exhaustive, leads to some uncertainty as to exactly how far the exclusions extend and invites expensive litigation. There would be greater certainty and clarity with the concept of reasonable administrative action if the list were to be made an exhaustive list of actions.
- 5.122 I have considered whether the list of the types of action that are taken to be "reasonable administrative action" should, in an amended version of s 5A(2), include a reasonable restructuring of the workforce through relocation, reclassification or transfer as an administrative action. Several employers raised with me the need to extend the exclusion in order to protect restructuring decisions, given the increasing demands on employers to achieve efficiencies by responding to technological change and competition.
- 5.123 However, it is clear from the Full Federal Court's discussion in *Reeve* that decisions and action of that kind fall outside the concept of "administrative action in respect of the employee's employment", and would be properly characterised as operational action: see paragraphs 5.111 and 5.113 above. To include restructuring decisions and action in s 5A(2) would not only contradict the concept of "administrative action in respect of the employee's employment", and involve a significant reduction in the benefits available under the SRC Act, but also place a significant part of the cost of advancing employers' business objectives on their employees. In my opinion, employers who pursue profitability or enhanced efficiency through restructuring their workforce should continue to be responsible for the personal health consequences that affect their employees.

THE RELEVANCE OF DETERMINATIONS BY THE FAIR WORK COMMISSION

5.124 In some situations, an incident that gives rise to a claim for compensation is also the subject of a dispute before the Fair Work Commission: see paragraphs 9.157–9.172 below. There is a great deal to be said for the proposition that employers and employees should not be permitted or required to re-litigate issues of that kind if the issues have also been brought before the Fair Work Commission. I consider this matter further in Chapter 9 at paragraphs 9.168-9.173 below.

RECOMMENDATIONS

5.125 I recommend that s 5A(1) be amended so that the exclusion will operate where the reasonable administrative action has made a significant (that is, substantially more than material) contribution to the disease, injury or aggravation.

5.126 I recommend that the final paragraph of s 5A(1) be amended as follows:

but does not include a disease, injury or aggravation ~~suffered as a result of~~ that was contributed to, to a significant degree, by reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

5.127 I further recommend that s 5A(2) be amended by removing the words “and without limiting that subsection”, so as to make it clear that the list in s 5A(2) is a complete list of the actions that are taken to be “reasonable administrative action”. The proposed s 5A(2) would read as follows:

For the purposes of subsection (1) ~~and without limiting that subsection,~~ **reasonable administrative action** is taken to include the following:

RECOMMENDATION 5.5

I recommend that the SRC Act be amended so that the reasonable administrative action exclusion in s 5A(1) operates only where the reasonable administrative action taken in a reasonable manner in respect of the employee's employment has contributed, to a significant degree, to the disease, injury or aggravation.

RECOMMENDATION 5.6

I recommend that s 5A(2) be amended by removing the words “and without limiting that subsection”, so as to make it clear that the list in s 5A(2) is a complete list of the actions that are taken to be “reasonable administrative action”.

7 REHABILITATION

- 7.1 All workers compensation schemes in Australia emphasise a timely, safe and durable return to work for injured employees, who are encouraged to participate in rehabilitation as soon as they are able to do so.
- 6.2 Early recovery from injury brings with it a range of benefits, for both injured employees and their employers. For employees, there is the obvious benefit of recovering from injury more quickly, and returning to work and life. For employers, early rehabilitation means that the investment in existing employees is not lost, productivity and workplace morale are improved and compensation costs (in the form of premiums for premium payers, and compensation payments for licensees) are lowered.
- 6.3 Some of the principal factors identified as contributing to good rehabilitation and early recovery are:²⁰
- (a) early intervention in treating the injury or disease;
 - (b) early workplace-based rehabilitation;
 - (c) effective claims management; and
 - (d) well-designed and properly targeted benefits and dispute-resolution structures.
- 6.4

RECOMMENDATION 6.1

I recommend that the SRC Act explicitly provide for early intervention as the primary form of rehabilitation, recognised in the injury management and rehabilitation code of practice proposed in **Recommendation 6.9**.

PROVISIONAL LIABILITY

CURRENT SYSTEMS OF PROVISIONAL LIABILITY

- 6.23 Many Australian workers compensation schemes have introduced mechanisms that facilitate early intervention through early access to compensation and encourage timely decision making. Those mechanisms include commencement of provisional compensation payments if the decision-making time period is exceeded, or general provisional payment of income replacement and medical expenses.
- 6.28 One consequence of that system is the potential for abuse that accompanies limited assessment of liability. However, as at 17 January 2013, 83 % of all claims lodged in the 2011–12 financial year were (ultimately) accepted.²¹
- 6.29

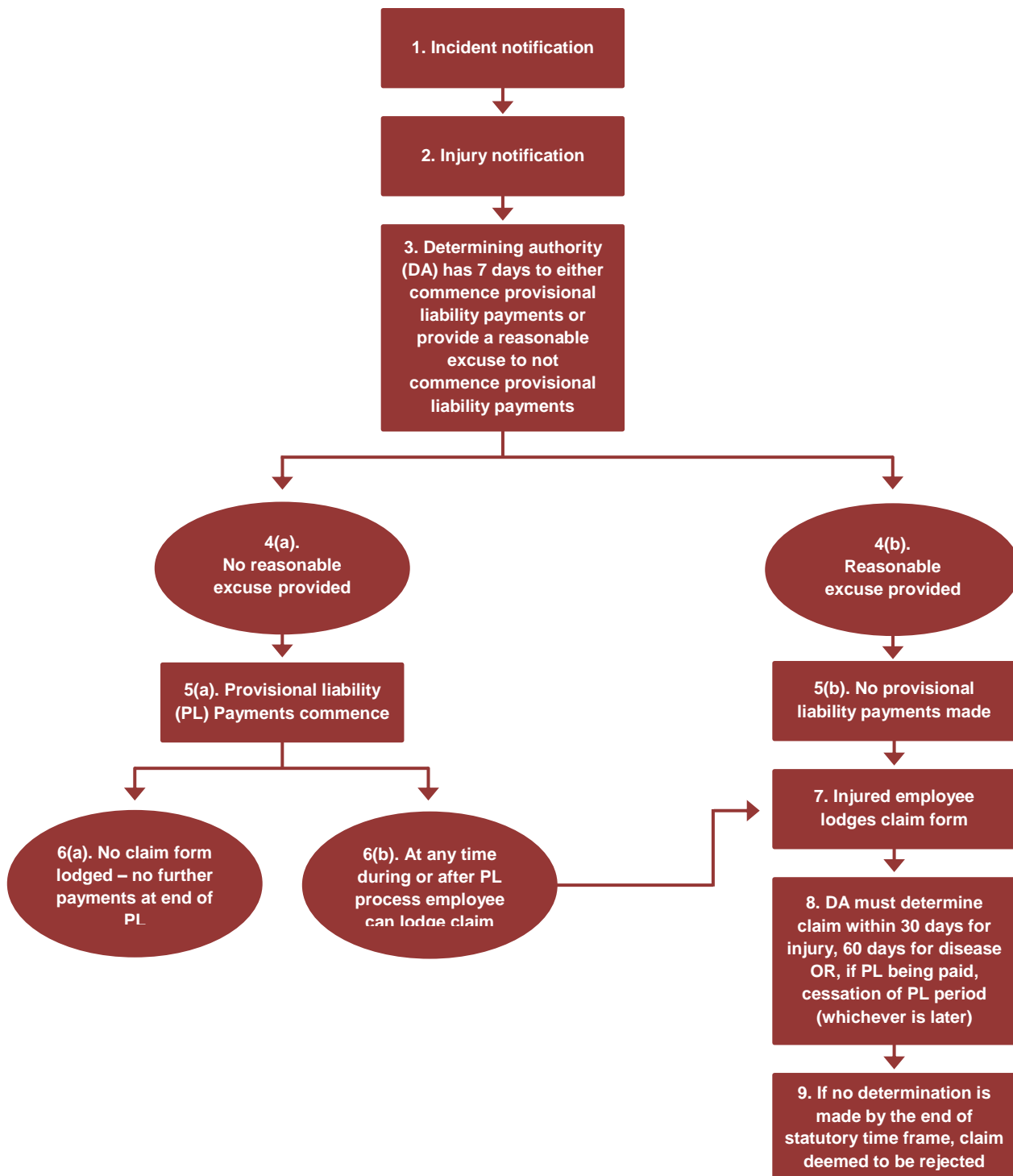
RECOMMENDATIONS

- 6.47 In order to support early intervention, the SRC Act should be amended to include a system of provisional liability that allows an injured employee access to a maximum of 12 weeks of incapacity payments, and medical costs of up to \$3,000. Provisional liability is to be determined on the following basis:
- (a) upon receipt of an injury notification the determining authority has seven days either to commence provisional liability payments or to provide a reasonable excuse (as prescribed) not to commence provisional liability payments; and
 - (b) if no reasonable excuse is provided, provisional liability payments must commence within seven days of the determining authority receiving the injury notification.

20 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Inquiry Report No 27, 6 March 2004, p 191. Available at: http://www.pc.gov.au/data/assets/pdf_file/0006/18546/workerscomp.pdf

21 As supplied by Comcare.

Figure 1: The proposed provisional liability model



6.48 Compensation for injuries and diseases

7.1 The SRC Act provides for various heads of compensation for employees with an injury. In this chapter I consider compensation paid for lost income, known as income replacement, and compensation for medical expenses.

7.2 There are many aspects to income replacement.

- (a) I consider first how those benefits are initially calculated (Calculating income replacement): paragraphs 7.3–7.38 below; and then the subsequent actions or events that can reduce those benefits (Adjusting payments during incapacity): paragraphs 7.39–7.155 below.
- (b) I then consider briefly income replacement while on a rehabilitation program: paragraphs 7.156–7.163 below.

(c) Next, I consider the level of benefits paid for the period of incapacity: paragraphs 7.165–7.201 below; and their duration: paragraphs 7.202–7.233 below.

(d) Finally, I consider the redemption of income replacement: paragraphs 7.234–7.262 below.

The other issues addressed in this chapter are compensation for medical expenses: paragraphs 7.263–7.378 below; compensation for medical expenses for defence-related claims managed by the MRCC under Part XI of the SRC Act: paragraphs 7.379–7.388 below; and compensation for services provided in the home (household and attendant care services): paragraphs 7.389–7.476 below.

RECOMMENDATION 7.12

I recommend that s 37(5) of the SRC Act be repealed.

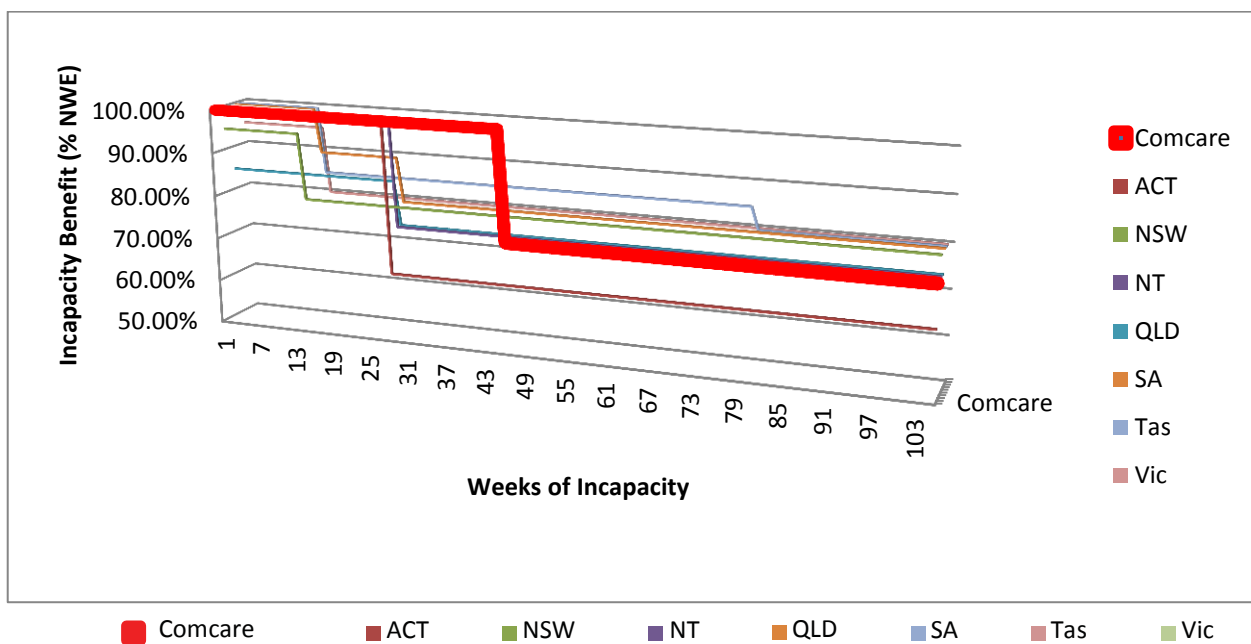
THE LEVEL AND DURATION OF INCOME REPLACEMENT

7.164 As discussed in paragraph 7.9 above, all Australian workers compensation schemes link compensation for lost income to an employee’s pre-injury earnings and impose limits on the calculation, level and duration of weekly benefits.

THE LEVEL OF PAYMENTS ADJUSTED BY S19

7.165 Structured reductions in weekly benefits, based on the period of incapacity, are commonly referred to as “step-downs”. The step-down provisions in the SRC Act have been in place since it commenced on 1 December 1988.

Figure 3: Step-down arrangements in all Australian workers’ compensation schemes



MODEL 1: PREFERRED MODEL FOR STEP-DOWNS

Weeks Incapacitated	Percentage of NWE
0-13	100 %
14-26	90 %
27+	80%

7.192 I also considered two other models.

MODEL 2

Weeks Incapacitated	Percentage of NWE
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Weeks Incapacitated	Percentage of NWE
0-13	100 %
14-26	90 %
27-52	80 %
53+	75 %

MODEL 3

Weeks Incapacitated	Percentage of NWE
0-13	100 %
14-26	90 %
27-52	80 %
53+	70%

RECOMMENDATION 7.13

I recommend that weekly compensation be paid at 100% of an employee's NWE during the first 13 weeks of the employee's incapacity for work, at 90% of the employee's NWE during weeks 14-26 of incapacity for work and thereafter at 80% of the employee's NWE while the employee remains incapacitated for work.

7.198 **Recommendation 7.13** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

RECOMMENDATION 7.14

I recommend that compensation be calculated, at the levels recommended in Recommendation 7.13, by reference to the employee's NWE less any earnings the employee receives from additional employment, deleting references to the "adjustment percentage".

RECOMMENDATION 7.15

I recommend that the step-down periods be calculated on the basis that time will run for each period during any week when the employee is participating in a return to work program or absent from work for any reason other than undergoing medical treatment, for which compensation is payable under s 16 of the SRC Act.

7.199 Recommendation 7.15 has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

THE DURATION OF PAYMENTS

7.202 No matter how they are funded, the one constant shared by all workers compensation schemes is that they must be financially viable and sustainable. There is a balance to be struck between, on the one hand, supporting injured employees who are recovering from injury and returning to work and, on the other hand, maintaining the affordability of a workers compensation scheme for employers. That balance is generally struck by denying access to compensation once particular thresholds are passed—in particular, the age of the employee. The SRC Act contains limitations by reference to the employee:

- (a) reaching the age of 65: discussed in paragraphs 7.204–7.224 below;
- (b) refusing to take part in a rehabilitation program: see paragraph 7.226 below; and
- (c) being imprisoned following conviction of an offence: see paragraph 7.227 below.

RECOMMENDATIONS

7.232 To achieve the objectives outlined in paragraph 7.230 above, the SRC Act should be amended so that entitlement to weekly compensation is suspended during any period of more than 60 days when

an employee is absent from Australia—subject to exceptions where the employee’s employment with the Commonwealth or a licensee, or “suitable employment” undertaken by the employee, require the employee to leave Australia. Employees should be obliged to notify the relevant determining authority of any absence from Australia that exceeds 60 days.

7.233

RECOMMENDATION 7.17

I recommend that the SRC Act be amended so that:

- (a) entitlement to weekly compensation is suspended during any period of more than 60 days when an employee is absent from Australia—subject to exceptions where the employee’s employment with the Commonwealth or a licensee or “suitable employment” undertaken by the employee require the employee to leave Australia; and
- (b) employees are obliged to notify the relevant determining authority of any absence from Australia that exceeds 60 days.

REDEMPTION OF COMPENSATION PAYMENTS

7.234 Redemption of compensation involves the payment of a lump sum amount to an employee in lieu of the employee’s ongoing weekly incapacity payments. The SRC Act limits redemption to compensation payments for incapacity for injured employees whose incapacity payments are equal to or less than the specified indexed amount (currently that amount stands at \$105.42²²): s 30(1) of the SRC Act.

RECOMMENDATIONS

VOLUNTARY REDEMPTION – BASIC FEATURES

7.253 I recommend that the SRC Act be amended so that an employee may redeem her or his entitlement to compensation payments, but only on a voluntary basis. Those voluntary redemptions would not replace, but would supplement, the compulsory redemption of low-level incapacity payments pursuant to s 30 of the SRC Act: see paragraphs 7.234–7.237 above. There is some point in allowing determining authorities to redeem liability to make those low-level payments— where the cost of administering the payments will approach, if not exceed, the level of payments being made— provided that the interests of employees remain protected (as those interests are currently protected) by the system of reconsideration and external review under Part VI of the SRC Act.

7.254 Voluntary redemption, where chosen by an employee, would apply to:

- (a) incapacity payments under s 19 of the SRC Act (or ss 20, 21 or 21A if retained and applicable);
- (b) compensation for the cost of medical treatment under s 16 of the SRC Act (including travel costs); and
- (c) compensation for attendant care services and household services under s 29 of the SRC Act.

7.255 Redemption would not apply to, and therefore would not extinguish liability with respect to:

- (a) compensation for dependants of an employee whose injury results in death, and for funeral expenses, under ss 17 and 18 of the SRC Act;
- (b) compensation for permanent impairment and non-economic loss under ss 24 and 27 of the SRC Act (but see paragraph 7.256(b) below); and
- (c) the obligations of the relevant authority and the employer relating to rehabilitation and the provision of suitable employment under Part III Division 3 of the SRC Act.

VOLUNTARY REDEMPTION – PRE-CONDITIONS

7.256 Redemption would only be possible if the following pre-conditions are met:

22 As at 1 July 2012, pursuant to s 30(4). See: http://www.comcare.gov.au/claims/benefits_and_entitlements/statutory_rates

- (a) two years have elapsed since the employee's first claim for weekly incapacity payments was accepted;
- (b) the employee's entitlement to compensation for permanent impairment and non-economic loss under ss 24 and 27 of the SRC Act has been determined;
- (c) the employee has been assessed as:
 - (i) having exhausted all rehabilitation options—that is, the employee has demonstrated a sustained return to work (at whatever level) with limited capacity for improvement; or
 - (ii) unfit to return to suitable employment with limited capacity for improvement; and
- (d) the employee has an existing and continuing entitlement to incapacity payments (whether the employee's incapacity is partial or total).

VOLUNTARY REDEMPTION – THE PROCESS

7.257 Redemption would only be payable if:

- (a) once the preconditions outlined in paragraph 7.256 above are met, the employee asks the determining authority to make a redemption offer;
- (b) within 42 days of the offer, the employee accepts an offer of redemption from the determining authority made in response to that request;
- (c) at the time of accepting the offer, the employee informs the determining authority in writing that the employee has received and understood independent legal and financial advice (see paragraph 7.258 below) about the redemption and its likely effect on the employee's legal and financial position; and
- (d) the employee and the determining authority sign a redemption agreement.

7.258 If an employee meets the criteria for redemption outlined in paragraph 7.256 above, the determining authority will be liable to pay for any legal and financial advice sought and received by an employee, once in every two-year period (so that, where an employee elects not to accept a redemption offer, the employee cannot require the determining authority again to pay the cost of obtaining legal and financial advice until two years have elapsed).

VOLUNTARY REDEMPTION – THE AMOUNT PAYABLE

7.259 The amount payable for a redemption would be calculated by the determining authority taking into account anticipated incapacity payments, compensation for the cost of medical treatment and compensation for attendant care and household services, with the redemption amount offered not to exceed the total of:

- (a) three years of incapacity payments (at the lower of 80 % of NWE indexed or the employee's current weekly incapacity entitlement);
- (b) an estimate of the cost of medical treatment for the next three years (based on the cost of the employee's medical treatment over the year prior to redemption); and
- (c) an estimate of attendant care and household services for the next three years (based on the employee's average service costs over the year prior to redemption).

7.260 I do not recommend that a formula be prescribed for calculating the amount to be offered. Instead:

- (a) the determining authority should decide the amount to be offered within the cap (see paragraph 7.259 above);
- (b) the determining authority should make a transparent offer by disclosing the basis of the calculations; and
- (c) the employee can then decide whether to accept the amount offered.

VOLUNTARY REDEMPTION – FINALITY

7.261 It is important that any redemption, entered into by the determining authority and a fully informed and properly advised employee, be a final redemption of the employee's relevant entitlements under the SRC Act. If redemption is to allow employees to make a clean break with the compensation system and allow determining authorities to close their files, redemption needs to be final.

- (a) The determining authority will calculate the amount of the redemption and provide the offer in writing to the employee.

- (b) The employee will have 28 days to consider the offer and seek legal and financial advice: see paragraph 7.257(c) above.
- (c) If the employee accepts the offer, the employee's claim is redeemed and closed. The employee will not be entitled to any further compensation in respect of the injury.
- (d) Any aggravation of the injury, and any consequential injury, would be treated as a new injury, independent of the redeemed claim and unaffected by the redemption.
- (e) Similarly, if the employee dies as a result of the injury to which the redemption related, a claim by the employee's dependants for compensation under ss 17 and 18 of the SRC Act will not be affected by the redemption.
- (f) Unlike redemptions under s 30 of the SRC Act, voluntary redemptions will not involve determinations for the purposes of Part VI of the SRC Act; they involve agreements between an employee and a determining authority. They will not be reviewable.

COMPULSORY REDEMPTION

7.262 I recommend retention of s 30 of the SRC Act, the power of determining authorities to determine that low-level incapacity payments be redeemed, but that the threshold for its operation be increased to \$150 per week, indexed by reference to CPI (as is currently the case).

RECOMMENDATION 7.18

I recommend that s 30 of the SRC Act be amended so that an employee may redeem her or his compensation payments on a voluntary basis.

RECOMMENDATION 7.19

I recommend that s 30 be retained, but that the threshold for its operation be increased to \$150 per week, indexed by reference to the CPI.

COMPENSATION FOR MEDICAL EXPENSES

- 7.263 A determining authority is liable to pay compensation of such amount as it determines is appropriate in respect of medical treatment that was reasonably obtained by an injured employee: s 16(1) of the SRC Act.
- 7.264 Further, a determining authority must pay the costs associated with travel to and from medical treatment, and in respect of any costs incurred by an employee if the employee remains at the place where she or he is receiving medical treatment: s 16(6) of the SRC Act. Before compensation is payable under s 16(6), the reasonable length of the journey must exceed 50 kilometres, unless the journey by the employee involved the use of public transport or ambulance services: s 16(7) of the SRC Act.
- 7.265 There are four questions involved in determining whether compensation for medical expenses is payable pursuant to s 16(1):
- (a) Is the service that was provided "medical treatment"?
 - (b) Was that treatment obtained in relation to an "injury" suffered by an employee?
 - (c) Was that medical treatment reasonable for the employee to obtain in the circumstances?
 - (d) What is the appropriate amount of compensation payable for that medical treatment?
- 7.266 Determining whether medical treatment was obtained in relation to an injury suffered by an employee is relatively straightforward. I have not been made aware of any issues with that concept and, as a result, it is not discussed.

WHAT IS MEDICAL TREATMENT

7.267 Medical treatment is defined in s 4(1) of the SRC Act to include the provision of eight types of treatment and any other form of treatment that is prescribed. Medical treatment means (in part):

- (a) medical or surgical treatment by, or under the supervision of, a legally qualified medical practitioner: paragraph (a) of the definition;
- (b) dental treatment by, or under the supervision of, a legally qualified dentist: paragraph (c) of the definition;
- (c) therapeutic treatment by, or under the supervision of, a physiotherapist, osteopath, masseur or chiropractor registered under the law of a State or Territory providing for the registration of physiotherapists, osteopaths, masseurs or chiropractors, as the case may be: paragraph (d) of the definition;
- (d) treatment and maintenance as a patient at a hospital: paragraph (g) of the definition; or
- (e) nursing care, and the provision of medicines, medical and surgical supplies and curative apparatus, whether in a hospital or otherwise: paragraph (h) of the definition.

7.268 Except for masseurs, the health practitioners that may provide therapeutic treatment without the direction or supervision of an LQMP (paragraph (d) of the definition) must be registered under the law of a State or Territory to practise.

NATIONAL HEALTH PRACTITIONER REGULATION

7.269 In March 2008 the Council of Australian Governments decided to establish a single National Registration and Accreditation Scheme for 10 health professions, to be introduced on 1 July 2010, and to be administered by the AHPRA. Following additions that came into effect on 1 July 2012, the following 14 health professions are now regulated by the AHPRA.²³

- (a) Aboriginal and Torres Strait Islander health practitioners;
- (b) Chinese medicine practitioners;
- (c) chiropractors;
- (d) dental practitioners (including dentists, dental hygienists, dental prosthetists and dental therapists);
- (e) medical practitioners;
- (f) medical radiation practitioners;
- (g) nurses and midwives;
- (h) occupational therapists;
- (i) optometrists;
- (j) osteopaths;
- (k) pharmacists;
- (l) physiotherapists;
- (m) podiatrists; and
- (n) psychologists.

7.270 The introduction of the National Registration and Accreditation Scheme means that each of the 14 health professions that are regulated by a national board must meet the standards and policies set by the relevant National Board in order to be registered to practise in Australia.

7.271 Masseurs are not subject to the National Registration and Accreditation Scheme. That is, masseurs do not have to be registered in order to practise in Australia and do not have a National Board setting standards that must be met by a masseur.

7.272 In its submission to the Review, the Australian Psychological Society addresses the issue of medical treatment providers and, in particular, the difference between psychologists (who are subject to registration) and counsellors (who are not):²⁴

... psychologists and psychological services in particular, need to be included in s.4 of SRC Act alongside medical treatment and therapeutic treatment. Doing so will also tighten up the SRC Act, as, in its current form, the Act exposes Comcare workers to treatment by poorly qualified providers who may exacerbate conditions or do further harm through inadequate treatment.

²³ Embodied in the Health Practitioner Regulation National Law Act 2009 (Qld) and complementary legislation in each State and Territory.

²⁴ Australian Psychological Society, Submission to the Review, p 3.

Comcare currently has no legislative power to prevent such treatment as it is “under the referral of a medical practitioner”. Given the large increase in psychological claims, there is a risk of poor outcomes through treatment provision by unaccredited and unregulated “counsellors” ...

- 7.273 The introduction of the National Registration and Accreditation Scheme and the registration and regulation of 14 health professions under that Scheme mean that the SRC Act is out of step with current regulatory practice.
- 7.274 As discussed in paragraphs 7.228–7.231 above, even though there are arguments for restricting access to compensation for employees who are absent from Australia, there will be situations where medical treatment received outside Australia should be compensated; for example, where an employee is outside Australia because of her or his employment.

RECOMMENDATIONS

- 7.275 Definitions of “legally qualified dentist” and “legally qualified medical practitioner” should be inserted in s 4(1) of the SRC Act, consistent with the registration scheme administered by AHPRA. Those definitions could be expressed as follows:
- Legally qualified dentist** means a practitioner registered with the Dental Board of Australia.
- Legally qualified medical practitioner** means a practitioner registered with the Medical Board of Australia.
- 7.276 The definition of “medical treatment” in s 4(1) of the SRC Act should also be amended, as follows:
- (a) by removing the words “, or under the supervision of,” in paragraph (a);
 - (b) by removing “masseur” from paragraph (d);
 - (c) by amending paragraph (d) to require that the listed health practitioners be registered under “the National Registration and Accreditation Scheme”;
 - (d) by adding a new paragraph (da) to include therapeutic treatment by a health practitioner recognised and accredited by Comcare; and
 - (e) by adding a new paragraph (db) to include medical, surgical, dental or other therapeutic treatment outside Australia, where Comcare is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare.
- 7.277 Comcare recognition and accreditation of health practitioners, as contemplated by the new paragraph (da), could include, for example, recognition and accreditation of masseurs and of medical treatment providers located outside Australia.
- 7.278 Giving Comcare the discretion to approve health practitioners outside Australia, as contemplated by the new paragraph (db), would ensure that employees who require medical treatment outside Australia because of the requirements of their employment, and employees who are travelling for personal reasons within the 60-day period that will be specified in s 120 of the SRC Act (see paragraph 7.233 above), are not denied compensation for the cost of their medical treatment.
- 7.279 Paragraphs (a) and (d), as amended, and new paragraphs (da) and (db) would read:
- medical treatment** means:
- (a) medical or surgical treatment by a legally qualified medical practitioner; or
....
 - (d) therapeutic treatment by a physiotherapist, osteopath, or chiropractor registered under the National Registration and Accreditation Scheme or by a Comcare recognised and accredited health practitioner; or
 - (da) therapeutic treatment by a health practitioner recognised and accredited by Comcare; or
 - (db) medical, surgical, dental or other therapeutic treatment outside Australia, where the determining authority is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare; or
...

- 7.280 New paragraphs should be inserted in s 69 of the SRC Act to include, as two of the functions of Comcare:
- (a) the recognition, accreditation and monitoring of medical treatment providers who are not subject to AHPRA regulation; and
 - (b) the approval of appropriate medical, surgical, dental or other therapeutic treatment for employees outside Australia.
- 7.281 Accreditation of medical treatment providers would be subject to the providers meeting standards defined in the Clinical Framework for the Delivery of Health Services (the **Clinical Framework**) (discussed in paragraphs 7.309–7.338 below); and the accreditation would be of the relevant professional body, or of a particular qualification, on a national basis rather than of individuals—for example, the national body for masseurs, rather than individual massage therapy providers, would need to negotiate with Comcare for accreditation.

RECOMMENDATION 7.20

I recommend that definitions of “legally qualified dentist” and “legally qualified medical practitioner” be inserted in s 4(1).

RECOMMENDATION 7.21

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to ensure that medical treatment is provided by legally qualified health practitioners with the relevant registration or by health practitioners who have been recognised and accredited by Comcare.

RECOMMENDATION 7.22

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to include treatment provided outside Australia where the determining authority is satisfied that the quality and cost of that treatment is comparable with treatment provided by a health practitioner registered under the National Registration and Accreditation Scheme or recognised and accredited by Comcare.

- 7.282 **Recommendation 7.22** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

RECOMMENDATION 7.23

I recommend that s 69 of the SRC Act be amended to insert new paragraphs to include, as the functions of Comcare:

- (a) the recognition, accreditation and monitoring of medical treatment providers who are not subject to AHPRA regulation; and
- (b) the approval of appropriate medical, surgical, dental or other therapeutic treatment for employees outside Australia.

RECOMMENDATION 7.24

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended to include treatment and maintenance as a resident in a nursing home.

RECOMMENDATIONS

- 7.291 In my view, paragraph (h) of the definition of “medical treatment” should be split into two paragraphs, so that “medicines” can be limited to those prescribed by a legally qualified medical practitioner or dentist and dispensed by a registered pharmacist, or provided to a patient at a hospital or nursing home.
- 7.292 Paragraph (h), as amended, would read:

medical treatment means:

- (h) nursing care, whether in a hospital or otherwise;
- (ha) the provision of medicines prescribed by a legally qualified medical practitioner or legally qualified medical dentist and dispensed by a registered pharmacist or provided to a patient at a hospital or resident in a nursing home, medical and surgical supplies and curative apparatus;

RECOMMENDATION 7.25

I recommend that the definition of “medical treatment” in s 4(1) of the SRC Act be amended so that “medicines” will be limited to those prescribed by a legally qualified medical practitioner or dentist and dispensed by a registered pharmacist, or provided to a patient at a hospital or resident in a nursing home.

A NOMINATED LEGALLY QUALIFIED MEDICAL PRACTITIONER

RECOMMENDATIONS

7.302 I recommend the SRC Act be amended to restrict compensation for Schedule 8 medications to those that are prescribed by the employee’s nominated legally qualified medical practitioner.

7.303 I recommend the term “nominated legally qualified medical practitioner” be defined in s 4 of the SRC Act as follows:

nominated legally qualified medical practitioner means a legally qualified medical practitioner who has been nominated by an employee using the prescribed form for the purpose of prescribing Schedule 8 medications.

7.304 I further recommend that s 16 be amended by inserting a new subsection immediately after subsection (3) as follows:

16(3A) An amount of compensation in respect of Schedule 8 medications will only be payable under subsection (1) if that medication has been prescribed for the employee’s use by the employee’s nominated legally qualified medical practitioner.

RECOMMENDATION 7.26

I recommend that the SRC Act be amended to restrict compensation for Schedule 8 medications to those that are prescribed by the employee’s nominated legally qualified medical practitioner.

I further recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prescribe a form in which an employee would nominate a legally qualified medical practitioner for the purpose of prescribing Schedule 8 medications.

WHAT IS REASONABLE MEDICAL TREATMENT: THE CLINICAL FRAMEWORK FOR DELIVERY

7.309 In June 2012, all State and Territory workers compensation schemes and the Comcare scheme endorsed the Clinical Framework.²⁵ The Clinical Framework is based on a document published in 2005 by WorkSafe Victoria and the Victorian Transport Accident Commission.

7.310 The Clinical Framework is an evidence-based policy framework that outlines a set of five guiding principles for the delivery of allied health services to injured employees. It reflects a contemporary bio-psycho-social approach to the treatment of injured employees, with the primary aim of achieving the best possible outcome for injured employees.

7.311 Those principles also support healthcare professionals in their treatment of an injury through:

- (a) measurement and demonstration of the effectiveness of treatment;

25 Available at: <http://www.tac.vic.gov.au/upload/clinical-framework-single.pdf>

- (b) adoption of a bio-psycho-social approach;
 - (c) empowering the injured person to manage their injury;
 - (d) implementing goals focused on optimising function, participation and return to work; and
 - (e) basing treatment on best available research evidence.
- 7.312 There is now strong evidence that, over and above individual injury characteristics and compensation system features, there is a considerable variation in health and return to work outcomes that is attributable to the quality and focus of the treatment provided.²⁶
- 7.313 The role of health professionals in the workers compensation process cannot be underestimated. Determinations about compensation payable under the SRC Act must be based on medical evidence. Claims managers in the Comcare scheme rely on health professionals managing the medical and rehabilitative needs of injured employees effectively and appropriately.
- 7.314 However, health professionals are also subject to other pressures that can impact on the management of an injured employee's claim for compensation.
- (a) For example, in Australia in 2009–10, only 1.6 % of GPs' general practice encounters were – related to their patients' employment.²⁷
 - (b) In addition to the time constraints generated by the volume of their work, GPs may also feel torn between the desire to “advocate” for their patients and their legal responsibility to provide an objective assessment of their patients' level of work disability, particularly when the patients' conditions lack objective clinical features (for example “back pain” or mild mental health problems²⁸).
 - (c) The priority of many GPs is likely to be maintaining a good relationship with the GP's patient. As a result, even if the GP is not convinced by the patient's presentation, the GP may acquiesce in the patient's wishes to avoid confrontation or damaging rapport.²⁹
- 7.317 The SRC Act is characterised as “beneficial” legislation; as such, where legislative ambiguities arise, the legislation is interpreted in a way that benefits employees. The SRC Act does not define “reasonable” and any consideration of what is “reasonable” must be undertaken against the assumption that the legislation is beneficial.
- 7.318 For example, in *Re Monk and Comcare* [1996] AATA 280, the AAT found that the provision of a new motor vehicle, which had been modified to allow Ms Monk to drive her electric wheelchair on and off, was reasonable in the circumstances because:
- (a) Ms Monk was financially unable to acquire the vehicle;
 - (b) provision of the vehicle would be beneficial to Ms Monk's mental health;
 - (c) provision of transport for the wheelchair was recommended by Ms Monk's rehabilitation provider; and
 - (d) Ms Monk was not mobile without the wheelchair.
- 7.319 In *Re Mikic and Comcare* [2002] AATA 125, the AAT approved the continuation of massage therapy as part of a broader treatment plan, despite the fact that there was no curative effect associated with the massage therapy, which had cost \$29,000 over an eight-year period.
- 7.320 In *Re Holt and Comcare* [2006] AATA 1059, the AAT found that it was reasonable for Mr Holt (who had “generalised anxiety disorder and adjustment reaction with brief depressive reaction”) to attend a Buddhist meditation retreat in another city because he identified as a Buddhist.
- 7.321 Although the SRC Act is beneficial, Comcare also has a responsibility, not only as a Commonwealth authority, but also as the administrator of the Comcare scheme and as a determining authority, to protect the health and wellbeing of injured employees receiving compensation and to ensure the appropriate usage of Commonwealth funds.

26 P Cotton, *The Impact of the Psychosocial Quality of Work on Wellbeing and Performance*, Queensland Alliance of Mental Health Inc, 7 June 2012, p 7. Available at: <http://www.alteringstates.com.au/wp/wp-content/uploads/2012/07/Dr-Peter-Cotton.pdf>

27 RACGP, *The RACGP Curriculum for Australian General Practice 2011*, Occupational Medicine, p 334. Available at: <http://curriculum.racgp.org.au/media/12332/occupationalmedicine.pdf>

28 DA Dunstan, “Are sickness certificates doing our patients harm?”, 38 *Australian Family Physician* 1–2 (January–February 2009) p 62. Available at: <http://www.racgp.org.au/afp/200901/200901dunstan.pdf>

29 DA Dunstan, “Are sickness certificates doing our patients harm?” 38 *Australian Family Physician* 1–2 (January–February 2009) p 61.

- 7.322 Comcare has a responsibility as regulator of the Comcare scheme to ensure, where possible, that health practitioners are held accountable for their conduct, and that they do not exploit what is, in effect, a publicly-funded scheme by overcharging, over-servicing or providing services that do not meet basic professional standards.
- 7.323 With the exception of arranging for an injured employee to attend a medical examination under s 57 of the SRC Act, a determining authority has no involvement in, or control over, an injured employee's choice of medical or therapeutic practitioner or treatment—even in situations where health professionals do not, or refuse to, comply with treatment guidelines or are otherwise not appropriately qualified to provide such services.
- 7.324 Services provided by unregistered health practitioners and over-servicing, by both registered and unregistered health practitioners, can put injured employees at risk. Each Australian workers compensation scheme manages that risk in different ways.
- (a) For example, WorkSafe Victoria relies on the Medicare Australia provider numbers and registration details for medical practitioners. Medical practitioners providing services in the Victorian scheme must be registered with Medicare Australia in order to be paid.³⁰
- (b) In Tasmania, medical practitioners who wish to sign workers compensation medical certificates must be accredited by the WorkCover Tasmania Board.³¹
- 7.328 The importance of the bio-psycho-social approach has been highlighted by the Australian Psychological Society, which submits:³²

... the APS would like to stress the notion that physical and mental health are inseparable and seriously integrated aspects of overall health. For any physical injury that occurs, there are inevitable and important-to-acknowledge psychological consequences or associated features. likewise, any psychological injury is undoubtedly associated with physical health impacts and consequences. The recognition of the unavoidable interrelationship of physical and psychological aspects of health underlies much of the APS's membership work in the community, with its work with government policy development and particularly with injury compensation schemes.

- 7.329 Paragraphs (b) and (d) of the definition of medical treatment refer to therapeutic treatment obtained at the direction of an LQMP and, as noted at paragraph 7.267 above, therapeutic treatment by or under the supervision of legally qualified dental practitioners, physiotherapists, osteopaths, masseurs and chiropractors.
- 7.330 Therapeutic treatment is defined as including an examination, test or analysis done for the purpose of diagnosing, or treatment given for the purpose of alleviating, an injury: s 4(1) of the SRC Act.
- 7.331 The meaning of therapeutic treatment was considered by the Federal Court in *Comcare v Watson* [1997] FCA 149; (1997) 73 FCR 273, where Finn J said:³³

The applicant has submitted that a treatment can only be “therapeutic” if its object is to cure a disease or injury. Though some dictionary definitions do emphasis the “healing or curative” connotation of the words “therapy” and “therapeutic”: see for example, Shorter Oxford English Dictionary (3rd ed); the latter's use in this context encompasses the alleviation of the pain of an injury. This view is consistent with the s 4 definition of “therapeutic treatment” which included “treatment given for the purpose of alleviating an injury” (emphasis added). The Shorter Oxford English Dictionary, for example, defines “alleviation” as “the action of lightening ... pain”. That usage is an appropriate one to apply here given the s 4 definition itself. And it permits a construction which accords with the beneficial purposes of the legislation ...

The only additional comments I would make on this are, first, that therapeutic treatment in this setting is a purposive activity – that is, its purpose or object must be the treatment of the particular injury in question. If such is not the actual, specified purpose of the activity then

30 WorkSafe Victoria, *Policy for Medical Practitioners*, November 2011. Available at: <http://www.worksafe.vic.gov.au/forms-and-publications/forms-and-publications/medical-practitioner-policy>

31 Available at: http://www.workcover.tas.gov.au/health_providers/medical_providers/how_to_become_accredited/becoming_an_accredited_medical_provider

32 Australian Psychological Society, Submission to the Review, p 5.

33 [1997] FCA 149; (1997) 73 FCR 273 at 276D–277A.

notwithstanding its beneficial effects, it will not relevantly be therapeutic treatment for present purposes. Secondly, because such treatment is purposive, an indicator that a doctor-prescribed activity is intended, relevantly, to be therapeutic will commonly be the adoption of some level of monitoring to gauge whether it is appropriately adapted to its purpose or is effective in some degree in realising that purpose.

7.332 In *Bashar v Comcare* [2002] FCA 837; (2002) 69 AID 784 at [9], Madgwick J cited those paragraphs from *Comcare v Watson* with approval, and said:

... the notion of therapeutic treatment includes merely palliative treatment, what his Honour referred to as, “the alleviation of the pain of an injury”. It may or may not be relevant to the case but, in the context of a statute such as this, the notion of “therapeutic” might well also include a further extension, namely, treatment for prophylactic or preventative purposes, that is to say, to prevent pain, or other effect of an injury from becoming worse or from appearing.

7.333 The use of the word “therapeutic” is ambiguous and therefore open to interpretation. That interpretation can result in a wide range of services and treatments being found reasonable, even though they may not be evidence based or considered best clinical practice. If a treatment is found to be reasonable, a determining authority is liable to compensate the employee for the cost of the treatment.

7.334 Paragraphs (a), (c) and (d) of the definition of “medical treatment” refer to treatment “under the supervision of” LQMPs, legally qualified dentists or physiotherapists, osteopaths, masseurs and chiropractors; and paragraph (b) of the definition refers to treatment “obtained at the direction of” LQMPs. In *Comcare v Watson*, Finn J noted:³⁴

For my own part I would be prepared to adopt the “advised, prescribed or ordered” terminology of Hill J³⁵ as representing the proper meaning to be given to the “at the direction of” formula in the s 4 definition – these terms having relatively well understood and not greatly dissimilar connotations in the context of doctor-patient communications as to the undertaking of treatment for an injury. In consequence I reject not only the Tribunal’s apparent construction of the formula as meaning “guidance” – I also reject the applicant’s submission that direction requires monitoring, control or management by a doctor.

7.335 The phrase “under the supervision of”, in paragraphs (a), (c) and (d) of the s 4(1) definition of “medical treatment”, allows for compensation to be paid in respect of the cost of treatment given by any person, regardless of qualifications, so long as the treatment is under the supervision of an LQMP (or legally qualified dentist, physiotherapist, osteopath, masseur or chiropractor). Similarly, the phrase “obtained at the direction of”, in paragraph (b) of the definition, allows for compensation to be paid in respect of the cost of treatment given by any person, regardless of qualifications, so long as the treatment is obtained at the direction of an LQMP. In addition, there is no requirement for LQMPs to ensure the qualifications or expertise of service providers to whom they refer an employee. In some circumstances, the LQMP or other health provider may simply provide a referral for a type of treatment and leave the choice of provider up to the employee seeking the treatment.

7.336 Principle one of the Clinical Framework is underpinned by four key messages:³⁶

1. Treatment should result in a measureable benefit to the injured person.
2. Relevant aspects of the person’s health status that are expected to change with treatment should be measured (such as pain, depression, activities of daily living, health-related quality of life and work performance).
3. When available, outcome measures that are reliable, valid and sensitive to change should be used.
4. Outcome measures must be related to the functional goals of therapy, relevant to the person’s injury, and address the components of the World Health Organisation International Classification of Functioning, Disability and health.

34 [1997] FCA 149; (1997) 73 FCR 273 at 276B-C.

35 In *Thiele v The Commonwealth* [1990] FCA 123; (1990) 22 FCR 342 at 348.

36 The Clinical Framework, p 3.

- 7.337 Measurement of treatment effectiveness has a number of benefits to the employee and the determining authority:
- (a) the employee is provided with information about her or his health status (improving, worsening, not changing) and is empowered to track and monitor her or his own progress and manage her or his own injury; and
 - (b) the determining authority is provided with information and justification to support determinations to continue, change or cease payment of compensation in respect of the cost of particular forms of treatment.
- 7.338 The definition of “therapeutic treatment” (see paragraphs 7.330–7.331 above) and the phrases “under the supervision of” and “at the direction of” in the definition of “medical treatment” (see paragraphs 7.334–7.335 above) have the potential to frustrate the principles endorsed by the Clinical Framework.

RECOMMENDATIONS

- 7.344 As previously noted,³⁷ early recovery from injury provides a range of benefits for both employees and their employers. Early medical intervention in treating an injury or a disease is critical in ensuring an early and durable return to work. The adoption of the Clinical Framework, and the requirement for medical treatment to have a measurable benefit so that employees can track and monitor their own progress, would facilitate better return to work outcomes.
- 7.345 For that reason, the SRC Act should be amended so that, in order to be compensable, medical treatment must meet objective standards such as those in the Clinical Framework.
- 7.346 There are several ways in which that could be achieved—for example, by:
- (a) replacing the reference in s 16(1) of the SRC Act to “treatment that it was reasonable for the employee to obtain in the circumstances” with a reference to “treatment that is clinically justified and provides a measurable benefit to the employee”; or
 - (b) amending s 16 of the SRC Act to include a requirement that, for compensation to be payable in respect of the cost of medical treatment, the treatment must meet the principles of the Clinical Framework adopted by Comcare; or
 - (c) inserting new subsections into s 16 in the SRC Act, as follows:
 - (1A) Comcare may prepare and issue Clinical Framework Guidelines relating to the management of an employee’s injury.
 - (2A) In determining whether it was reasonable for an employee to obtain particular medical treatment, a determining authority shall have regard to the Clinical Framework Guidelines prepared and issued under subsection (1A).
- 7.347 Inserting new subsections into s 16 of the SRC Act, as proposed in paragraph 7.346(c) above, would provide a simple and effective means of enhancing the quality and efficacy of medical treatment, including therapeutic treatment. If that change is made, along with the change recommended in paragraph 7.276 above, the weaknesses in the current definition of “medical treatment” (discussed in paragraphs 7.329–7.338 above) should be resolved.
- 7.348 Where medical treatment is provided outside the Clinical Framework, or where there are concerns about the adequacy, appropriateness or frequency of medical treatment, a determining authority should have the capacity to refer the practitioners involved to the relevant professional regulatory body. That would include referral of the IQMP in circumstances where the IQMP has recommended treatment.

RECOMMENDATION 7.28

I recommend that the SRC Act be amended so that, in order to be compensable, medical treatment must meet objective standards such as those in the Clinical Framework.

³⁷ In paragraphs 6.2–6.3 above.

RECOMMENDATION 7.29

I recommend that the SRC Act be amended to provide for the referral of practitioners to the appropriate professional regulatory bodies where treatment is provided outside the Clinical Framework, or where there are concerns about the adequacy, appropriateness or frequency of treatment—including where an LQMP has recommended the treatment.

THE APPROPRIATE LEVEL OF COMPENSATION FOR THE COST OF MEDICAL TREATMENT

- 7.349 As noted in paragraph 7.265 above, the final step in deciding what compensation is payable is determining what amount is appropriate in respect of the cost of medical treatment that it was reasonable for an injured employee to obtain: s 16(1) of the SRC Act.
- 7.350 Compensation for medical treatment is payable to either the employee, the employee's legal personal representative or the person to whom the cost of treatment is payable: s 16(4).
- 7.351 Although s 16(1) makes the determining authority liable to pay "compensation of such amount as [the determining authority] determines is appropriate to that medical treatment", there is no provision in the SRC Act for Comcare as the regulator to prescribe appropriate medical service fees that would be binding on all decision-makers under the SRC Act. Section 16(1) proceeds on the basis that the determination of the appropriate amount to pay for medical treatment is made on a case-by-case basis. Any determination made by a determining authority as to the appropriate amount to pay for the treatment of a particular employee could also be varied on review by the AAT at the request of the employee.
- 7.352 When determining what constitutes an "appropriate" amount for medical treatment, Comcare (as a determining authority) refers to its medical service rates,³⁸ which lay down payment limits for various forms of medical treatment. The rates are a non-binding internal guideline. Where possible, those rates are based on the schedule of fees recommended by health professional organisations such as the Australian Medical Association (the **AMA**) and the Australian Psychological Society.
- 7.353 Where fees are disputed, Comcare (as a determining authority) will also have regard to schedules of fees established by other workers compensation schemes in the relevant State or Territory.
- 7.354 In *Re Sinclair and Comcare* [2002] AATA 23; (2002) 67 AID 247, the AAT set aside Comcare's decision to compensate Ms Sinclair for \$36.40 of the \$50.00 that she had paid for physiotherapy sessions, and directed that Ms Sinclair be compensated for the full \$50 per session. Comcare had determined the appropriate amount was that payable pursuant to the Queensland compensation scheme's schedule of fees. The AAT considered the average cost of physiotherapy treatments, and said, at [17]:
- When deciding what amount is appropriate to particular medical treatment rendered, it is conceivable that reference must be made to the actual costs incurred. That is not to say that the issue of cost is open-ended. Clearly, if the majority of service providers charged between \$45-\$55 per session, and the costs incurred by the applicant for treatment from her practitioner of choice was vastly in excess of that amount, then it would be open to Comcare to determine that the amount was so disparate from the usual cost of providing such services, that it is not "appropriate to that medical treatment" and determine that a lesser amount be paid.
- 7.355 As noted in paragraph 7.352 above, the medical service rates used by Comcare are not enforced for use across the Comcare scheme, but are an internal guideline applied by Comcare as a determining authority. Accordingly, licensees can set their own medical service rates, which are not necessarily the same as those that Comcare uses. That variation might be thought to create inequitable outcomes for claims made under the one scheme; but that is not a sufficient reason to compel licensees to pay no more than Comcare pays by way of compensation for medical treatment.
- 7.356 Generally speaking, the approach taken by the AAT in *Sinclair*, that the amount of reimbursement should be based on the actual expense reasonably incurred by the employee (see paragraph 7.354 above), is understandable—that is, an employee should not have to subsidise costs for medical

38 Available at: http://www.comcare.gov.au/claims/benefits_and_entitlements/medical_expenses/medical_service_rates

treatment reasonably obtained in relation to a compensable injury. However, that approach does not take into account the overall cost to the Comcare scheme.

- 7.357 In 2010–11, medical and rehabilitation costs represented 22.7 % of the total cost of claims liabilities under the Comcare scheme. That figure has been steadily increasing by at least 8 % each year for the past three years.³⁹
- 7.358 On an individual basis, it may not be unreasonable for a determining authority to pay an “appropriate” fee that is (say) \$1, or even \$10, more per service than Comcare’s schedule of fees allows. However, as at 30 June 2012, Comcare had 12,308 active claims,⁴⁰ in most of which the employee was receiving medical treatment. Individual exceptions to medical service rates are not uncommon and therefore must be viewed in terms of their overall cost to the scheme. Every time an exception is made to pay treatment costs that are higher than Comcare’s set fees, the result is an overall increase in scheme costs.
- 7.359 Another issue with Comcare, or any other determining authority, making exceptions to its set fees for an individual is that, unless an injured employee challenges the determining authority’s decision to pay only the set fee, the employee is less likely to be granted a payment exception. That can create inequitable outcomes.
- 7.360 Where an employee challenges a decision by a determining authority to pay less than the fee charged by a medical service provider, the cost incurred by the determining authority in defending its decision will almost always far exceed the amount in dispute. That is, the costs of a system that leaves the level of fees open to dispute are likely to outweigh the benefits of that system.

RECOMMENDATIONS

- 7.363 The Comcare scheme covers a relatively small number of employers and employees (compared to State and Territory schemes), with a large geographic span. As a result, there are limitations that reduce the practicality of implementing a wide-ranging accreditation framework.
- 7.364 In order to restrain expenditure, and to avoid both inconsistencies in the amount of compensation paid for medical expenses and disputes about the amount of compensation paid, it would be preferable for the SRC Act to authorise Comcare to prepare and issue a table of rates of payment for the cost of specific types of medical treatment, in a form that would not be reviewable by the AAT.
- 7.365 To achieve those objectives, a new subsection (1A) could be inserted in s 16, authorising Comcare to prepare and issue, as a legislative instrument, a table of medical service rates that are to apply throughout the Comcare scheme. The “appropriate” amount of compensation for medical treatment, which determining authorities would be liable to pay by s 16(1) of the SRC Act, would be linked to those rates.
- 7.366 In order to ensure that the rates do not result in reduced access to treatment, Comcare should consider relying on existing scales of payment in the relevant State and Territory workers compensation schemes.
- 7.367 It would also be sensible for any scale of fees issued by Comcare to permit a higher fee to be paid where, for example because of the isolated location at which medical treatment is to be provided, some additional cost will be incurred.
- 7.368 Because the scale of fees would define the quantum of the liability imposed on determining authorities by s 16(1) of the SRC Act, the scale would not prevent a licensee from paying a higher rate for a particular medical treatment service if the licensee chose to do so; although Comcare, as a Commonwealth authority that is involved in spending public funds, would be constrained from making any higher payment.

39 See *Comcare–SRCC Annual Report 2011–12*, p 71; *Comcare–SRCC Annual Report 2010–11*, p 30; *Comcare–SRCC Annual Report 2009–10*, p 19. Available at: http://www.srcc.gov.au/publications/srcc_annual_reports

40 As provided by Comcare. Note: this figure is based on claims that received some kind of payment in the three months prior to 30 June 2012. There may be a small number of claims that remain active but which were dormant during this three-month period

RECOMMENDATION 7.30

I recommend that Division 1 of Part II of the SRC Act be amended to allow Comcare to prepare and issue, as a legislative instrument, a table of medical service rates that are to apply throughout the Comcare scheme as the rates at which determining authorities are liable to pay compensation under s 16(1) of the SRC Act. The “appropriate” amount of compensation for medical treatment would be linked to those rates.

COMPENSATION FOR COSTS ASSOCIATED WITH TRAVEL TO AND FROM MEDICAL TREATMENT

RECOMMENDATIONS

- 7.374 I am not persuaded that all travel should be compensated. Before any consideration is given to such a proposal, it would need to be properly costed. Nor am I persuaded that any change to s 16(7)(a) of the SRC Act would avoid the types of anomalies that can arise under the current provisions (as explained in paragraph 7.371 above).
- 7.375 In order to avoid those anomalies and the resulting inequity between different employees, a discretion to pay compensation for travel might be considered. However, a discretion would inevitably lead to disputes about its extent and application. Although the cost of travel up to 50 kilometres by private vehicle may be appreciable, it is not sufficient to warrant the costs that would be involved in disputing its payment.
- 7.376 Any arbitrary rule (such as that found in s 16(7)(a) of the SRC Act) will lead to a situation where some individuals fall short of the line, wherever that line might be. Changing the distance at which employees qualify for compensation for travel would lead to the same type of situation, unless that distance was zero. However, Parliament clearly intended that not all travel by private transport to medical treatment would be compensable.
- 7.377 The 50-kilometre qualifying distance only applies to employees who travel by private transport. Employees who need to use public transport or travel by ambulance because of their injuries qualify to have the cost of the entire journey compensated: s 16(7)(b) of the SRC Act.
- 7.378 Therefore, I do not recommend any change to ss 16(6) or (7) of the SRC Act.

4. COMPENSATION FOR PERMANENT IMPAIRMENT

PERMANENT IMPAIRMENT

- 8.1 Permanent impairment compensation is paid as a lump sum. The compensation is separate from, and additional to, incapacity benefits payable to injured employees under the SRC Act. Incapacity benefits are paid to replace an employee’s regular salary or wages and are referred to as compensation for economic loss; while permanent impairment compensation can be described as compensation for non-economic loss, and is paid to compensate for loss of use of bodily functions: s 24 of the SRC Act and pain and suffering: s 27.
- 8.2 Section 28(1) of the SRC Act authorises Comcare to prepare a written document, to be called the “Guide to the Assessment of the Degree of Permanent Impairment” (the **Approved Guide**), that sets out the:
- (a) criteria for determining the degree of the permanent impairment of an employee resulting from an injury;
 - (b) criteria for determining the degree of non-economic loss suffered by an employee as a result of an injury; and

(c) methods by which the degrees of permanent impairment and non-economic loss, as determined under those criteria, shall be expressed as a percentage.

The Approved Guide must be approved by the Minister: s 28(3) of the SRC Act. The Approved Guide can also be varied or revoked by Comcare under s 28(2) of the SRC Act, with the Minister's approval: s 28(3).

- 8.3 In making any assessment of the degree of permanent impairment or non-economic loss, a determining authority or the AAT must apply the relevant provisions of the Approved Guide: s 28(4) of the SRC Act.
- 8.4 The obligation to apply the Approved Guide is also expressed in s 24(5), which directs the determining authority to determine the degree of permanent impairment of an employee resulting from an injury under the provisions of the Approved Guide.
- 8.5 The amount of compensation payable to an employee who has a permanent impairment resulting from an injury is the same percentage of the maximum amount payable under s 24 as the degree of permanent impairment (expressed as a percentage) determined under the Approved Guide: s 24(3), (4) and (6) of the SRC Act. An employee who has 10 % permanent impairment will receive 10 % of the maximum payable under s 24 of the SRC Act, which is currently \$168,605.02, and a percentage of the current maximum of \$63,226.92 for non-economic loss under s 27 of the SRC Act, calculated under Division 2 of the Approved Guide.

MEASURING IMPAIRMENT: THE APPROVED GUIDE

- 8.6 Permanent impairment benefits are calculated on the basis that degrees of impairment can be measured, with the level of compensation intended to reflect the degree of loss of bodily functions and pain and suffering.
- 8.7 Since the introduction of the SRC Act on 1 December 1988,⁴¹ Comcare has issued three Approved Guides for the measurement of impairment. The first edition was published in 1989, the second edition in 2006 and edition 2.1 in June 2011⁴². Both the Second Edition and Edition 2.1 are stand-alone guides, largely based on the American Medical Associations *Guides to the Evaluation of Permanent Impairment*, fifth edition (**AMA5**).
- 8.8 Compared to the First Edition, the Second Edition and Edition 2.1 provide greater clinical focus, with comprehensive criteria for the assessment of the degree of impairment.
- 8.9 Currently, the various Australian workers compensation schemes use different guides to assess permanent impairment, the majority based on the fourth or fifth edition of the American Medical Association guides. The diversity in approach to assessment means that benefits can vary significantly from one scheme to another, and that there is little capacity for scheme administrators to learn from shared experience. Medical assessors also have difficulty in developing assessment skills that can be used across the schemes.
- 8.10 Action area five of the National Workers' Compensation Action Plan 2010–2013⁴³ requires Safe Work Australia to investigate and report on options for nationally consistent arrangements relating to the assessment of permanent impairment. That objective is to be achieved by:
- (a) investigating choices for assessment tools;
 - (b) analysing and reporting on options to promote national consistency;
 - (c) developing agreed nationally consistent permanent impairment approaches and guidance material; and
 - (d) promoting nationally consistent use of permanent impairment assessment tools and guidance materials.

41 As the Commonwealth Employees' Rehabilitation and Compensation Act 1988, renamed as the SRC Act by amending legislation passed in 1992 and 1993.

42 Available at: http://www.comcare.gov.au/data/assets/pdf_file/0015/100905/Guide_to_the_assessment_of_the_degree_of_permanent_impairment.pdf

43 Available at: http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/566/NationalWorkersCompensationActionPlan2010_2013.pdf

- 8.11 Following the publication of the Second Edition of the Approved Guide, Comcare received criticism from doctors and other key stakeholders concerning the application and operation of the Approved Guide. Those criticisms have been strengthened over the years by a number of significant cases in the Federal Court and High Court, which have brought into question the capacity of the Approved Guide to compensate workers fairly and equitably for permanent impairment.
- 8.12 In *Broadhurst v Comcare*,⁴⁴ a single Judge of the Federal Court found that, to the extent that Table 9.17 of the Approved Guide failed to provide a 10 % impairment rating, it frustrated the operation of the statutory scheme, which requires a determination as to whether the degree of permanent impairment resulting from a particular injury is less than 10 %.⁴⁵ The Judge also found that, where a particular table in the Approved Guide could not be used, the Approved Guide required that assessment of the degree of permanent impairment should be made in accordance with the sixth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment (AMA6)*.⁴⁶
- 8.13 Comcare successfully appealed against the decision that AMA6 should be applied where the Approved Guide does not contain a 10 % rating. In *Comcare v Broadhurst*,⁴⁷ the Full Federal Court held that the correct edition of the reference guide to be used was **AMA5**.⁴⁸
- 8.14 Those decisions emphasised the growing list of problems with the Second Edition of the Approved Guide and the urgent need for Comcare to address those problems.⁴⁹
- 8.15 On 13 June 2011, in response to *Comcare v Broadhurst*, Comcare issued Edition 2.1 of the Approved Guide, which came into effect on 1 December 2011. Edition 2.1 addresses not only the problem highlighted in *Comcare v Broadhurst*, but also the problems raised in *Canute v Comcare* and *Fellowes v Military Rehabilitation and Compensation Commission* (discussed in paragraphs 8.27–8.29 below). I understand from Comcare that Edition 2.1 was intended to be an interim Approved Guide to address those problems as a matter of urgency, and consideration of its replacement continues to be a priority.
- 8.16 The Strategic Issues Group on Workers' Compensation⁵⁰ (the **SIG WC**) has agreed to seek endorsement from Safe Work Australia members in March 2013 on a national permanent impairment assessment guide (the **proposed National Guide**) and a proposed permanent impairment assessor document.⁵¹ The proposed National Guide is based on AMA5, as amended by the New South Wales scheme.
- 8.17 The proposed permanent impairment assessor document has been developed to facilitate mutual recognition of permanent impairment assessors across the country. The document allows for some jurisdictional variations; however, it establishes nationally consistent eligibility criteria that a medical practitioner will need to satisfy if the practitioner wants to become an accredited permanent impairment assessor. The proposed National Guide and permanent assessor document are yet to be considered by Safe Work Australia.

RECOMMENDATIONS

- 8.22 The disadvantages of the current diverse approach to the assessment of permanent impairment, summarised in paragraph 8.9 above, are so clear that remedial action, as recommended by the National Workers' Compensation Action Plan (see paragraph 8.10 above), is urgently required.

44 [2010] FCA 1034; (2010) 189 FCR 561.

45 [2010] FCA 1034; (2010) 189 FCR 561 at [55], [58]–[59] (Buchanan J).

46 [2010] FCA 1034; (2010) 189 FCR 561 at [63].

47 [2011] FCAFC 39; (2011) 192 FCR 497.

48 [2011] FCAFC 39; (2011) 192 FCR 497 at [15] and [73].

49 The decision in *Lilly v Comcare* [2013] FCA 26 provides a recent addition to the list of problems.

50 The SIG WC oversees work on the improvement of workers compensation arrangements throughout Australia and other workers compensation matters as required. It also provides policy advice and recommendations to Safe Work Australia. The SIG WC is tripartite and is constituted by Safe Work Australia members and their nominees.

51 Victoria does not support the National Guide.

RECOMMENDATION 8.1

I recommend that Comcare adopt the proposed National Guide as the Approved Guide, and the proposed permanent impairment assessor document.

MEASURING IMPAIRMENT: MULTIPLE INJURIES ARISING OUT OF THE ONE EVENT

- 8.23 Multiple injuries arising out of the one event, each of which results in permanent impairment, require special consideration. There are three key concepts that interlink when considering those impairments:
- (a) whole person impairment;
 - (b) the combined values chart; and
 - (c) the combining of injuries under the SRC Act.
- 8.24 The American Medical Association *Guides to the Evaluation of Permanent Impairment* estimate the impact of an impairment (whether affecting one bodily system or several bodily systems) on an individual's overall ability to perform the activities of daily living (excluding work), by providing for the calculation of the percentage of the individual's whole person impairment.⁵²
- 8.25 The combined values chart in the American Medical Association guides was designed to enable physicians to account for the effects of multiple impairments with a combined or summary value. A standard formula was used to ensure that, regardless of the number of impairments, the summary or combined value would not exceed 100 % of the whole person.⁵³ It is the combined values chart, not the "whole person impairment" concept that accounts for the effects of multiple impairments.
- 8.26 Most workers compensation schemes in Australia are event-based or accident-based. The concept of combining impairments arising from one event or accident is a concept that is and has been used in workers compensation schemes, even when they were still using a table of maims to assess impairment. However, the American Medical Association guides cannot be used to combine impairment values without the use of the whole person impairment concept, or the use of the combined values chart.
- 8.27 Combining impairment values to determine one overall impairment value was the original intent of the legislation. That process is consistent with the modern approach to the assessment of permanent impairment. It may be argued that the High Court's decisions in *Canute v Comcare*,⁵⁴ and *Fellowes v Military Rehabilitation and Compensation Commission*,⁵⁵ have substantially affected the ability of the Approved Guide to provide fairly for the assessment of compensation for permanent impairment, and have resulted in inequitable outcomes for injured employees.
- 8.28 In *Canute v Comcare*,⁵⁶ the High Court found that Mr Canute's adjustment disorder (following a compensable spinal injury) was an injury that must be assessed separately from the spinal injury:⁵⁷ the impairment from the disorder could not be combined with the impairment from the spinal injury (to calculate "whole person impairment") before considering the 10 % threshold in s 25(4) of the SRC Act.
- 8.29 The High Court noted that the majority of the Full Federal Court in *Canute* had observed that the SRC Act seemed to require a consequential injury to be treated as an aspect of the impairment

52 AMA5, 2005, p 4.

53 AMA5, 2005, p 9.

54 [2006] HCA 47; (2006) 226 CLR 535.

55 [2009] HCA 38; (2009) 240 CLR 28.

56 [2006] HCA 47; (2006) 226 CLR 535.

57 [2006] HCA 47; (2006) 226 CLR 535 at [36].

created by the initial injury;⁵⁸ and Comcare had supported that approach in the High Court. The High Court rejected that approach.⁵⁹

Comcare's case depends upon confining the meaning of "injury" to exclude such "consequential injuries". However, there is no foundation in the Act for any such distinction between "an injury" and a consequential or secondary injury. Neither of these qualifiers finds any expression in the Act. The Act speaks exclusively in terms of "an injury".

- 8.30 Earlier, the Court had stressed that the SRC Act obliges Comcare to pay compensation not in respect of an employee's impairment but in respect of an "injury", which is defined in terms of the resultant effect of an incident or ailment upon the employee's body; that the SRC Act assumes that an employee may sustain more than one "injury" in a workplace incident;⁶⁰ that the SRC Act assumes that "an injury" may result in more than one "impairment";⁶¹ and that the SRC Act does not import a "whole person" approach to the determination of the degree of permanent impairment.⁶²
- 8.31 After rejecting the Full Federal Court's view, the High Court went on to note.⁶³
- The Act only adopts the "whole person impairment" approach with respect to permanent impairments resulting from each "injury". That "whole person" approach cannot properly be used to deny the applicability of s 24 to something which corresponds to the legislative definition of an "injury". The statutory criterion of an "injury" is antecedent to the concept of "whole person" impairment, not the other way around.
- 8.32 One consequence of the High Court's reasoning in *Canute* is that, where the one event results in a number of injuries, the permanent impairment resulting from each injury must be assessed separately, and the permanent impairment from each injury must individually satisfy the 10 % threshold in s 24(7), or the 5 % threshold for hearing loss in s 24(7A).
- 8.33 As a result, an employee who has been involved in a work-related accident and has 9 % impairment to the foot, 7 % impairment to the ankle and 7 % impairment to the wrist will receive no permanent impairment benefits.
- (a) That is because each value falls below the 10 % threshold in s 24(7), and the High Court found in *Canute* that the SRC Act proceeds on the basis that more than one injury may be caused in a workplace incident, and compensation is payable under s 24 in respect of the impairment from each injury—not in respect of an employee's whole person impairment.
- (b) If those separate impairments of 9 %, 7 % and 7 % could be combined to achieve a combined impairment value (using the combined values chart in the Approved Guide), the employee would achieve a combined impairment value of 20 %, and would qualify for compensation under both s 24 and s 27 of the SRC Act.
- 8.34 Another consequence of the *Canute* reasoning is that the combined values chart can only be used in very limited circumstances.
- (a) That is because the purpose of the combined values chart is to derive a permanent impairment percentage that arises from multiple impairments. Multiple impairments usually arise as a result of a primary injury and secondary or consequential injuries. Because each injury must be assessed as a separate injury, the combined values chart cannot be used in that situation.
- (b) After *Canute*, the combined values chart can only be used where a single injury gives rise to multiple losses of function, and therefore multiple impairments. To obtain the degree of permanent impairment in respect of that single injury, the scores for each loss of function (impairment) are combined using the combined values chart.
- 8.35 In *Fellowes v Military Rehabilitation and Compensation Commission*,⁶⁴ the majority of the High Court held that the degree of permanent impairment that Ms Fellowes suffered from an injury to her right knee should be assessed independently from the degree of permanent impairment that she suffered

58 [2005] FCAFC 299; (2005) 148 FCR 232 at [76].

59 [2006] HCA 47; (2006) 226 CLR 535 at [34].

60 [2006] HCA 47; (2006) 226 CLR 535 at [10].

61 [2006] HCA 47; (2006) 226 CLR 535 at [11].

62 [2006] HCA 47; (2006) 226 CLR 535 at [15].

63 [2006] HCA 47; (2006) 226 CLR 535 at [37].

64 [2009] HCA 38; (2009) 240 CLR 28.

from a discrete injury that she had previously sustained to her left knee.⁶⁵ The MRCC had accepted liability for both injuries but, because the MRCC had already paid for the impairment to Ms Fellowes' left knee, it decided it was not liable to pay for the same injury to her right knee. (Ms Fellowes had already been compensated for a 10 % permanent impairment to her lower limbs.)

- 8.36 The High Court held that the reference in the Approved Guide to two injuries causing the "same impairment" required consideration of the particular effect of the injuries.⁶⁶ Although Ms Fellowes suffered injuries to her knees, both of which were assessed as creating 10 % permanent impairment, they were separate injuries with separate effects, and therefore separately compensable. The MRCC was liable to pay for the second impairment of 10 %.
- 8.37 As noted in paragraph 8.33 above, the reasoning in *Canute* disadvantages an injured employee who might, for example, have 9 % impairment to the foot, 7 % impairment to the ankle and 7 % impairment to the wrist: each is a separate injury according to the *Canute* reasoning and must be assessed separately, and each value falls below the 10 % threshold prescribed by s 24(7) of the SRC Act.
- 8.38 By comparison, an injured employee who is similarly injured and assessed as having a 10 % impairment to the foot, 10 % impairment to the ankle and 3 % impairment to the wrist will be awarded 10 % permanent impairment for the foot and 10 % for the ankle. As at 1 July 2012, the total amount of compensation for permanent impairment under s 24 that would be payable to the injured employee in this second example would be \$33,721.00. That employee would also be eligible to receive a lump sum amount for non-economic loss under s 27 of the SRC Act.
- 8.39 Additionally, Comcare cannot adopt the proposed National Guide as currently drafted under s 28 of the SRC Act, unless the SRC Act is amended in order to support the use of the combined values chart in the American Medical Association guides.

RECOMMENDATIONS

- 8.43 The SRC Act should be amended so that separate impairments arising from a single injury occurrence can be combined to achieve a combined impairment value. That result could be achieved by inserting a new subsection (6A) in s 24, to the effect that, if an employee sustains more than one injury in a single incident arising out of or in the course of employment, the impairments resulting from each injury are to be combined under the provisions of the Guide so as attribute a single value for the degree of permanent impairment for the purpose of this Division.

RECOMMENDATION 8.2

I recommend that the SRC Act be amended so that separate impairments arising from a single injury occurrence can be combined to achieve a combined impairment value.

Recommendation 8.2 has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**

COMPENSATING FOR PERMANENT IMPAIRMENT: THRESHOLDS, CALCULATING LEVELS AND THE MAXIMUM BENEFIT PAYABLE

- 8.44 Once the level of an employee's permanent impairment has been determined, the next questions are:
- From what level of impairment should compensation be payable—what should the threshold for payment of compensation be?
 - How much compensation should be payable for what level of impairment?
 - What should the maximum compensation payable be?

The answers to these questions are informed by both policy and the need to protect the financial viability of the scheme.

⁶⁵ [2009] HCA 38; (2009) 240 CLR 28 at [21] and [25].

⁶⁶ [2009] HCA 38; (2009) 240 CLR 28 at [26].

THRESHOLDS

- 8.45 As noted in paragraphs 8.4 and 8.5 above, s 24(3), (4), (5) and (6) of the SRC Act direct that the level of compensation payable for an employee's permanent impairment is determined by the employee's degree of permanent impairment (expressed as a percentage) under the Approved Guide. If the degree of permanent impairment is less than 10 % (for impairments generally) or 5 % (for hearing loss), no compensation is payable: s 24(7) and (7A) of the SRC Act. However, no minimum level of impairment applies to the loss, or loss of the use, of a finger or toe, and to the loss of the sense of taste or smell: s 24(8) of the SRC Act.
- 8.46 The thresholds are also applied to the situation where, after the level of an employee's permanent impairment has been assessed, the employee claims that the degree of permanent impairment has increased. Unless the subsequent increase is 10 % or more, or 5 % or more for hearing loss, no further amount of compensation is payable for the increase: s 25(4) and (5) of the SRC Act.
- 8.47 In 1988, when the 10 % threshold was implemented, it was technically difficult to assess an impairment below 10 %. However, with advances in medical science, this is now less problematic because there is more certainty in assessing the degree of impairment at lower percentages.
- 8.48 The Pearson Royal Commission on Civil liability and Compensation for Personal Injury in the United Kingdom provided recommendations on the issue of tort law reform. Those recommendations also provide some insight into the justification for permanent impairment thresholds. The Commissioner offered three distinct arguments in favour of compensation for permanent impairment—namely, that it:⁶⁷
- (a) serves as a palliative or solace to the victim;
 - (b) allows the injured employee to purchase alternative sources of satisfaction to those he or she has lost; and
 - (c) helps to meet the hidden costs of the impairment (that is, the impact on lifestyle).
- 8.49 There are several reasons why permanent impairment compensation should only be provided where the impairment reaches a particular threshold:
- (a) if permanent impairment compensation is paid to meet the hidden costs of impairment, then those costs must be real (and the impairment significant) for the objective to be realised;
 - (b) there is a cost–benefit ratio—each claim for permanent impairment incurs significant administrative costs; and
 - (c) where there is no threshold at all, the amounts of compensation paid for permanent impairment can be very low, and often the amount paid out in legal costs can well exceed the amount of compensation paid for the permanent impairment.
- 8.50 The philosophical rationale for a threshold is to distinguish between serious impairments and those losses of bodily function that can be considered minor. If it can be agreed that a threshold is necessary, the question then remains: at what level should that threshold be set? And, following payment of permanent impairment compensation, should the threshold to access permanent impairment payments after any worsening or a secondary condition be set at the same level?
- 8.51 Permanent impairment threshold levels vary considerably throughout Australian jurisdictions.

TABLE 5: JURISDICTIONAL COMPARISON OF PERMANENT IMPAIRMENT THRESHOLDS

Thresholds expressed as a percentage of whole person impairment

⁶⁷ United Kingdom, *Royal Commission on Civil Liability and Compensation for Personal Injury*, 1978 (the **Pearson Royal Commission**), Volume 1, p 85.

Thresholds expressed as a percentage of whole person impairment			
Jurisdiction	General	Hearing	Psychological
Comcare	10 %	2% ^a	10%
Australian Capital Territory	No threshold	3.9% (approximately) ^b	N/A ^c
New South Wales	11 %	11 %	15%
Northern Territory	5 %	5 %	5 %
Queensland	1 %	5 %	1%
South Australia	5 %	5 %	N/A ^d
Tasmania	5 %	2 % ^e	10 %
Victoria	10 %	10 %	30 %
Western Australia	1 %	6 %	15 %

a. There is no permanent impairment benefit payable for psychological conditions in the ACT scheme.

b. In South Australia, there is no entitlement for permanent impairment in relation to a psychiatric impairment.

8.52 As can be seen, leaving aside permanent impairment for psychological injuries, thresholds vary from no threshold (in the Australian Capital Territory) to 11 % (in New South Wales). It is interesting to note that, with the exception of Queensland⁶⁸ and the Northern Territory (where the same threshold is applied), the threshold for psychological injuries (where permanent impairment compensation is payable) is higher than that applied for general conditions.

TABLE 6: BREAKDOWN OF PERMANENT IMPAIRMENT CLAIMS LODGED, BY BODILY LOCATION⁶⁹

Body location major group	Accepted ^a	Rejected ^b	Total
Claims for permanent impairment assessed in 2011-12			
Psychological system	88	29	117
Trunk	40	52	92
Upper limbs	34	58	92
Head	51	18	69
Lower limbs	16	31	47
Neck	16	9	25
Multiple locations	4	8	12
Systemic locations	1	2	3
Unspecified	0	3	3
Total	250	210	460
Claims for permanent impairment assessed in 2010-11			
Psychological system	75	17	92
Trunk	20	24	44
Upper limbs	8	17	25
Head	32	25	57
Lower limbs	14	27	41
Neck	3	7	10
Multiple locations	2	3	5
Systemic locations	1	3	4
Unspecified	2	2	4
Total	157	125	282

⁶⁸ Comparisons between the Comcare and Queensland schemes should be made with a great degree of caution given the short-tail nature of the Queensland scheme.

⁶⁹ **Table 6** provides the number of permanent impairment requests determined, based on the financial year in which the request was received, for premium paying agencies only. Only limited data is available for self-insured licensees.

-
- a. That is, the determining authority has assessed that compensation is payable for permanent impairment.
 - b. That is, the determining authority has assessed that compensation is payable for permanent impairment.

- 8.53 I consider that maintaining the same threshold for both “general” conditions and psychological conditions is appropriate. I do not see any reason why a distinction should be drawn between psychological injuries and other types of injuries. Psychological injuries are real injuries, the impairments caused by psychological injuries are real and can be just as disabling as physical injuries. Introducing a higher threshold for psychological injuries would discriminate against psychological injuries.⁷⁰ This has particular relevance for the Comcare scheme when considering the information provided in **Table 6**, and that approximately a quarter of permanent impairment claims assessed in 2011–12 were for psychological injuries. Further, for the reasons outlined in paragraphs 8.63–8.64 below, I do not recommend lowering the 10 % initial threshold prescribed by s 24(7) of the SRC Act.
- 8.54 One issue that has been raised through submissions, and in the consultations, is the challenge for an employee needing to meet the 10 % threshold for initial claim for permanent impairment compensation, and then having to meet that threshold again at a later date should any worsening occur or any secondary condition arise, as prescribed by s 25(4) of the SRC Act.
- 8.55 That issue should be considered in context. The SRC Act provides for interim permanent impairment payments. If the impairment of an employee is 10 % or greater, is not likely to improve, and may in fact deteriorate, the employee may request that an interim assessment of permanent impairment and payment of compensation be made: s 25(1) and (2) of the SRC Act.

RECOMMENDATIONS

- 8.63 I do not recommend any changes to the initial threshold prescribed by s 24(7) of the SRC Act. In my view, the 10 % threshold for both “general” conditions and psychological conditions (other than for a hearing loss) is appropriate, because it treats psychological and other injuries in the same way (for the reasons outlined in paragraph 8.53 above), and because of the other recommendations that I make about the level of compensation to be paid and how that compensation is to be calculated: see paragraphs 8.82–8.84 below.
- 8.64 I am proposing a significant increase to the maximum compensation payable for permanent impairment. In order to restrain the growth of outlays, which will be under significant upward pressure from the changes I propose, I do not recommend a change to the 10 % initial threshold (for impairments other than a hearing loss) as prescribed by s 24(7) of the SRC Act. It is within the range of thresholds applied in the various State and Territory schemes, and provides a balance to the upward pressure on outlays that will be caused by increasing the maximum benefit payable, as recommended in paragraph 8.83(c) below. Further, maintaining a strong threshold ensures that only impairments with clearly discernible effects are compensated.⁷¹ For the same reasons, I do not recommend a change to the initial threshold for a hearing loss of 5 % binaural hearing loss, as prescribed by s 24(7A) of the SRC Act.
- 8.65 However, I am proposing a lower threshold for any subsequent permanent impairment claims made for any worsening of the condition or a secondary condition (other than a hearing loss). The importance of minimising the disadvantage imposed on employees who do not take advantage of the right to an interim assessment of permanent impairment pursuant to s 25(1) and (2) (for good reason—see paragraphs 8.56–8.57 above) needs to be balanced against the considerations identified in paragraph 8.64 above—primarily, counteracting the upward pressure on outlays that will be caused by increasing the maximum benefit payable, as recommended in paragraph 8.83(c) below.

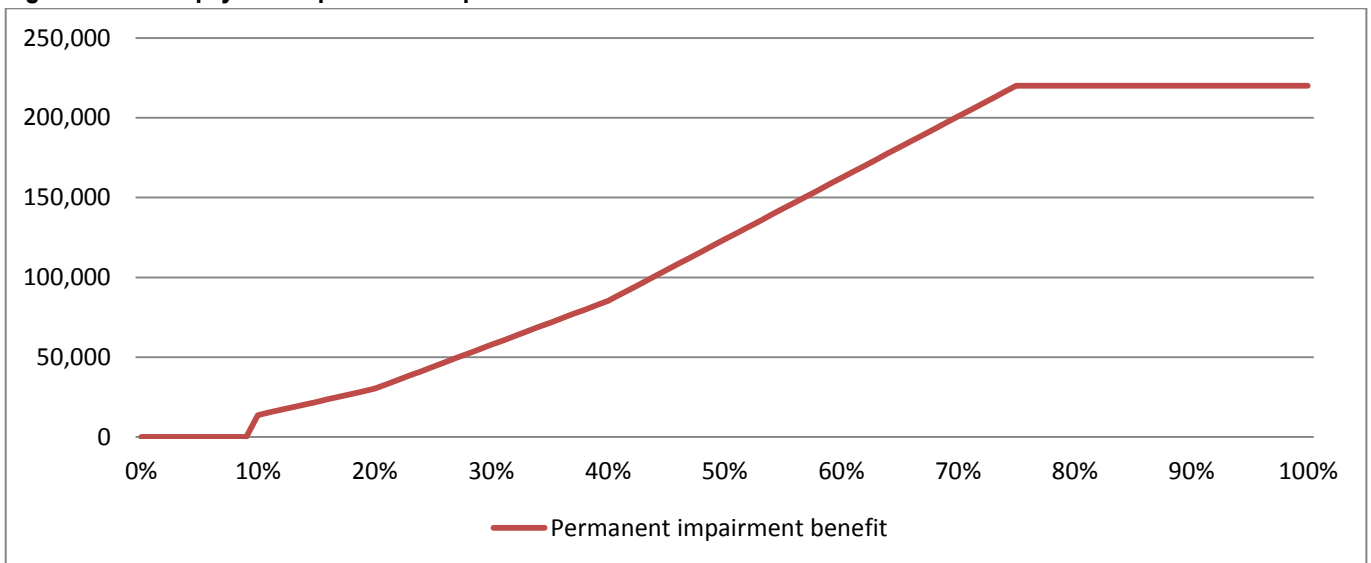
⁷⁰ See also the discussion in paragraphs 5.46 and 5.61 above.

⁷¹ See the conclusions of the Pearson Royal Commission, referred to in paragraph 8.48 above.

CALCULATING THE LEVEL OF BENEFIT

- 8.66 There are essentially two methods for calculating the level of permanent impairment benefits:
- (a) a linear model, where the benefit payable is a straight percentage of a maximum benefit; this is the method currently used in the Comcare scheme; or
 - (b) an algorithmic model, where a more complex formula is applied, so that employees who have the greatest impairment receive the greatest amount of compensation, whereas employees with lower levels of impairment receive less compensation than they would if the linear model were used.⁷²
- 8.67 Both the linear and algorithmic models are in use in Australia. The New South Wales algorithm illustrates the impact of algorithmic models. Only where an employee has an impairment level of at least 42 % will the New South Wales algorithm provide a level of impairment benefit equal to the benefit that would be provided under a linear model. The amount of compensation received by an employee who has an impairment of 41 % and below is significantly less than the amount that would be received under a linear model.

Figure 4: Benefits payable for permanent impairment claims made on or after 19 June 2012 in New South Wales



- 8.68 Under the New South Wales algorithmic model, once an employee's impairment level exceeds 42 %, the amount of compensation received increases at a faster rate until the employee is assessed as being 75 % impaired, when the maximum impairment benefit is automatically paid.
- 8.69 Using an algorithm to calculate the permanent impairment benefit for a particular level of impairment has the advantage of maximising the level of compensation available to very seriously injured employees, while maintaining a degree of scheme viability through restricting the access of less injured employees to higher amounts of compensation.

RECOMMENDATIONS

- 8.70 As part of a package of changes, I recommend that the SRC Act adopt an algorithmic model to calculate the level of benefits. This will mean that the most seriously impaired employees will receive the greatest level of benefits.

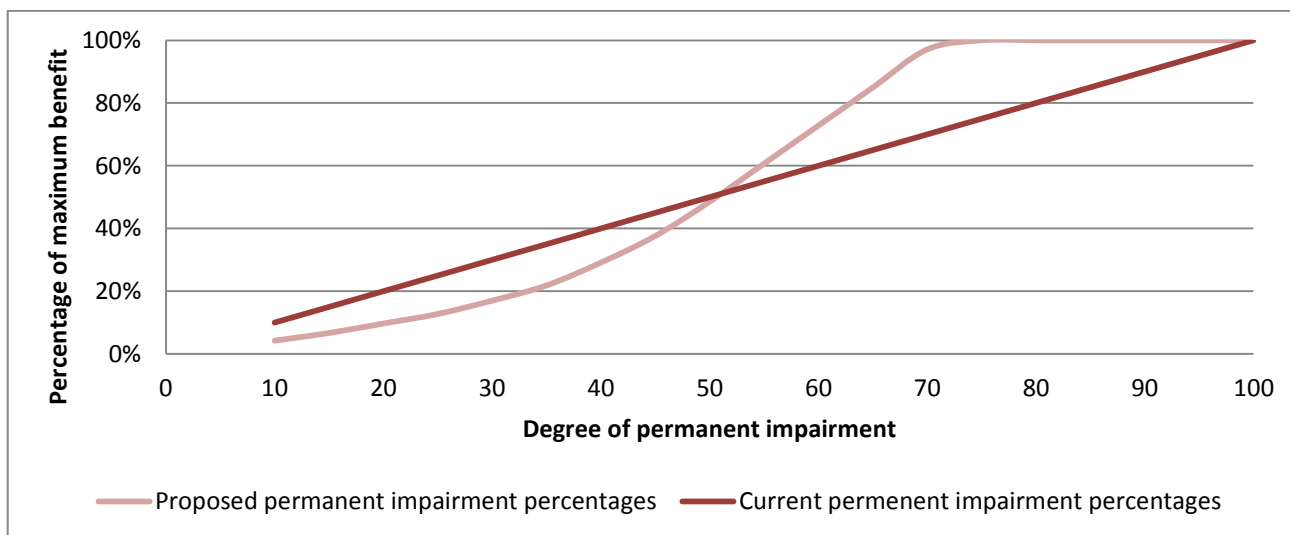
⁷² Exceptions to this proposition include Tasmania, where an employee with a low percentage impairment could receive more compensation under the algorithm; and the MRC Act, where the algorithm includes a variable that reflects the age of the employee, so that the result will vary according to age.

THE MAXIMUM BENEFIT PAYABLE

RECOMMENDATIONS

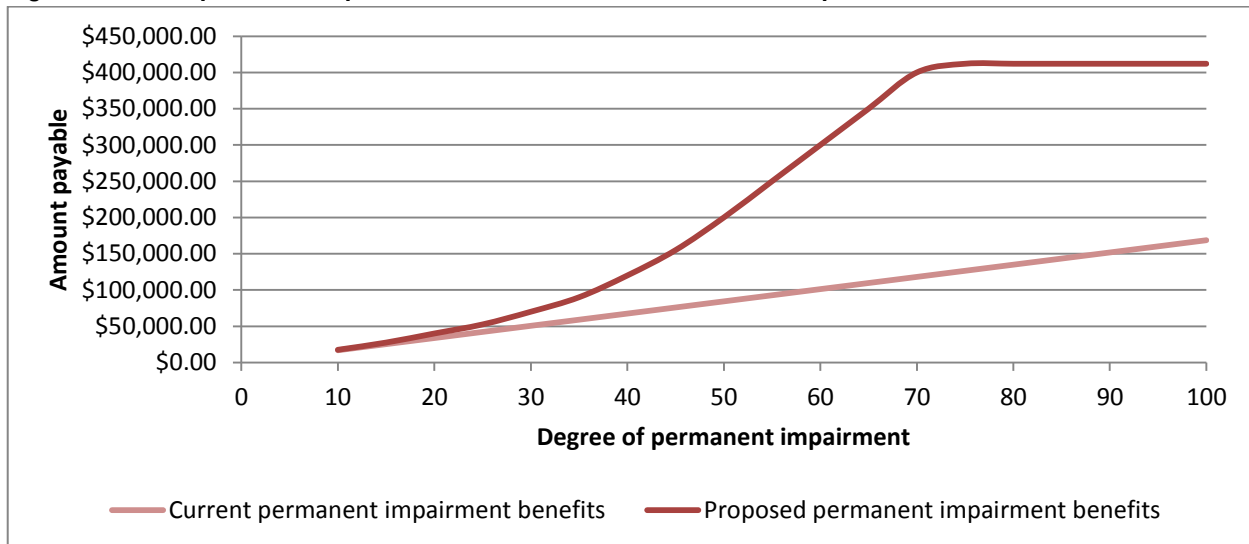
- 8.82 Bearing in mind the final sentence of the terms of reference, I propose a package of amendments to permanent impairment payments: an increase to the maximum benefit payable in line with the death benefit, together with amendments to the level of benefit to be paid for permanent impairments.
- 8.83 The package that I propose involves the following elements:
- (a) (the threshold for the payment of compensation for permanent impairment other than for hearing loss remain at 10 % (and the hearing loss threshold remain at a binaural hearing loss of 5 %);
 - (b) following payment of permanent impairment compensation, the permanent impairment threshold under the SRC Act for any worsening of the original or secondary condition, other than for hearing loss, be reduced to 5 % (and the hearing loss threshold remain at a subsequent increase of 5 % in binaural hearing);
 - (c) the maximum benefit payable for permanent impairment (being the combined amount payable pursuant to s 24 and s 27) be the same amount as the lump sum compensation payable pursuant to s 17 for a death, with the maximum s 24 payment being 72.72 % of the death benefit and the maximum s 27 payment being 27.27 % of the death benefit; and
 - (d) an algorithmic model be introduced for calculating permanent impairment compensation, consistent with the model outlined in **Figure 5**.

Figure 5: Comparison of the linear and algorithmic models for payment of benefits, as a percentage of the maximum benefit



- 8.84 As can be seen in **Figure 5** (consistent with the situation in New South Wales), at a certain point the percentage of the maximum benefit received under the algorithmic model is greater than that received under the linear model. This ensures that those employees with the greatest level of impairments receive the greatest compensation.

Figure 6: SRC Act permanent impairment benefits – current benefit levels compared to recommended benefit levels



RECOMMENDATION 8.3

I recommend that, following payment of permanent impairment compensation, the permanent impairment threshold under the SRC Act for any worsening of the original or secondary condition (other than a hearing loss) be reduced to 5 %.

8.85 **Recommendation 8.3** has been the subject of actuarial costing. Taylor Fry has provided an estimate of the cost impact of this proposal, available at Chapter 2, **Table 2**.

RECOMMENDATION 8.4

I recommend that the maximum benefit payable for permanent impairment (being the combined amount payable pursuant to s 24 and s 27) be the same amount as the lump sum compensation payable pursuant to s 17 for a death that results from an injury, with the maximum s 24 payment being 72.72 % of the death benefit and the maximum s 27 payment being 27.27 % of the death benefit.

RECOMMENDATION 8.5

I recommend that an algorithmic model be introduced for calculating permanent impairment compensation, consistent with the model outlined in **Figure 5**.

8.86 **Recommendation 8.4** and **Recommendation 8.5** have been the subject of actuarial costing. Taylor Fry has provided an estimate of the effect of this proposal, available at Chapter 2, **Table 2**.

8.87 Because the proposal would also impact Part XI claims, the Australian Government Actuary also considered the proposal. The cost estimated by the Australian Government Actuary is available at Chapter 2, **Table 3**.

AAT REVIEW: THE EXPERIENCE

9.92 Resolution of SRC Act disputes is a relatively lengthy process, although there has been a marked improvement over the last two years in the time it takes to resolve matters. The AAT aims to finalise applications within 12 months of lodgement and has set a target that it will finalise 75 % of workers compensation applications within that timeframe.⁷³

9.93 The proportion of applications under the SRC Act and the small number of applications under the Seacare scheme (described together by the AAT as **compensation applications**) finalised by the AAT within 12 months in the last three financial years is set out in **Table 13** below.

TABLE 13: PROPORTION OF AAT APPLICATIONS FINALISED WITHIN 12 MONTHS⁷⁴

	2009-10	2010-11	2011-12
Proportion of compensation applications finalised within 12 months	57 %	68 %	70 %

9.94 Most compensation applications are finalised by consent prior to a hearing and decision, either during the conference process or following conciliation or one of the other types of alternative dispute resolution process: see **Table 14** below.

TABLE 14: RESOLUTION OF COMPENSATION APPLICATIONS BY DISPOSITION⁷⁵

	2009-10		2010-11		2011-12	
	No.	%	No.	%	No.	%
Application withdrawn	344	24	303	23	258	23
Finalised by consent	849	59	832	63	664	60
Heard and decided	213	15	167	13	144	13
Other	38	3	18	1	37	3
Total	1,444	100	1,320	100	1,103	100

9.95 The number of compensation applications made to the AAT has been declining over an extended period but appears to have stabilised over the past three years: see **Table 15** below.

TABLE 15: TOTAL NUMBER OF COMPENSATION APPLICATIONS LODGED WITH AAT BY YEAR⁷⁶

	2001-02	2006-07	2009-10	2010-11	2011-12
Total number of lodgements	2,254	1,451	1,178	1,086	1,157

9.96 As might be expected, over the last 10 years, the AAT has seen a marked growth in SRC Act cases involving licensees (other than Australia Post and Telstra).

TABLE 16: APPLICATIONS LODGED WITH THE AAT BY RESPONDENT⁷⁷

	2001-02		2006-07		2011-12	
	No.	%	No.	%	No.	%
Australian Postal Corporation	508	23	385	27	179	15
Comcare	843	37	513	35	417	36
Department of Defence/Military Rehabilitation and Compensation Commission	376	17	274	19	136	12
Telstra Corporation Ltd	494	22	242	17	146	13

73 AAT, Submission to the Review, p 6.

74 AAT, Submission to the Review, p 6.

75 AAT, Submission to the Review, p 6. Note: internal table references not reproduced.

76 AAT, Submission to the Review, p 4.

77 AAT, Submission to the Review, p 4. The percentages have been rounded to the nearest whole number and so may not total 100 %.

Other decision makers	33	1	37	3	279	24
TOTAL	2,254	100	1,451	100	1,157	100

9.97 As noted in paragraph 9.93 above, the AAT has reported a marked increase in the percentage of compensation applications finalised within 12 months over the last three years. However, even after that increase, it is clear that the AAT's review processes are taking substantially longer to resolve disputes than the process used in any of the other Australian workers compensation schemes.

9.98 According to the CPM Report, Comcare scheme disputes take longer to resolve than disputes in other Australian workers compensation schemes. The CPM Report notes that:⁷⁸

A high percentage of disputes resolved in a longer timeframe may also indicate that there are a high number of more complex disputes being dealt with within a jurisdiction, or that there are some mandatory medical or legal processes in place that inherently delay resolution.

9.99 **Table 17** below shows the timeframe for resolution of workers compensation disputes nationally, by jurisdiction.

TABLE 17: PERCENTAGE OF DISPUTES RESOLVED WITHIN SELECTED TIME PERIODS (CUMULATIVE)⁷⁹

Jurisdiction	Within 1 month (%)	Within 3 months (%)	Within 6 months (%)	Within 9 months (%)
2006-07				
Comcare	4.6	14.5	29.0	44.8
Seacare	1.6	9.5	22.2	46.0
New South Wales	2.8	51.9	87.6	97.3
Queensland	14.7	77.3	90.0	94.2
Tasmania	45.2	59.9	77.0	85.1
Victoria	2.1	52.6	74.7	87.8
Western Australia	19.5	44.2	65.2	74.1
National average	6.6	52.7	78.3	88.7
2010-11				
Comcare	3.6	11.9	27.4	50.1
Seacare	8.5	63.2	63.8	74.5
New South Wales	7.8	42.0	86.0	95.5
Queensland	15.2	81.6	93.1	95.7
Tasmania	59.4	71.6	83.2	90.7
Victoria	1.7	46.4	75.2	88.8
Western Australia	41.7	62.6	82.5	91.6
National average	10.4	50.3	80.5	90.9

9.100 For 2010–11, half of all disputes about workers compensation matters were resolved within three months of the date of lodgement, with Queensland resolving the highest proportion of disputes within that time (82 %) followed by Tasmania (72 %). However, only 12 % of Comcare scheme disputes were resolved within that time.

9.101 Although a large majority of compensation applications are finalised without a contested hearing and a formal decision by the AAT, it remains the fact that only 70 % of compensation applications are finalised by the AAT within 12 months, whereas 90 % of such applications across all Australian jurisdictions (including the Comcare scheme and Seacare scheme) are finalised within nine months: see **Table 17** above.

⁷⁸ CPM Report, p 36.

⁷⁹ CPM Report, p 36, Indicator 23: Percentage of disputes resolved within selected time periods (cumulative). Note: figures were not available for the Northern Territory or South Australia.

- 9.102 As I have already noted (see paragraphs 9.93 and 9.97 above), despite improvements over the past three years, the AAT's review processes are taking substantially longer to resolve disputes than the processes used by the schemes functioning in other Australian jurisdictions. Although it is plainly important that any dispute resolution process not sacrifice accuracy and reliability to speed, it is also clear that delayed resolution can have a negative impact on recovery and rehabilitation processes.
- 9.103 The AAT has pointed to several factors that might explain the time that it takes to finalise compensation applications,⁸⁰ including:
- (a) an inconsistency in approach taken by determining authorities (Comcare and licensees), discussed in paragraphs 9.110–9.118 below;
 - (b) the fact that employees are effectively discouraged from gathering new evidence in support of their claims until after an application for review is lodged with the AAT, discussed in paragraphs 9.56–9.68 below; and
 - (c) disputes over jurisdiction, partly reflecting the Full Federal Court's judgment in *Lees v Comcare*, discussed in paragraphs 9.129–9.139 below.
- 9.104 The AAT also highlighted a potential issue in relation to employees who suffer from a disease in situations where it is not clear which previous employment contributed to the disease. That issue is discussed in paragraphs 9.140–9.144 below.
- 9.105 There are a number of other areas where processes for dealing with disputes that have reached the AAT may be streamlined in order to improve dispute resolution timeframes. The Review has considered the following options:
- (a) referring medical and scientific disputes to a specialist panel, discussed in paragraphs 9.145–9.156 below;
 - (b) binding the parties to decisions of the Fair Work Commission that relate to the same subject matter as the subject matter before the AAT, discussed in paragraphs 9.157–9.173 below; and
 - (c) referring certain disputes to the Fair Work Commission, discussed in paragraphs 9.174–9.192 below.

9.106

RECOMMENDATION 9.8

I recommend that the AAT be encouraged to explore practical ways to achieve a further, and marked, reduction in the time taken to resolve compensation applications.

RECOMMENDATION 9.12

I recommend that s 66(1) of the SRC Act be amended to provide that all parties to a matter before the AAT must disclose any evidence to the AAT at least 28 days before the hearing of the matter.

RECOMMENDATIONS

- 9.139 In order to address obstacles to the resolution of matters in dispute under the SRC Act, I recommend that the SRC Act be amended so as to permit the AAT to hear matters that have not been the subject of a reviewable decision, with the consent of the parties. That could be achieved by adding a subsection (3) to s 64 as follows:
- (3) Where an application has been made to the Administrative Appeals Tribunal for review of a reviewable decision, and the parties agree, the Administrative Appeals Tribunal may also review any determination that was made by the determining authority:
 - (a) in relation to the applicant; and
 - (b) in relation to the same injury the subject of the reviewable decision; whether or not that determination has been reconsidered by the determining authority.

80 AAT, Submission to the Review, pp 7–12.

RECOMMENDATION 9.13

I recommend that the SRC Act be amended to permit the AAT to hear matters not the subject of a reviewable decision, with the consent of the parties.

MEDICAL AND SCIENTIFIC DISPUTES

- 9.145 As detailed in paragraph 9.84 above, all disputes arising under the Comcare scheme are dealt with, on review, by the AAT and thereafter the Federal Court or the Federal Magistrates Court. There is currently no capacity under the SRC Act for a medical or scientific issue to be referred to a specialised medical panel or tribunal. Where disputes about those medical or scientific matters are not resolved on reconsideration, they are resolved by the AAT.
- 9.146 In some Australian jurisdictions, medical issues are referred to specialised medical panels or medical tribunals for determination (as detailed in **Table 18**). The use of medical panels and tribunals can enhance the effectiveness of dispute resolution by permitting distinctly medical issues to be determined directly by expert medical decision makers. For example, the Victorian Act allows the Victorian WorkCover Authority, a self-insurer, a conciliation officer and the County Court to refer a medical question (a term that is defined in s 6(1) of that Act) to a medical panel for its opinion; and s 68(4) of the Victorian Act provides that the opinion of a medical panel on a medical question referred to the medical panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive on a medical question.

TABLE 18: JURISDICTIONAL ANALYSIS – USE OF MEDICAL TRIBUNALS AND/OR PANELS⁸¹

Use of medical tribunals and panels	
Australian Capital Territory	Medical referees may be requested throughout the dispute resolution process to prepare a report to help parties reach an agreement: Part 7. Regulations.
New South Wales	Approved medical specialists are appointed to assess medical disputes
Queensland	Referral to Medical Assessment Tribunal (MAT) by an insurer to decide a worker's capacity for work or permanent impairment: s 500. No appeal against a decision by MAT unless fresh medical evidence is submitted to MAT within 12 months of the MAT decision: s 512.
South Australia	<p>A compensating authority or the tribunal may require a worker who claims compensation under the Act or who is in receipt of weekly payments to submit to an examination by a medical panel or to answer questions (or both) on a date and at a place arranged by the Convenor of Medical Panels so that the medical panel can determine any specified medical question: s 98F(2). That power may be exercised by a compensating authority both before and after the matter has been referred to the tribunal for judicial determination: <i>Campbell v Employers Mutual Ltd</i>; <i>Yaghoubi v Employers Mutual Ltd</i> [2011] SASCFC 58. Medical questions are defined in s 98E.</p> <p>The opinion of a medical panel on a medical question is final and binding on the parties, subject to the opinion not being based on an error of fact or law, but is not binding on the tribunal. It remains for the tribunal to determine what weight is given to an opinion. The tribunal should satisfy itself that the opinion of the panel is based on evidence and made within its expertise: s 98H(4) and <i>Campbell v Employers Mutual Ltd</i>; <i>Yaghoubi v Employers Mutual Ltd</i> [2011] SASCFC 58.</p>
Tasmania	The tribunal may refer a medical question to a medical panel when there is conflicting medical opinion and one of the parties wishes to continue with proceedings. The determination of the medical panel is binding on the tribunal: s 51 and s 63(1).
Victoria	"Medical questions" as defined in s 5(1) may be referred to the medical

81 CPM Report, p 29.

Use of medical tribunals and panels

panels. Disputed impairment benefits assessments under s 104B and any medical question arising in a conciliation dispute relating to a worker's entitlement to weekly payments for reduced work capacity after 130 weeks under s 93CD must be referred to medical panels. Medical panels must form binding opinions on medical questions referred: s 68.

- 9.147 Although the Victorian medical panels (to take them as an example) are permitted to resolve medical questions, they have no authority to resolve other factual questions, such as disputed aspects of an employee's history, or legal questions, such as the proper construction of legislation. The medical panels have not always observed that limitation, and several of their opinions have been quashed for that reason by the Victorian Supreme Court (through the process of judicial review, which depends on showing jurisdictional error).
- 9.148 Many of the cases that are heard in the AAT under the SRC Act involve disputes over medical issues, including the diagnosis and causation of injuries and diseases and the assessment of incapacity for work or impairment. Frequently, those medical issues intersect with broader factual disputes (including disputes about an employee's pre-employment history or disputes about what actually happened during the employee's employment) or with legal disputes about the construction of the SRC Act or the Approved Guide. I accept the point made by the AAT in its Submission to the Review:⁸²
- Workers compensation cases invariably involve a combination of factual, medical and legal issues. In general, it is difficult to deal with the factual and medical issues separately. Medical opinions are based on underlying facts which are often contested.
- 9.149 The AAT has a diverse membership, including many members with medical qualifications, and processes, such as neutral evaluation and the use of concurrent evidence, that are tailored to dealing with medical issues. The AAT also has legal members, who are qualified to resolve legal disputes, and it has more than 35 years' experience in resolving broad factual issues of the kind that frequently intersect with medical disputes. Its capacity to bring to bear a range of expertise on questions that very often do not fall into precisely defined and separate categories (factual, legal and medical) is one of the AAT's strengths.
- 9.150 However, it has been noted that there is no guarantee that a medical question will be heard by a medically qualified member and that, more importantly, medical members of the AAT are not current practising medical practitioners and might not be competent to adjudicate on current medical management issues in a rapidly evolving area of medical practice.⁸³

RECOMMENDATIONS

- 9.156 For the reasons outlined in the submissions identified in paragraphs 9.148 and 9.151–9.155 above, and because of the practical difficulties in framing a purely medical question (especially in situations where there remains or is likely to be a factual dispute), it is difficult to see the benefit in providing for the referral of matters to a medical tribunal. Therefore, I do not recommend any change to the way in which medical and scientific disputes are dealt with under the SRC Act.

DECISIONS MADE BY THE FAIR WORK COMMISSION

- 9.158 The Fair Work Commission is the national workplace relations tribunal. It is an independent body established by the *Fair Work Act 2009* (the **Fair Work Act**) with power to carry out a range of functions relating to:⁸⁴
- (a) the safety net of minimum wages and employment conditions;
 - (b) enterprise bargaining;
 - (c) industrial action;

82 AAT, Submission to the Review, p 12.

83 Addendum to submission 23 (name withheld), Submission to the Review, p 2.

84 See Fair Work Commission, *Future Directions for Australia's National Workplace Relations Tribunal*, January 2013. Available at: <http://www.fwa.gov.au/>

- (d) dispute resolution;
- (e) termination of employment; and
- (f) other workplace matters.

9.159 Many psychological injuries sustained in the workplace are, in their genesis, human resource management issues (resulting, for example, from interpersonal conflict and performance management matters), rather than medical issues. That raises the question whether there should be a role for the Fair Work Commission in relation to psychological injuries that result in workers compensation claims.

9.160 9.161 It is possible that a dispute about actions that might amount to “reasonable administrative actions” under the SRC Act could be brought to the Fair Work Commission—for example:

- (a) in a claim that an employer had failed to apply or had wrongly applied a disciplinary process in an enterprise bargaining agreement that included such a process, where the dispute resolution clause in the agreement permitted the Fair Work Commission to arbitrate the matter: s 739 of the Fair Work Act;
- (b) if an employee claimed to have been unfairly dismissed for making a workers compensation claim or as a result of the employer following an unfair or unreasonable process;
- (c) in a dispute about an adverse action claim involving dismissal (for example, based on some workplace right or discriminatory ground);
- (d) in a dispute about an adverse action claim not involving dismissal (based on some workplace right or discriminatory ground); or
- (e) in a dispute about unlawful termination (on discriminatory grounds).

RECOMMENDATIONS

9.173 I recommend that immediate consideration be given to identifying those determinations made by the Fair Work Commission that consider and determine the reasonableness or otherwise of an employer’s action that could be a reasonable administrative action; and that, if determinations of that kind can be identified, the employer and the employee should be entitled to rely on that determination when a decision maker (a determining authority or the AAT) is determining whether the employer’s conduct amounted to reasonable administrative action for the purposes of s 5A(1) of the SRC Act.

RECOMMENDATION 9.14

I recommend that:

- (a) immediate consideration be given to identifying those determinations made by the Fair Work Commission that consider and determine the reasonableness or otherwise of an employer’s action that could be a reasonable administrative action within s 5A(1) of the SRC Act; and
- (b) if determinations of that kind can be identified, the employer and the employee should be entitled to rely on that determination when a determining authority or the AAT is determining whether the employer’s conduct amounted to reasonable administrative action for the purposes of s 5A(1) of the SRC Act.

A NEW ROLE FOR THE FAIR WORK COMMISSION

9.174 In addition to allowing decisions of the Fair Work Commission to determine what is a reasonable administrative action, the Review has considered the possibility of a wider dispute-resolving role for the Commission. To evaluate that possibility, it is necessary to consider the work of the Fair Work Commission and whether disputes under the SRC Act would be a good “fit”. It is also necessary to consider which disputes under the SRC Act could be dealt with by the Fair Work Commission.

THE WORK OF THE FAIR WORK COMMISSION

9.175 In accordance with s 577 of the Fair Work Act, the Fair Work Commission is required to perform its functions and exercise its powers in a way that:

- (a) is fair and just;

- (b) is quick, informal and avoids unnecessary technicalities;
- (c) is open and transparent; and
- (d) promotes harmonious and cooperative workplace relations.

9.176 The recent record of the Fair Work Commission reveals that it has met or exceeded all of its key performance indicators, as **Table 19** shows.

The Fair Work Commission is resolving matters at a faster pace than the AAT. A point of difference could lie in the nature of the disputes; however, it appears from that comparison that the Fair Work Commission is highly efficient in resolving workplace disputes.

9.179 If the disputes under the SRC Act that are properly described as disputes about workplace matters can be identified, there would be obvious advantages in having the Fair Work Commission resolve those disputes: essentially, the faster resolution of disputes would contribute to better outcomes for injured workers by removing a factor (prolonged disputation) that impedes recovery and rehabilitation.

THE NATURE OF DISPUTES UNDER THE SRC ACT

9.180 The determinations that give rise to disputes under the SRC Act can be placed in two broad categories: those that relate to workplace matters and those that relate to questions of eligibility under the SRC Act.

RECOMMENDATIONS

9.190 Although the AAT has played an important part in resolving disputes under the SRC Act, the extended time taken by the AAT's processes should be of great concern, if only because of its negative effect on employees' recovery from injury and on their rehabilitation. It is apparent that the AAT has made some improvement in the time taken to resolve disputes, but the AAT's performance is well behind the performance of the dispute resolution systems in other Australian workers compensation schemes. The extended time taken by the AAT's processes is thrown into sharp relief when compared to the performance of the Fair Work Commission, which should be given a significant role to play in the resolution of disputes under the SRC Act with the objective of delivering faster resolution of the disputes that are transferred to the Commission and demonstrating, through its processes, ways in which the AAT can further improve its performance.

9.191 Immediate consideration should be given to answering the questions identified in paragraph 9.187 above with a view to defining a review jurisdiction for the Fair Work Commission under the SRC Act and defining the relationship between that review jurisdiction and the AAT's review jurisdiction under the SRC Act.

9.192 Priority should be given, in that consideration, to defining a review jurisdiction for the Fair Work Commission under Division 3 of Part II of the SRC Act with a view to giving the Fair Work Commission jurisdiction to review all reviewable decisions relating to rehabilitation programs.

RECOMMENDATION 9.15

I recommend that immediate consideration be given to defining a jurisdiction for the Fair Work Commission to review reviewable decisions under the SRC Act that involve workplace issues, with a view to transferring that part of the AAT's review jurisdiction under the SRC Act to the Fair Work Commission and defining the relationship between the Fair Work Commission's review jurisdiction and the AAT's review jurisdiction under the SRC Act.

RECOMMENDATION 9.16

I recommend that priority be given to defining a review jurisdiction for the Fair Work Commission under Division 3 of Part II of the SRC Act, with a view to giving the Fair Work Commission jurisdiction to review all reviewable decisions relating to rehabilitation programs.

INFORMATION-GATHERING POWERS

9.193 To support early and quick decisions, it is important that decision makers have sufficient power to gather the information required to make a decision.

INFORMATION-GATHERING POWERS IN OTHER SCHEMES

9.200 Several of the State and Territory schemes prescribe time limits for complying with requests for information.

TABLE 21: PRESCRIBED TIME LIMITS FOR THE PROVISION OF INFORMATION⁸⁵

Scheme	Employer/worker is to supply further information to insurer or authority on request
Commonwealth	28 days – s58(2)
Australian Capital Territory	7 days – s 126(2)
New South Wales	7 days – 1998 Act, s69(1)(b)
Northern Territory	Not specified
Queensland	10 business days of receiving notice – s 167(2)
South Australia	Not specified
Tasmania	Not specified
Victoria	No time limit except decision must be made on claim for weekly payments or deemed accepted
Western Australia	Not specified

RECOMMENDATIONS

9.214 I recommend that the SRC Act be amended so that:

- (a) information requested under s 58 be provided within the period specified in the request (as with a notice issued under s 71);
- (b) penalties are prescribed for a failure to comply with a s 71 notice;
- (c) determining authorities have the power to request information relevant to a claim from parties other than the employer and the employee (for example, the employee's medical practitioners, a previous employer or an insurer); and
- (d) determining authorities have the power to request information relevant to the administration of liabilities under the SRC Act (for example, information from an employee or from the employee's current employer about the level of the employee's current work activity or current remuneration).

⁸⁵ Extracted from Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, April 2012, p 35, Table 2.7: Prescribed time periods for claim submission. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.docx>

5. LIABILITIES ARISING APART FROM THE SRC ACT

COMMON LAW

- 10.1 Common law damages for employment-related injuries are not available in every Australian workers compensation jurisdiction. Since the mid-1980s, all jurisdictions except the Australian Capital Territory have restricted the availability of damages at common law, and some jurisdictions have completely removed access to common law damages, for employment-related injuries.
- 10.2 Under the SRC Act, the right of an employee to sue the employer for damages for an employment-related injury sustained in the course of employment, or for property damage resulting from such an injury, has been abolished (apart from the limited rights available under s 45: see paragraph 10.3 below): s 44(1) and (2). That abolition does not affect cases where an employee's injury results in death: in those cases, the employee's dependants can sue for common law damages: s 44(3). Nor does it preclude a claim in relation to a disease that is sustained after the end of employment—that is, a disease that cannot be said to be “an injury sustained by an employee in the course of his or her employment”—because, although the disease is an “injury” as defined in s 5A(1) of the SRC Act, it will be taken to be sustained after the end of, and therefore not in the course of, employment.⁸⁶
- 10.4 The current cap effectively limits the access to common law damages in relation to injuries sustained during the course of employment. The cap has an effective value in 2013 that is 50 % lower than its value in 1988 (when the SRC Act commenced). On the other hand, the indexed benefits payable on a no-fault basis for permanent impairment (ss 24 and 25) and non-economic loss (s 27) have retained their original value.
- 10.5 Schemes with little or no common law access, for example the Comcare and the South Australian schemes, tend to have statutory benefits that cater for the ongoing needs of permanently incapacitated workers. They are “long-tail” schemes, anticipating the payment of compensation and benefits for the life of the injury or disease.
- 10.6 Schemes with relatively unrestricted access to common law damages, for example Queensland and Tasmania, tend to be focused on workers with short-term injuries or diseases. Those schemes look to the common law to meet the needs of the more seriously injured. Neither of those schemes is a long-tail scheme: statutory benefits in Queensland and Tasmania cut out after five years and nine years respectively.⁸⁷
- 10.7 All schemes that allow recovery of common law damages include provisions to prevent recovery of both workers compensation and common law damages.⁸⁸ Most jurisdictions allow a claimant to retain the right to no-fault compensation up to the point at which negligence is proved. Any compensation received under the no-fault scheme must then be repaid and the claimant will then be prevented from accessing further statutory benefits.⁸⁹

86 See *Commonwealth v Holland* (1991) 24 NSWIR 198. Section 7(4) of the SRC Act is relevant here: it fixes the date when an employee is taken to have sustained an injury, being a disease, by reference to the date when the employee first sought medical treatment or the disease resulted in death, incapacity for work or impairment; and that date may be (in the case of diseases with delayed onset, such as mesothelioma or post-traumatic stress disorder) well after the employee has ceased employment.

87 Similarly, the Victorian scheme provides relatively generous (although complicated) access to common law damages (see s 134AB of the Victorian Act) but, for most workers, caps weekly payments of compensation at 117 weeks (the end of the “second entitlement period”) unless the worker is assessed as having an indefinite lack of, or only limited, work capacity: see ss 93C and 93D of the Victorian Act.

88 Safe Work Australia, *Comparison of Workers Compensation Arrangements in Australia and New Zealand*, February 2010, pp 181–186. Available at: <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf>

89 For example, s 48(3) of the SRC Act obliges an employee, or a dependant, who has received compensation under the Act and then recovers common law damages in respect of the same injury or death to pay to Comcare an amount equal to the compensation or damages, whichever is less; and s 48(4) of the SRC Act provides that compensation is not payable to an employee or a dependant under the Act in respect of an injury or death after the date when the employee or the dependant recovers common law damages in respect of that injury or death. Subsections (4A)–(6) of s 48 provide specific exceptions to those provisions.

- 10.8 Since the mid-1990s, no-fault schemes have generally evolved as employees' rights to sue for damages have been exchanged for guaranteed, but possibly lower, levels of compensation.

THE BENEFITS OF STATUTORY COMPENSATION SCHEMES

- 10.9 To succeed in recovering common law damages against an employer, the employee would need to show fault (generally, negligence) on the part of the employer (in particular, that the employer breached a duty of care owed to the employee) and that, as a result of that fault, the employee suffered damage.

- 10.10 The common law says that employers have a general duty to provide their employees with a safe system of work. That general duty includes a duty to:
- (a) employ reasonably competent staff;
 - (b) take reasonable care to ensure a safe place of work; and
 - (c) provide, inspect and maintain safe plant and equipment.

Where an employer breaches the duty of care and an employee suffers damage as a result, the employee may recover damages, provided that the right to pursue common law damages has not been removed by legislation.

- 10.11 Under statutory workers compensation schemes, employees do not need to establish fault in order to receive compensation. It is generally only necessary to show that an injury (other than a disease) arose "out of, or in the course of, the employee's employment": s 5A(1) of the SRC Act; or that a disease "was contributed to, to a significant degree, by the employee's employment": s 5B(1) of the SRC Act.

RECOMMENDATIONS

- 10.27 The benefits associated with statutory compensation schemes (namely the no-fault nature of liability, the timeliness of compensation, support for early intervention, reduced legal costs, greater certainty and reduced medical expenses) provide compelling reasons in favour of retaining statutory compensation for employment-related injuries and diseases.
- 10.28 While common law damages for employment-related injuries may be argued by some to be a "fundamental right", a statutory compensation scheme does not disregard that right; it simply provides a different mechanism for compensating employees for work-related injury and disease. For the same reason, statutory compensation payments do not discriminate against those harmed in the workplace compared to those harmed outside the workplace. Indeed, a person injured at work may be in a better position, because he or she does not have to prove either negligence or a duty and a breach of that duty in order to recover compensation for the injury.
- 10.29 The one distinct advantage of common law damages (allowing closure by resolving a claim completely) can be achieved through the redemption of workers compensation benefits in a lump sum payment. As detailed in paragraphs 7.253–7.262 above, I recommend changes to permit the redemption of compensation payments more generally.
- 10.30 For those reasons, I recommend that the current restrictions on access to common law damages in the SRC Act, including the current non-indexed cap on damages for non-economic loss in s 45(4) of the SRC Act, be retained.