



Australian Government

Comcare

Policy review of permanent
impairment guide – options paper

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Glossary of terms

AAT	Administrative Appeals Tribunal
ACTU	Australian Council of Trade Unions
ADL	Activities of Daily Living
AMA Guide	American Medical Association Guides to the Evaluation of Permanent Impairment
CPI	Consumer Price Index
DEEWR	Department of Education, Employment and Workplace Relations
FCA	Federal Court of Australia
GARP	Guide to the Assessment of Rates of Veterans Pensions
GEPIC	Guide to the Evaluation of Psychiatric Impairment for Clinicians
HCA	High Court of Australia
ISPA	Injured Service Persons Association National
MCS	Military Compensation Scheme
MRCA	<i>Military Rehabilitation and Compensation Act 2004</i>
MRCC	Military Rehabilitation and Compensation Commission
NEL	Non-economic loss
NWE	Normal Weekly Earnings
OHS	Occupational Health and Safety
PIRS	Psychiatric Rating Impairment Scale
PI	Permanent Impairment
RSL	Returned and Services League of Australia
SRC Act	<i>Safety, Rehabilitation and Compensation Act 1988</i>
SRCC	Safety, Rehabilitation and Compensation Commission
VEA	<i>Veterans Entitlement Act 1986</i>
WPI	Whole Person Impairment

Format of the paper

Part I is an overview of the progress of the review to date.

Part II is a discussion of issues raised that may impact on the legislation.

Part III is a discussion of issues raised that may impact on the Permanent Impairment guide itself.

Part 1 – Overview

Introduction

Comcare is undertaking a policy review of the *Guide to the assessment of the degree of Permanent Impairment* (the Comcare Guide). The terms of reference of the review concentrate on the public policy issues associated with the assessment and payment of compensation for Permanent Impairment (PI). Other issues associated with the compensation of non-economic loss (NEL) from injuries resulting in PI will also be considered. The review is limited to Part 1 of the Comcare Guide.

The decision to examine the Guide and the supporting legislative framework is based on:

- Threshold issues being raised that are associated with compensation for PI in general
- Feedback on the operation and application of the current Guide, highlighted by submissions received during the review of the Comcare Scheme conducted in 2008 by the Department of Education, Employment and Workplace Relations (DEEWR).
- Recent court decisions that have changed or clarified the operation of the Guide.

On 1 April 2009 an issues paper (Attachment 1) was released by Comcare, and submissions on the content were invited, with 11 submissions received. Through these submissions Comcare has identified a number of areas in the Guide and provisions of the *Safety Rehabilitation and Compensation Act* (the SRC Act) that require revision. Comcare has now developed an options paper, which outlines the areas identified for revision and associated options. Comcare is now seeking the views of stakeholders on the options paper.

Comcare received submissions (Attachment 2) from unions, ex-service organisations, the legal profession and employers. Two submissions were noted as confidential. Reference to these submissions in the options paper are described as 'Employer 1' and 'Employer 2'.

Actuarial advice is being obtained which may impact the final report that Comcare will submit to the Australian Government.

Submissions to the options paper

The purpose of this options paper is to detail a number of options for addressing issues identified in submissions and include arguments for and against these options. Comcare's preferred option has also been identified in each of the areas (**Attachment 3**). The primary purpose of identifying Comcare's preferred option is to focus feedback. However your input on all of the options proposed is requested. Comcare encourages those making submissions to provide evidence to support their position.

Submissions can be provided electronically or in hard copy and should be sent to Denise Lowe-Carlus via the addresses below by COB 7 August 2009.

Unless marked confidential, all submissions will be made public and may be placed on Comcare's website. Comcare's preference is for submissions to be made public, with confidentiality only reserved for material which would be genuinely prejudicial to the party making the submission if disclosed.

After consideration of the submissions and further consultation, Comcare will submit a final report to the Australian Government in August 2009.

Comments should be provided by COB 7 August 2009 to the following address:

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Background

Commonwealth employees have had access to no-fault lump sum benefits for work-related permanent injuries or disabilities since 1930.¹

The way in which PI benefits are determined has undergone substantial change over time. The *Commonwealth Employees' Compensation Act 1930* and *Compensation (Commonwealth Government Employees) Act 1971* based PI payments on a limited 'Table of Maims' schedule of injuries that did not include compensation for psychiatric impairments. If the condition was not included in the Table of Maims, a PI payment could not be made.

In 1988, with the introduction of the SRC Act, there was a major shift in legislative focus, with access to common law restricted. Another major change was the expansion of the basic PI benefits via the Table of Maims to comprehensive payment of lump sums for PI and NEL. These payments replaced awards of damages at common law for losses of a non-economic nature.

¹ *Commonwealth Employees' Compensation Act 1930*

The current scheme

Under the SRC Act, claims for PI and NEL can only be determined where an injury has been accepted in accordance with s14 of the SRC Act. In addition, the injury must be:

- permanent; and
- there must be an impairment.

The terms 'permanent' and 'impairment' are defined in s4 of the SRC Act. These definitions must be satisfied before compensation for a PI can be accessed.

Once it has been established that there is an injury, it is permanent and there is an impairment, the next step is to assess the level of impairment. Section 24 of the SRC Act requires that the degree of PI be determined under the provisions of an approved Guide.

Section 24 also provides details of a threshold that must be met for PI benefits to be payable. Employees must have suffered a PI to a degree of at least 10 per cent. This section also stipulates the maximum amount payable for permanent impairment which is indexed yearly by the consumer price index (CPI). The current indexed maximum is \$150 396.

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

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

Both the PI benefit and associated NEL benefit are paid to injured employees as lump sums. They are paid in addition to any ongoing economic loss benefits such as salaries/wages, medical, rehabilitation, household and attendant care, aids and modifications and such costs.

Under section 45 of the SRC Act, where a PI benefit is payable, the employee may elect to institute an action or proceedings for damages for NEL. Once they do this, their election is irrevocable. No statutory permanent impairment (s24) nor NEL (s27) benefits are payable after the date of such an election. The SRC Act caps the quantum of damages available at common law to \$110 000. This amount is not indexed.

This legislative framework for access to PI and NEL benefits of at least 10 per cent whole person, based on the provisions of an approved Guide, replaced the *Compensation (Commonwealth Government Employees) Act 1971* (the 1971 Act) more limited regime of statutory payments for impairments based on a 'Table of Maims'. However, the 1971 Act provided unrestricted and un-capped access to common law action.

Part II – Legislation

Part II of the paper is primarily concerned with the sections of the SRC Act that relate to PI.

1. The adequacy of current impairment benefits

Currently, the indexed maximum for PI under s24 is \$150 396 and the current indexed maximum amount payable for a section 27 benefit is \$56 399. Therefore, the total maximum available is \$209 795. A comparison against similar benefits payable across jurisdictions is at **Attachment 4**.

The comparison highlights the fact that the lump sum available under the SRC Act is less than that payable in the majority of Australian jurisdictions, with only WA and the ACT having access to lower PI lump sums. An examination of both of these schemes reveals they each have more significant access to common law than is available under the SRC Act.

Historically, the Commonwealth has been a leader in PI, being one of the first jurisdictions to move away from the Table of Maims and implement a more comprehensive guide with the adoption of a whole person impairment (WPI) methodology. However, from an examination of the *Comparison of workers' compensation arrangements – Australia and New Zealand*, published in October 2002, it is evident that the PI benefit landscape is very different today. The majority of Australian jurisdictions have reviewed their PI benefits in the past five years (**Attachment 4**).

In 2002, while still behind NSW and Victoria, the SRC Act benefits were higher than in any other jurisdiction. The SRC Act, with the combination of 45 weeks of compensation at 100 per cent of normal weekly earnings (NWE) and then weekly benefits at 75 per cent of NWE until age 65, had and continues to have, the highest economic loss benefit payable in any Australian jurisdiction.

Of particular importance is the interaction between PI and common law. The SRC Act is predicated on limited access to common law. Recent studies of workers' compensation scheme design have supported this approach². It has been argued in submissions that the more limited the access to common law, the higher the PI benefit should be. In general, other Australian jurisdictions have less restricted access to common law than in the SRC Act.

Another issue raised in some submissions was the 'uncapping' of the common law benefit under the SRC Act, so that the maximum common law amount increases at the same rate as PI.

² For example, Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, March.

1.1 Issues raised

In a number of submissions it was noted that the level of benefits payable for PI under the SRC Act were inadequate. Injured Service Persons Association National (ISPA) noted that the Government had already indicated that it intended to increase the value of the death benefit under the SRC Act to \$400 000, and went on to state:

'...there is no compelling reason not to increase the combined value for Permanent Impairment and non-economic loss compensation to at least the equivalent of the death benefit under s17 (particularly given that on a true 'whole person' impairment scale, 0% means perfect health and 100% means death.'

The Australian Council of Trade Unions (ACTU) stated:

'We note that only Western Australia and the ACT have lesser maximum permanent impairment benefits than Comcare. We also note that the Accident Compensation Act Review Final Report, on the Victorian system, recommends to the Victorian Government that the maximum permanent impairment benefit available under that scheme is increased to \$484,830. If this recommendation is adopted by the Victorian government, the Victorian scheme will have the highest maximum permanent impairment benefits of all Australian jurisdictions and will have a maximum benefit \$275,035 or 230% greater than the maximum Comcare benefit.'

Similarly, the Law Council of Australia stated:

'Given the increases applicable in other jurisdictions the amount of entitlements under sections 24 and 27 needs to be reviewed.'

However, Employer 1 provided a different perspective:

'Overall the Comcare scheme has entitlements which are equivalent to those found in other State compensation jurisdictions and in some cases, those entitlements exceed their State counterparts e.g. household and attendant care services. Permanent impairment benefits should not be looked at in isolation. While the maximum benefits payable under ss. 24 and 27 may be lower than the equivalent payments in some other States, this is made up for by the maintenance of a 10% permanent impairment threshold for psychiatric impairments, the ability to claim a psychiatric impairment which is a sequela of a physical injury and more generous incapacity payment entitlements under s. 19 of the Act.'

In addition, some submissions made observations in relation to the capped rate of common law available under the SRC Act. ISPA noted that the maximum compensation payable for common law under the SRC Act, set at the capped rate of \$110 000, has diminished in 'real value' over the years. ISPA also stated:

'...the cap on Common Law damages for Non-Economic Loss should be at least equal to the maximum under ss24 and 27 combined and indexed in accordance with s13. Alternatively, if there is compelling reasons to keep the capped amount under s45 less than the maximum under ss24 and 27 combined, the ISPA notes that if the amount under s45 had been indexed to the Consumer Price Index, the present value of the maximum amount would be approximately \$202,748.'

ACTU stated:

'The maximum amount of award available under common law should equal the combined maximum amount available under s24 and s27 of the Act.'

Similarly, KCI lawyers stated that the common law maximum of \$110 000 set in December 1988 should be increased:

'...if it had been indexed thereafter the current value would now be approximately \$202,748. This amount is also comparable to the current death benefit of \$225,594 which could also be the new common law maximum.

By contrast, Employer 1 stated:

'The legislation specifically fixed this amount at \$110,000 to dissuade employees from instituting common law action. There should be no change to this amount.'

1.2 Options

Option one: No change to the current level of impairment benefits

Overall the SRC Act provides benefit levels which are equivalent to those available in other State compensation schemes and in some cases, the benefits exceed those available in other schemes. In particular, the SRC Act provides access to 45 weeks of incapacity to injured employees at 100 per cent of their normal weekly earnings, far exceeding the equivalent benefit available in State jurisdictions. As argued in the submission of Employer 1, in light of the design of the SRC Act, the current level of PI benefits are appropriate and should be retained.

Option two: Increase the maximum payable for PI and NEL combined to \$360 000

With effect from 13 May 2008, the SRC Act has been amended to increase lump sum death benefits from \$224 494 to \$400 000. When the SRC Act commenced, death benefits were \$120 000 and the combined amount for PI and NEL was set at approximately 90 per cent of the death benefit, \$110 000. The original balance of the scheme's benefit structure between the ratio of the combined PI/NEL to death benefit should be reinstated. The amended rate would be 90 per cent of \$400 000 or \$360 000.

While the opinion has been expressed in some submissions that the maximum amount available for common law under the SRC Act should be indexed, or should be capped at a higher amount, the limited access to common law and a capped maximum amount are fundamental to the design of the legislation³. Therefore, rather than index the maximum payable for common law, or increasing this amount, an option harmonious with the intent of the SRC Act would be to increase the maximum payable for PI/NEL.

3 Hansard, Minister's Second Reading Speech – *Commonwealth Employees' Rehabilitation and Compensation Act 1988*, Wednesday, 27 April 1988 "perhaps the most controversial aspect of the new legislation is that common law actions against the Commonwealth will be replaced by the comprehensive benefits which I have described".

Option three: Increase the maximum payable for PI and NEL combined to \$400 000

As mentioned above, with effect from 13 May 2008, the SRC Act has been amended to increase the lump sum death benefit to \$400 000. As submitted by ISPA, if death is broadly equivalent to 100 per cent impairment, then the maximum payable for PI/NEL combined should also be \$400 000. It should be noted that this would not maintain the originally intended relativity between the death benefit and the combined PI/NEL amount.

1.3 Preferred option

Comcare's preferred option is to increase the maximum amount payable for PI/NEL to 90 per cent of the death benefit, that is \$360 000 (to be indexed annually) but not to increase the maximum amount available under common law.

2. Separate payments for PI and NEL

A feature of the majority of Australian jurisdictions is that PI is a single payment. Only NSW and the Commonwealth have a dual payment structure, resulting in one payment for a physical or psychiatric loss and another for 'pain and suffering and loss of enjoyment of life'⁴.

Currently, the maximum payable for NEL under the SRC Act is \$56 300. Where an employee is entitled to a payment under s24 of the SRC Act, fifty per cent of the maximum amount (\$28 150) is payable at the same percentage proportion as the PI payment (for example, if an employee has a 15 per cent WPI, they will receive 15 per cent of \$28 150). The proportion of the additional \$28 150 is payable at a rate determined based on responses given by a claimant to a NEL questionnaire. This questionnaire asks an employee to provide a rating on various issues including level of pain, suffering and mobility.

The end result is that the payment directly related to pain and suffering and loss of amenity of life is a maximum payment of \$28 150. While no submissions specifically addressed this point, Comcare has considered that this is a potential area for improvement.

2.1 Options

Option one: Maintain the current system of separate payments for PI and NEL

Maintain the current system of separate payments for PI and NEL requiring employees to provide the determining authority with evidence of how their life has been affected by their injury. As a consequence, a more individualised impairment benefit package, taking these lifestyle elements into consideration, can be delivered to the employee.

4 Hansard, Minister's Second Reading Speech – *Commonwealth Employees' Rehabilitation and Compensation Act 1988*, Wednesday, 27 April 1988 "In recognition that a permanent impairment may lead to considerable pain and suffering and loss of enjoyment of life, up to \$30,000 will also be payable for any non-economic loss suffered by an employee."

Option two: Combine PI and NEL into one payment

The dual system adds an administrative cost to the scheme. An injured employee completes the eight page NEL form, assigning scores in relation to issues such as 'pain' and 'suffering' and then takes the form to their medical practitioner. The medical practitioner also scores the injured employee and can provide further comments. The form is then sent to the determining authority. The determining authority reviews the form, taking into consideration the scores given by the injured employee, the medical practitioner and also comments provided. If the determining authority disagrees with a particular rating, they will advise the employee of what they consider the rating should be and also provide reasons for the revised rating. This decision is a determination under the SRC Act and is therefore subject to reconsideration.

Not only is the process administratively lengthy, this process could place additional strain on an employee. In certain circumstances, seriously injured employees can be disadvantaged by separate payments for PI and NEL. In the current system, if an employee dies before their claim for NEL is determined, then their estate is only entitled to receive the PI benefit, not the NEL benefit. This situation would be circumvented if PI and NEL benefits were rolled into one payment.

To add weight to the view that separate NEL processes are unnecessary, American Medical Association Guide 5 (AMA 5), which the second edition of Comcare's PI Guide is based, provides medical practitioners with the ability to increase some impairment ratings by one to three per cent based on very similar elements as compensated under s27. American Medical Association Guide 6 (AMA 6) also contains this feature. This feature enables medical practitioners to automatically perform a NEL assessment when performing the assessment.

If the preferred option under 1, being the adequacy of current impairment benefits, is accepted, the maximum benefit available for the combined PI and NEL payment would be \$360 000.

2.2 Preferred option

Comcare's preferred option is that the s24 benefit be increased to include the previous NEL component and, by consequence, s27 of the SRC Act be repealed.

3. The irrevocable election between PI and common law

The SRC Act provides that where a PI benefit is payable, the employee is able to make an irrevocable election to institute an action or proceedings for damages for NEL under section 45 of the Act. No statutory PI (s24) or NEL (s27) benefits are payable after the date of such an election.

In the majority of Australian schemes, an employee is allowed to pursue a common law action concurrent with, or subsequent to, pursuing a claim for PI. If an employee is successful in their common law action, all compensation payments made, including PI payments, must then be repaid.

3.1 Issues raised

The ACTU submitted that while actions under common law could take considerable time to progress through the court system, this should not deny employees access to compensation for their permanent injury or incapacity, or for any NEL.

‘Workers’ should be able to pursue a common law action while con-currently seeking permanent impairment compensation. If successful in their common law case the permanent impairment amount should then be deducted from the common law award.’

The Law Council of Australia believes that there is a strong argument for better access to common law.

‘...not just for providing fairer entitlements for injured workers, but also for normative reasons in reinforcing good occupational health and safety practices.’

Employer 1 submits that there is no need to remove this essential component of the PI scheme.

‘...removing this requirement [of an irrevocable election] would inevitably lead to an increase in common law actions which goes against the intention of the legislation.’

3.2 Options

Option one: Maintain the irrevocable election between PI and common law

As mentioned above, limited access to common law and a capped maximum amount are fundamental to the design of the legislation. For this reason, the irrevocable election between PI and common law should be maintained.

The *Occupational Health and Safety Act 1991* (OHS Act) and supporting regulations provide an effective framework for employers to maintain safe workplaces. In addition, with the implementation of the model OHS laws, which will include a more comprehensive range of punitive measures, including criminal actions for breaches of duty of care, the argument that employees having access to common law action would be an ‘incentive’ for employers to maintain safe workplaces, loses relevance.

Option two: Amend the legislation to allow an employee to pursue a common law action concurrently or after seeking PI compensation under the SRC Act.

In most Australian jurisdictions, an employee is entitled to pursue a common law action concurrent with or after seeking PI compensation through relevant legislation. If the employee is successful in their common law action, they must pay back any other compensation they have obtained including PI compensation. Under this option, the legislation would be amended to allow concurrent common law action for PI under the SRC Act. However, as outlined above, pursuing this option would change a fundamental element of the design of the legislation.

An additional issue to consider is that by allowing concurrent or subsequent common law action, there would be an increase in scheme administrative and legal costs.

3.3 Preferred options

Comcare's preferred option is that the irrevocable election between permanent impairment and common law be maintained.

4. The reasonableness of current impairment thresholds

Thresholds for access to PI vary greatly across all Australian jurisdictions and the views in the submissions on this issue also varied greatly.

In 1988, when the 10 per cent threshold was implemented, it was difficult to assess an impairment below 10 per cent. However with advances in medical science, this is now less problematic as there is more certainty in assessing the degree of PI at lower percentages.

Reducing the threshold to the current minimum level of measurable impairment (1 per cent) would create an increase to the administrative costs of the scheme. In the absence of an actuarial study, it is unclear exactly what impact such a change would have on the financial viability of the scheme. However, it is expected that there would be an increase in the total costs of PI in the jurisdiction.

All submissions agreed that the simplicity in having one threshold (with a few exceptions, notably hearing loss) is a positive aspect of the benefit structure. Some jurisdictions set a higher threshold, up to 30 per cent, for access to a PI payment for psychiatric conditions.

In considering this issue, the balance between equitable and fair benefits and the financial viability of the scheme has been kept in mind and five options have been identified.

4.1 Issues raised

A number of submissions expressed the view that the current 10 per cent threshold should be reduced or abolished.

The ACTU stated:

'A minimum threshold of 10% whole person impairment for the most common conditions is an unnecessary further burden on a worker who has already established their injury and impairment is a result of their work. The imposition of a threshold on top of Guides, which are specifically designed to exclude any rating for minor injuries, results in the denial of an impairment payment for significant impairments.

Permanent impairment benefits should apply for all permanent impairment that has occurred as a result of a worker's employment.'

ISPA stated:

'...there should be no threshold for Permanent Impairment and Non-Economic Loss claims and consequently no threshold to access damages at Common Law for losses of a non-economic nature.

Common Law damages (which the ISPA agrees have been eroded due to the omission of indexation in the SRC Act) reflect community standards in cases of employer negligence and to diminish the importance of this check and balance will further undermine the efforts of others to improve occupational health and safety standards.'

The position of the Australian Lawyers Alliance is as follows:

'The arbitrary imposition of any permanent impairment threshold (10 per cent or otherwise), before sections 24 or 27 SRC Act compensation becomes payable, prevents an employee from properly receiving his or her entitlement to compensation for an accepted injury that has resulted in a permanent impairment. The Lawyers Alliance respectfully submits that there should be no threshold.

If a threshold is to remain, then there should continue to be exceptions retained and possibly expanded for specific permanent impairments (that is, as presently done for impairment for loss of use of a finger or toe).

A reduction of the threshold to the minimum measurable level of impairment would produce a positive result in that employees would be properly compensated when they suffer an injury resulting in permanent impairment. The Lawyers Alliance therefore submits that the 10 per cent threshold referred to in subsection 25(4) of the SRC Act should also be reduced, or abolished entirely, to allow employees to be properly compensated for additional permanent impairment resulting from an accepted injury.'

KCI Lawyers noted that Victoria is the only State or Territory that has set a threshold at 10 per cent before compensation is payable.

'The other States and Territories have established a threshold that ranges from zero to one up to five per cent. If there was the need to consider what the threshold should be then, commonsense would dictate that it should range between one per cent and 5 per cent. Even when an average is taken of all of the threshold i.e. by adding twenty eight per cent and dividing by eight the average is three point five per cent threshold.

'Therefore, at a minimum and to the use the other State and Territories as a reasonable indicator of what a threshold should be it could be argued that the Comcare threshold should be three point five per cent.

'The issue of whether there should be any threshold is vexed. Obviously a person who suffers impairment should be entitled to compensation whether the impairment can be assessed at one or two per cent or greater than three point five per cent or possibly ten per cent. This is recognised when, for example a person has injured a toe or finger however under the s24(8) of the SRC Act there is no requirement to satisfy a minimum ten per cent. This is due to Parliament acknowledging that, it would be unfair and inequitable ie contrary to the objects of the SRC Act and to the general beneficial nature of legislation to deny anyone compensation for suffering an impairment to their toe or finger by requiring that they first meet a threshold.

'...there could be a significant reduction in litigation and of competing medico legal opinions if there was no threshold but only an issue as to the level of impairment prior to compensation being paid.

'We also note that maintaining a 10% threshold denies a person the ability to issue common law proceedings if they fail to meet the threshold...The issue of Occupational Health and Safety is also an intrinsic part of the threshold given the potential to reduce further injuries and possible further deaths is the threshold was lowered and common law claims were issued to highlight the negligence.'

The Law Council of Australia stated:

'The philosophical rationale for a threshold is to distinguish between serious impairment and those losses that can be considered of minor nuisance value only. The practical rationale is fiscal – to limit the cost to the government of properly compensating injuries through lump sum compensation.

'The introduction of thresholds inevitably produced injustices in respect of those who fall short of that threshold but nevertheless appear to have subjectively suffered significant loss. This injustice is heightened when the threshold is entirely based on loss of range of movement rather than taking into account more subjective factors. For example, the loss of capacity to properly bend one's wrist may have greater subjective consequences for a policeman, labourer or tradesman than a clerical officer.

'The Law Council suggests that Comcare should consider modelling a number of options from a 5% threshold to no threshold but with section 27 entitlements cutting in at 5 per cent or 10 per cent'

By way of contrast, the Returned & Services League of Australia's (RSL) position is:

'...the current principles of assessment thresholds under the permanent impairment guide is reasonable for current and ex-service personnel that may be eligible to claim under the SRC Act.'

Employer 1 submitted that the current threshold of 10% should be retained as it denotes a level of permanent impairment of some significance before a lump sum is payable to the employee.

'In the sense the threshold acts as a filter for low level impairments which may not have a significant impact on an employee's quality of life.

'Excluding the current exceptions relating to hearing loss, loss of finger/toe, loss of taste and loss of smell, changing the threshold level with respect to other conditions is likely to have a significant psychiatric impact on many employees who may unconsciously adopt an invalid role upon being assessed for a permanent impairment.

'...an impairment is more likely to be considered permanent if it is of the order of at least 10% whole person rather than, say, 1% or 2%. On a whole person basis, a small permanent impairment of less than 10% is much less likely to be of major significance to an employee attempting to achieve recovery from a compensable condition. While this is not to say a person will necessarily fully 'recover' from his/her impairment, a small impairment is likely to be subsumed by the employee's overall general bodily health and not be considered as significant enough as to prevent the employee from undertaking a rehabilitation program. This will consequently not allow the employee to adopt an invalid role.

'Reducing the threshold level below 10% for most conditions would have a profound costs impact on the Commonwealth and the licensees. There is also likely to be an impact on the SRC Act's focus on rehabilitation as an employee suffering a permanent impairment, albeit at a level under 10%, could be reluctant to return to the workplace and may delay undertaking a rehabilitation program/return to work plan.

'...the current general 10% threshold should apply to all impairments, except for those in respect of which there is already a reduced level of impairment (loss of hearing, loss of taste etc.). State compensation jurisdictions provide a range of thresholds, in particular relating to psychiatric impairments.

'While the Commonwealth threshold for a psychiatric permanent impairment is the same as the general threshold of 10%, many State jurisdictions have significantly higher threshold levels for psychiatric permanent impairments and some do not allow for payment of a lump sum for a psychiatric impairment at all. Given the current statistics that psychiatric claims make up a significant number of existing claims in the Commonwealth jurisdiction, it is considered that the overall balance of a 10% threshold for all permanent impairments (bar the exceptions noted above such as for hearing loss etc.) is fair overall to all employees under the Comcare scheme.

'In addition, having a range of thresholds would lead to more complexity in the application of the scheme and would detract from the whole person concept.

'Finally on this point, having a range of different thresholds could be the source of much misinterpretation and frustration on the part of injured employees who may feel that their particular type of impairment should be subject to a lower threshold consistent with other similar impairments. A range of different thresholds can lead to a great deal of subjectivity as to the appropriate description to be applied to a claimed impairment so as to obtain the best desired result. It is considered that a 10% threshold across the board is equitable insofar as dealing with all employees under the Comcare scheme.

'It is considered that reducing the threshold to the minimum measurable level of impairment, such as 1% (as is the case currently in NSW, QLD and WA), would lead to a significant proliferation of claims, increased costs and substantial administrative activity. There would also be increased levels of dispute concerning impairment levels with consequent increases in applications to the AAT and legal costs.

'The scheme under the SRC Act as a whole is beneficial towards injured employees and it is felt that the overall entitlements available to employees certainly far outweigh any perceived detriment that may be caused by having a 10% threshold for a permanent impairment claim.

'Were changes to be made to the current 10% threshold, some consideration needs to be given as to what further increased level of permanent impairment would entitle an employee to a further lump sum payment. Currently for most permanent impairments, once an initial assessment has been made an increase of 10% or more is required to entitle the employee to a further lump sum payment. Were this 10% threshold to be eliminated it would be extremely costly and inefficient to entitle an employee to claim a further lump sum upon any increase in that employee's permanent impairment.'

Employer 2 also submitted that there should be a threshold for PI claims and that the current thresholds should be maintained.

'If an employee suffers from an impairment of 10% or greater (with the exception of hearing loss) he or she is entitled to benefits. If the threshold was reduced, say in accordance with that system adopted by NSW who for the most part has a 1% threshold, this would result in an abundance of "nuisance" type claims.

'For example, it is not submitted that a 2% back impairment or a 3% skin cancer impairment is an impairment of sufficient severity to warrant an additional compensation payment.

'It should also be noted in regard to the example given, a 2% back injury under the NSW system, does not equate to 2% of the maximum amount of compensation payable. Under that scheme there is a separate table to provide each body part with an individual rating. A back injury is worth 60% of the maximum and therefore a 2% impairment equates to 2% of 60%.'

4.2 Options

Option one - Reduce threshold to the minimum measurable level of impairment

The view expressed in a number of submissions was that any threshold was arbitrary and therefore the threshold should be the minimum measurable level of impairment. The view was expressed that PI benefits should be available for any PI that has occurred as a result of employment.

Very small impairments (1 per cent) can now be objectively measured, so from a purely medical perspective, there are few barriers to the implementation of what would essentially amount to a 1 per cent threshold being used.

The Pearson Royal Commission⁵ in the United Kingdom, a 1978 Royal Commission that provided recommendations in relation to tort reform that are still considered relevant today, gave three reasons for paying compensation for NELs. The Commission argued that such compensation:

- Serves as a palliative or solace to the victim
- Allows the injured employee to purchase alternative sources of satisfaction to those he or she has lost
- Helps to meet the hidden costs of the impairment (i.e. the impact on lifestyle)

If these are the three arguments for the payment of PI, then it follows that, the hidden costs of the impairment are negligible until the impairment is of some significance. As commented by the Law Council of Australia, the philosophical rationale for a threshold is to distinguish between serious impairment and those losses that can be considered of minor nuisance value only.

Arguments in submissions against the reduction of the threshold to the minimum measurable level of impairment can be summarised as:

1. Fiscal – as the SRC Act's threshold has been 10 per cent since 1988, there is no reliable data on what the financial impact might be of reducing the threshold, however it could be significant.
2. Administrative – as above, there is no reliable data on the increased number of claims that could be received and therefore, the administrative impact upon the scheme. It is estimated that there could be an increase of over 25 per cent in the number of PI claims received per annum. Further analysis is currently being undertaken in relation to the administrative impact to the scheme of this option.

Option two – Reduce threshold to five per cent - include 12 month waiting period on the lodgement of PI claims

Reduce the threshold to five per cent, and place a 'waiting period' of 12 months on the lodgement of PI claims, except traumatic amputations, mesothelioma and lung cancer. This could mitigate some of the administrative burden on the scheme of reducing the threshold, as it is less likely 12 months post injury that a claim for PI would be rejected due to not meeting the threshold test that the impairment was permanent.

Option three – Reduce threshold for all injury types except psychiatric conditions – increase threshold for psychiatric conditions

Reduce the threshold for all injury types except psychiatric injury and increase the threshold for psychiatric conditions. A third of Comcare's accepted PI claims relate to psychiatric conditions (**Attachment 5**). If the threshold for psychiatric impairments was increased and the threshold for other conditions reduced, this might lessen the financial impact on the scheme of the reduction in thresholds for other injuries.

5 *Royal Commission on Civil Liability and Compensation for Personal Injury, 1978*

There is a 15 per cent threshold for psychiatric conditions in NSW and WA, 30 per cent in Victoria and no PI payable for psychiatric conditions in SA and ACT. Increasing the PI threshold for psychiatric conditions under the SRC Act would then be consistent with the approach in other jurisdictions.

Further discussion about an increased threshold for psychiatric impairments is contained under 12.2 – Psychiatric conditions, option one.

Option four – Retain the current threshold – reduce the threshold for deterioration of conditions

Retain the current thresholds, but reduce the threshold for deterioration of conditions. Currently, once a person has met the initial threshold, until their impairment has deteriorated a further 10 per cent, they cannot access a further PI payment. Having already met the 10 per cent impairment test, the employee has quite a serious injury. A lower threshold for a deterioration of a condition could be considered.

Comcare is considering the PI benefit package for slow onset conditions and whether it should be different from the package for other conditions. Several submissions addressed this point and commented that the packages should not differ (see 11.1 Slow onset conditions – Issues raised). However, the nature of these conditions potentially results in this group of injured employees being disadvantaged by having to meet an additional 10 per cent for a deterioration of their condition.

Option five – Retain the current threshold levels

In consideration of the recommendation to increase the maximum payable for PI and also considering the administrative efficiency of retaining one threshold for the majority of conditions, the option of retaining the current threshold levels should be considered.

4.3 Preferred option

On balance, and in consideration of the recommendation to increase maximum payable for PI, Comcare's preferred option is that the threshold of 10 per cent be retained and that the threshold for deterioration of impairment be reduced to five per cent.

5. Multiple injuries (Canute)

The High Court of Australia in *Canute v Comcare* [2006] HCA 47 (Canute) found that, where an injury occurrence results in a number of injuries, each injury is assessed as a separate injury which individually must satisfy the required threshold of 10 per cent degree of impairment. For example, in a motor vehicle accident where injuries are sustained to the left ankle, right wrist and left shoulder, each injury must be assessed as a separate injury.

A consequence of the Canute decision is that it disadvantages an employee who might, for example, have nine per cent impairment to their foot, seven per cent impairment to their ankle and seven per cent impairment to their wrist. Each value falls below the 10 per cent threshold. However, if these separate impairments were combined to achieve a combined impairment value, (in this example, nine per cent, seven per cent and seven per cent) they would achieve a combined value of 21 per cent using the combination tables in the Guide.

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

5.1 Issues raised

Submissions in relation to this issue varied and raised several complex issues. Some suggested that if the 10 per cent threshold was reduced or removed, then the issues raised by Canute would be largely mitigated or removed (see 5- Thresholds for more information about this issue).

ISPA stated:

'If it was intended that the SRC Act compensate Permanent Impairment holistically by combining all impairments resulting from multiple injuries which arise from a single occurrence, the wording of ss24, 25 and 27, or the definition of 'injury', would be quite different. Notwithstanding comments made by the Minister in the Second Reading Speech introducing the Bill to what would be known as the SRC Act, the term 'whole person' does not appear in any provision of the SRC Act.

'To the contrary, the clear words of ss24 and 27 are: where 'an injury' to an employee results in a Permanent Impairment, Comcare is liable to pay compensation to the employee in respect of 'the injury' and for any Non-Economic Loss suffered by the employee as a result of 'that injury' or impairment.

'However, it is the view of the ISPA that this would no longer be an issue if the thresholds were removed.'

KCI submitted that this issues has question has been made complex by the 10 per cent threshold.

'The reference to the High Court Case of Canute has raised more questions than it has answered. For example it has placed lawyers in the difficult position of trying to either argue for a combining of impairment assessment to establish a threshold if "equity, good conscience and the substantial merits of the case" would indicate that such an approach is reasonable and beneficial to [an injured worker].

'When for example an injury results in a number of impairments and those impairments can be assessed at 10% or over, the [injured worker] should not be disadvantaged by not having each and every impairment assessed and compensation paid for, not only the 10% impairment but the pain and suffering associated with each condition.'

Employer 1 submitted that there was no need to alter the current situation:

'From anecdotal evidence it is acknowledged that the High Court decision in *Canute v. Comcare* [2006] HCA 47 has had an impact in reducing the number of permanent impairment claims. In the past, sequelae of primary injuries which could be linked to the primary injury would have been combined with the permanent impairment resulting from the primary injury and the injured employee would have been entitled to a combined impairment rating. The High Court in *Canute* looked at a fact situation where a psychiatric sequela represented a separate injury.

'A distinction needs to be made between the sorts of injuries which may be considered to be separate to the primary injury and those consequential injuries which are mere manifestations or symptomatic of the previous injury but are not considered to have their own individual identity.

'*Canute's* case therefore provides a very good example of those sorts of injuries which may be considered to be separate injuries to the primary injury (the back injury and the psychiatric sequela) and those injuries which are mere manifestations or symptomatic of a previous injury but not considered to have their own individual identity (the right leg problem suffered by Mr Canute following on from his original back injury).

'Prior to the *Canute* case, the general practice by decision makers was not to combine separate impairments using the Combined Values Table unless they flowed from the same injury.

'If Comcare considers that the effect of *Canute* has been to unfairly limit the number of permanent impairment claims made by injured employees the appropriate resolution would be by way of an amendment to s. 24 of the SRC Act. [Employer 1] sees no need to alter the current situation.

'One side effect of the *Canute* decision has been the difficulty in properly assessing s. 27 non economic loss entitlements where there are a number of separate injuries and consequently separate permanent impairments. Where two or more individual impairments affect the same s. 27 factors, such as, for example, loss of mobility, it is a difficult exercise to apportion the correct rating to each individual impairment so as to avoid a duplicated payment. In other words it is difficult in the current climate to ensure that an employee is not being compensated more than once for the same factor in the s. 27 non economic loss calculations. It is recommended that guidelines be prepared to cover such situations in the event that Comcare maintains the status quo relating to the *Canute* principles.'

Employer 2 submitted that the 'pre-Canute' position should be restored.

'The current position does disadvantage a claimant who suffers from several impairments arising from one incident where those individual impairments are less than 10%. The present position also provides an unfair advantage to claimants who suffer from several impairments arising from one incident where those individual impairments are 10% or greater by virtue of the fact that the claimant is then entitled to multiple section 27 payments. Having regard to the fact that assessments are made on the basis of a "whole person impairment" it is submitted that one combined impairment should be made in respect of all injuries arising from one incident.

The Law Council of Australia stated that the purpose of whole person impairment scheme is to map a diverse range of impairments into a single index (whole person impairment).

‘It is appropriate and desirable that a number of impairments are able to be combined to reach a total level of impairment, particularly if a threshold remains in the legislation. As a matter of principle, there should also be no difference between an injury leading to two impairments immediately and one leading to two over the passage of time. It is this principle that partly explains the High Court decision of *Canute v Comcare* (2006) HCA 47.

‘The problem is best overcome by adopting a combined tables approach (pre-Canute) but allowing accumulation without reference to combined tables except for the purposes of subsequent quantification of impairment entitlements.

‘It also raises the issue of whether there needs to be a nexus between a particular injury and impairment. There is an argument that all injuries, regardless of date, could be added to produce one impairment.’

The Australian Lawyers Alliance stated that the present post-Canute methodology of assessing PI resulting from each individual accepted injury produces a number of artificial and improper barriers to employees being properly compensated for PI.

‘This methodology discriminates against employees who have suffered multiple impairments that are each assessed at 0-9 per cent under the guide. Such employees are not entitled to permanent impairment compensation, despite being significantly impaired from multiple work-related injuries.

‘Any negative impact of such methodology would be eliminated by the removal of an arbitrary percentage threshold before s24 & 27 compensation is payable for permanent impairment resulting from an accepted injury, or for additional permanent impairment resulting from an accepted injury.’

5.2 Options

Option one: Assess and compensate each impairment arising from a single injury occurrence separately.

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

This option disadvantages an employee who might have nine per cent impairment to their foot, seven per cent impairment to their ankle and seven per cent impairment to their wrist. Such values are unable to be compensated as each injury fails to achieve the required 10 per cent threshold.

Option two: Combine separate impairments arising from a single injury occurrence to achieve a combined impairment value.

Combining impairments is consistent with the original intent of the legislation, that the level of permanent impairment payments be determined using a 'whole person' approach.⁶

Option three: Combine all impairments arising from all injury occurrences under the SRC Act to achieve a combined impairment value.

In order to give full effect to the whole person impairment 'philosophy', an alternative option is to combine all impairments arising from all injury occurrences under the SRC Act to achieve a combined impairment value. This would be more consistent with the approach used under the *Veterans' Entitlement Act 1986*, as mentioned in the Second Reading Speech to the SRC Act.

An effect of combining all impairments arising from all injury occurrences under the SRC Act would be that 100 per cent PI would be the maximum benefit an employee could receive for PI under the SRC Act. Under the current system, it is possible that in adding benefits received from separate claims, an employee could receive benefits indicating in excess of 100 per cent whole person impairment.

5.3 Preferred option

Consistent with the 'whole person impairment' approach, Comcare's preferred option is that, for each employee, all impairments resulting from all injury occurrences under the SRC Act be combined.

6. Pre-existing conditions

The second edition of the Guide, within the principles of assessment, provides medical practitioners with the following instructions relating to pre-existing conditions and aggravations:

'Where a pre-existing or underlying condition is aggravated by a work-related injury, only the impairment resulting from the aggravation is to be assessed. However, an assessment should not be made unless the effects of the aggravation of the underlying or pre-existing condition are considered permanent. In these situations, the pre-existing or underlying condition would usually have been symptomatic prior to the work-related injury and the degree of permanent impairment resulting from that condition is able to be accurately assessed.

'If the employee's impairment is entirely attributable to the pre-existing or underlying condition, or to the natural progression of such a condition, the assessment for permanent impairment is nil.

Where the pre-existing or underlying condition was previously asymptomatic, all the permanent impairment arising from the work-related injury is compensable.'

⁶ Hansard, Minister's Second Reading Speech – *Commonwealth Employees' Rehabilitation and Compensation Act 1988*, Wednesday, 27 April 1988 "Under the existing Act, lump sum payments are made on the basis of a table of maims, with the level of payment being determined having regard to the loss, or loss of the efficient use, of various parts of the body. That approach has been abandoned and the level of payments in future will be determined using a 'whole person' approach, similar to that used under the *Veterans' Entitlements Act 1986*".

The Federal Court in *Jordan v Australian Postal Corporation* [2007] DFCA 2028 (Jordan), found that where there was a pre-existing (non compensable) impairment, it is necessary to isolate the compensable effects (where this is possible) before a percentage value is assigned to the impairment, rather than discounting for the pre-existing impairment after a value is assigned.

Considering both the instructions contained in Comcare's Guide and the decision in Jordan, confusion could arise when considering the manner and extent to which pre-existing conditions should be taken into account for the purposes of a PI assessment.

6.1 Issues raised

While some submissions addressed this issue, there were widely varying views on the appropriate way of isolating and compensating for pre-existing conditions.

ISPA stated:

'It is the usual practice of the Military Rehabilitation and Compensation Commission (in the case of members of the ISPA covered by the MCS) to ask a specialist for an assessment of the level of Permanent Impairment and ask the specialist to discount the level assessed by any contribution by non-employment factors (which in many cases is given as a notional '50%') with the result that some legitimate claims for compensation are defeated.

'It is the view of the ISPA that once a claimant satisfies the definition of 'injury' that results in 'impairment' that is 'permanent', the whole amount of the Permanent Impairment subsequently assessed in accordance with the Guide should be compensable unless there is evidence of pre-existing impairment and that impairment is capable of being assessed in accordance with the Guide.'

KCI stated:

'We are heartened that Comcare acknowledge the approach to try and in affect dissect a compensable from a non-compensable condition affecting, for example a particular limb or organ is quite cumbersome...In a significant number of cases medical attention is drawn to the alleged non-compensable condition which in many cases is very hard to determine medically, factually and legally.

'For example, in the case if an [injured employee] who suffers a 'back injury' and has an x-ray revealing disc degeneration that may arguably be due to significant 'wear and tear' from many years of arduous military service that the [injured employee] has undertaken or may be considered to be 'age related'. However a medico legal practitioner may deem the 'age related' disc degeneration to be the cause of ongoing pain and not die to a specific episode of back pain experienced.

'Therefore the [injured employee's] back pain and the impairment is now somehow not due to the injury and compensation for permanent impairment can be denied.

'There has also been significance common law authorities that date back to the turn of the 20th century establishing principles such as that a person must be taken as to how they are found ie: the "egg shell skull" rule or that is an asymptomatic condition is rendered symptomatic due to a work related event then the ongoing condition is compensable.

'To try and split up what a persons' underlying condition is as opposed to what their current condition may be due to a [work] related injury or disease is, in our view, contrary to the beneficial nature of the legislation that has evolved from over a century of common law principles and the manner in which Comcare are to determine claims in accordance with "equity, good conscience and the substantial merits of the case without regard to legal technicality".'

The Law Council of Australia agreed with the comments made in the issues paper regarding the case of Jordan.

'Besides such an approach being cumbersome, it involves a series of very subjective medical opinions and, meritably, greater disputation.

'Whilst acknowledging that entirely degenerative conditions should not be compensable, in circumstances where a bodily part or function was largely asymptomatic prior to injury, there should be a presumption that the condition or impairment was caused by the injury, with the onus on the employer or Comcare to show that degenerative factors were a significant component in the level of impairment.'

Employer 1 also agreed that the effect of the Jordan case has been to make the calculation of a permanent impairment cumbersome where there is a pre-existing impairment.

'A review of analogous decisions prior to the *Jordan* case indicates that the AAT used to routinely assess permanent impairments contrary to the manner in which the Federal Court in *Jordan* believed that should be done. The Tribunal in the past has accepted medical evidence in a number of cases to the effect that it was possible to isolate the compensable effects of a work related condition from a pre-existing or non work related condition so as to reflect only the impairment due to those compensable effects when calculating the degree of permanent impairment.

'Reference is made as examples to *Williams and Australian Postal Corporation [1998] AATA 154* and *Stewart and Comcare [2003] AATA 27*. Both of these cases essentially made findings as to current levels of whole person impairment and then deducted or isolated the proportion referable to non compensable factors.

'It is further noted that the opinion of Buchanan J in the *Jordan* case is contrary to the Full Federal Court judgment in *Carson v. Comcare [2004] FCA FC 204* where the Full Court did not set aside the AAT's decision that while Dr Carson had suffered from a 10% psychiatric permanent impairment, as he had a 5% permanent impairment prior to suffering his compensable injury, only 5% permanent impairment was suffered as a result of employment and he was therefore not entitled to a lump sum payment under s. 24.

'A strict application of the principles outlined in the *Jordan* case would see an increase in allowable permanent impairment claims, especially in relation to psychiatric permanent impairments. In addition there are practical problems which arise for decision makers in applying the principles from the Guide which require isolating the compensable effects of an injury upon a pre-existing or underlying condition so that the final assessment of permanent impairment should only reflect that impairment which is due to the compensable injury.

'[Employer 1] favours the situation as it applied prior to the *Jordan* decision an example of which is the AAT decision which was the subject of the appeal to the Full Court in the Carson case referred to above. If Buchanan J's decision is accepted as correctly based on the wording of s. 24, legislative amendment may be required to overcome the effects of that decision.'

6.2 Options

Option one: Maintain post Jordan method of discounting for pre-existing conditions

Consistent with *Jordan*, a medical practitioner isolating the non-compensable effects of a condition (where this is possible) before a value is assigned to the impairment could be considered a fair and equitable system.

A strict application of the principles in *Jordan* could result in employees being compensated for impairments that are not attributable to their employment, as a medical practitioner has not been able to isolate the non-compensable effects before assigning a value to the impairment.

Option two: Provide a clear legislative mechanism for discounting pre-existing conditions

Amend the SRC Act to allow pre-existing conditions to be discounted consistent with the 'principles of assessment' contained in the 2nd Edition of the Comcare guide.

This means that the SRC Act would deal specifically with a pre-existing impairment and exclude it from impairment assessments.

6.3 Preferred option

Comcare's preferred option is that a clear legislative mechanism be introduced for the discounting of pre-existing conditions.

Part III – The Guide

In the Second Reading Speech introducing the *Commonwealth Employees' Rehabilitation and Compensation Bill 1988* for the 1988 Act, the then Minister said:

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

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

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

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

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

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

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

7. General review of Guide

There are several reasons for the review of the current Comcare Guide. These reasons include a number of threshold issues associated with compensation for PI in general and feedback on the operation and application of the current guide. These were highlighted by submissions received during the Review of the Comcare Scheme conducted in 2008 by the Department of Education, Employment and Workplace Relations (DEEWR).

Currently, there are different guides in use in Australia to assess PI, the majority based on the 4th or 5th edition of the AMA Guide (**Attachment 6**). Queensland is currently conducting a trial of the use of the 6th edition of the AMA Guide, but the results of this trial are not yet known.

A number of submissions asked that Comcare revert back to the 1st edition *Guide to the Assessment of the Degree of Permanent Impairment* (1st Edition Guide), published in 1989. The 1st Edition Guide was based on the 2nd Edition of the AMA Guides. As the 2nd edition of the AMA Guides was published in 1984, it was effectively superseded by the 3rd edition of the AMA Guides in 1989 and is not used in any other Australian jurisdiction (**Attachment 5**). This suggestion was not considered as an option.

7.1 Issues raised

The ACTU noted the considerable national and international criticism of the AMA Guides for the evaluation of PI.

“We note on Page 5 of the 5th Edition of the AMA Guides the following:

‘Most impairment percentages in this fifth edition have been retained from the fourth edition because there are limited scientific data to support specific changes. It is recognized that there are limited data to support some of the previous impairment percentages as well. However, these ratings are currently accepted and should not be changed arbitrarily. In this edition, some percentages have been changed for greater scientific accuracy or to achieve consistency throughout the book.’

“While the AMA Guides attract significant criticism, they constitute an acceptable basis for the development of satisfactory impairment assessment methods in Australian compensation jurisdictions. The AMA Guides are not a static document, hence the recently released 6th Edition and subsequent errata. Similarly where the AMA guides fail to adequately assess impairments it has been possible to modify or supplement those guides to ensure an equitable result (see the Victorian modification of the fourth edition AMA guides for the assessment of infectious diseases and industrial asthma).”

The Law Council of Australia submitted that the AMA Guides are not the most effective way of assessing PI.

“As the first chapter of the AMA Guides notes:

‘...the Guides is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability testing.’¹

“Each addition has become increasingly technical and complex in attempting to put different impairments on a comparable continuum, so that physicians can “converse” on similar terms. The Guide attempts to categorise conditions that rarely, if ever, are a product of workplace injuries and has a poor focus on some injuries that are more likely to be incurred in the workplace (e.g. spinal injuries and their sequelae). While the purpose of the Guides is diagnostic and standardising it does not set common points that might be used for setting thresholds. The Law Council also notes that the Guides are the workings of medical specialists in the United States. They provide a useful reference point, however the clinical debates of American doctors ought not to be the basis for compensating injured Australian workers.

“Ultimately the better option is for there to be an Australian Guide designed for compensation purposes, which is fair and intelligible to doctors, lawyers, Comcare and injured workers. This would seem consistent with the approach that is intended to guide Comcare as set out in section 72 of the SRC Act.”

The Australian Lawyers Alliance submitted:

‘The AMA guides, where they have been introduced for the purposes of determining compensation, have resulted in a reduction of benefits to claimants. Comcare’s own statistics show that the introduction of the 2nd edition guide has resulted in a drastic reduction of successful claims and a similarly drastic reduction in compensation paid to injured workers for non-economic loss.

‘Indeed, the authors of the AMA guide have stated that these guides should not be used for the purpose of determining monetary compensation. The Lawyers Alliance submits that Comcare should move away from the use of these guides for the purpose of determining an injured worker’s entitlement to lump sum compensation.

‘If AMA guides are to be used however, it is beyond the scope of the present submission as to how these guides would need to be modified to reflect Australian conditions and the needs of Australian workers. A detailed submission could be made in this regard if Comcare were to move towards such a 3rd edition guide. In the alternative, the 1st edition guide should be applied in all cases until a suitable alternative is found.’

7.2 Options

Option one – Base the next edition of the Guide on the 6th edition of the AMA Guide

The 6th edition of the AMA Guide is the most current version of the AMA Guide, however it is still untested in Australia. Numerous errata have been identified and these errata have been published separately (that is, a revised edition of the AMA Guide has not been published). There appear to be teething problems being worked through and for Comcare to move to the 6th edition of the AMA Guide would require careful analysis of the different chapters and a comprehensive education campaign for doctors; most of whom have not yet been trained in the use of the 6th edition of the AMA Guide. By contrast, with ACT, SA, NSW and WA basing Guides on the 5th edition, there are now a number of medical practitioners already familiar with this edition of the Guide.

At this stage, no Australian jurisdiction has committed to moving to the 6th edition of the AMA Guide.

Option two – Base the next edition of the Guide on the 5th edition of the AMA Guide and complete an in depth analysis of the appropriateness of a transition to AMA6

In the interest of pursuing a harmonised approach to workers' compensation, the next edition of the Comcare Guide could continue to be based on AMA 5. This option would allow issues with the current Comcare guide to be addressed in a timely manner. Concurrent with a review of the next edition of the Guide, an analysis of the appropriateness (or otherwise) of a transition to AMA 6 should be completed over a 12 month period.

7.3 Preferred option

Comcare base the next edition of the Guide on the 5th edition of the AMA Guide and complete an in depth analysis of the appropriateness of a transition to AMA6

8. Stand alone guide

Consideration has been given to the adoption of a stand alone guide by Comcare. There are three different 'models' of PI guide in Australia:

- a 'stand-alone' Guide
- a 'designator' Guide (where an edition of the AMA Guide is designated as the Guide to be followed)
- a 'modifier' Guide (where the framework designates an edition of the Guide but also provides a separate Guide which acts to modify the AMA Guides or chapters)

Some submissions mentioned developing an Australian guide. Safe Work Australia is responsible for harmonisation of workers' compensation arrangements and as such it may consider this idea further.

8.1 Issues raised

ISPA has submitted that on the basis of the experience of the ISPA's legal advisers, Part 1 of the 2nd Edition Guide is unnecessarily complex and this complexity has inhibited many eligible claimants from seeking compensation.

'Very few treating doctors and specialists have experience or training in the use of the Second Edition Guide and therefore some are reluctant to provide an opinion, or they provide unhelpful opinions that result in disputes (particularly if the assessor has overstated the level of impairment because he or she did not understand how the terms defined by the SRCA, the principles of assessment, the introduction to chapters, the introduction to tables and the notes all interact and qualify each other).

'The First Edition Guide, on the other hand, is now familiar to many treating doctors and specialists and is more easily understood and applied. Whilst the ISPA acknowledges the manifold criticisms of the First Edition Guide, it understands that users of, and claimants covered by, Part 1 of the Second Edition Guide have understandably been much more critical of the Second Edition Guide.'

The Law Council of Australia stated that while the 2nd Edition is overly complex and has a number of deficiencies making it difficult to use, there is a need for a stand-alone Guide to assess PI.

'In fact, the Law Council is of the view that work should be commenced on a stand-alone Guide for all Australian jurisdictions for compensation purposes. Such a project could be conducted under the auspices of Safe Work Australia.'

Australian Lawyers Alliance submitted:

'Comcare's approved guide (2nd edition) does add complexity to the assessment of permanent impairment. Applying the guide correctly to the assessment of a spinal injury and resulting impairment would arguably necessitate the separate use of a specialist orthopaedic surgeon, neurologist, neurosurgeon and/or radiologist (presumably each of whom would have undergone Comcare training on the guide). The Lawyers Alliance notes that such Comcare training has been offered only on a limited basis since the introduction of the guide in March 2006.

'The complexity of the permanent impairment guide makes obtaining required specialist assessments prohibitively expensive. Workers are therefore denied their entitlement because they are unable to obtain the medical evidence that Comcare requires, using its guide, for permanent impairment that has resulted from an accepted injury. The guide has been expanded from its 1988 1st edition version of 65 pages to its 2006 2nd edition of 142 pages, making any decision on payments to the injured a more difficult and lengthy process. The 1988 1st edition guide gave medical practitioners 38 tables to consider when classifying an employee's impairment, where the 2006 2nd edition provides 151 tables.

'The guide also contains, in places, unhelpful and seemingly contradictory introductory paragraphs to various tables; for example, the first and ninth paragraphs of Table 9.7.'

KCI noted that they have the benefit of representing civilian Commonwealth employees who are covered by the Second edition Guide and also noted the difficulty in finding doctors who are able to undertake the impairment assessments, in particular for spinal tables using the current tables.

'Based on our experience, a treating specialist is now generally unwilling or unable to undertake the impairment assessments, for example as contained in the musculoskeletal section of the second edition Guide when compared to the First edition Guide. To date we have not been able to find any treating specialist who, considering the requirements of the second edition guide is willing or in their view competent to undertake such a complex impairment assessment.

'Whilst the first edition guide has had its criticism with respect to certain tables contained therein, which are capable of being remedied through a reasonable and beneficial review of a particular table or tables in accordance with s28 of the SRC Act, the first edition Guide remains familiar and practical for treating doctors and specialists to undertake assessments and apply the Tables.'

Employer 1 submitted that the current Comcare Guide is fair and appropriate in its coverage of employees under the Comcare scheme.

'It is noted that the AMA Guides to the Evaluation of Permanent Impairment (fourth edition and fifth edition), are among the references used by Comcare for the preparation of the Guide (second edition) and this is acknowledged in Comcare's Policy Review paper.

'All the State compensation jurisdictions to some extent adopt or utilise the AMA Guides (particularly the fifth edition).

'[Employer 1] submits that the Stand Alone guide (second edition) should be retained as, rather than adding complexity to the assessment of permanent impairment, it clarifies in detail the manner of assessing a wide range of permanent impairment claims. This is in marked contrast to the very general nature of the first edition of the Guide which was the subject of much criticism by the AAT and the Federal Court due to its imprecise language and broad generalisations which detracted from rather than assisted a precise calculation of permanent impairment assessments.

'Certainly, claims managers and other stakeholders have become accustomed to using Comcare's Guide and reference to yet another separate publication would detract from that.'

Employer 2 submitted that the current guide is beneficial to both practitioners and claimants alike.

'It provides clear guidelines as to assessing injuries in the jurisdiction. The current guide is useful in interpreting the AMA guides in respect of permanent impairment assessments.'

8.2 Options

Option one: Designate a version of the AMA Guide as the next Comcare Guide.

The general view among submissions was the risks involved in designating an edition of the AMA Guide were too high. Concerns were expressed that this approach would result in the AMA having control over the content contained in a Commonwealth legislative instrument. This would however be the least time consuming option and should be considered.

Option two: Create a new stand alone guide as the next Comcare Guide

While there were some concerns about the complexity of Comcare's stand alone guide, these related in the main to the fact that the Guide is based on AMA 5th edition (rather than AMA 2nd Edition) rather than to the process of developing a stand alone guide itself. Retaining a standalone guide would allow Comcare to calibrate the Guide to suit the legislative structure.

The current stand alone guide contains features that make it much easier to use than the AMA Guides. For example, when assessing knee impairments, the AMA guides require several different range of motion measurements, and separate calculation of the percentage impairments as 'lower extremity' percentages. These percentages are later added and then may need to be combined with other 'lower extremity' percentages depending on the type of condition. Finally, the lower extremity percentage is converted into a whole person percentage.

In creating the current guide, significant effort was expended to simplify the AMA tables so assessments were calculated only in WPI. In addition, many of the AMA tables have been converted into one table, creating a simpler assessment methodology.

In theory, this simplified assessment methodology should create a simpler system, but as more and more doctors are becoming familiar with AMA 5th edition, Comcare's stand alone guide may be considered a burden; as another methodology that a doctor has to learn.

Option three: Develop a modifier guide based on AMA 5th Edition

Developing a modifier guide would allow the AMA 5th edition tables to 'stand' as they are, unless modified by Comcare. This type of guide would be less labour intensive to create and maintain than a stand alone guide. It would also mean that a doctor trained in AMA 5th edition would already have a sound understanding of the assessment process, needing only to learn about any additional information contained in the modifier guide.

Option four: Develop a modifier guide based on the NSW Workcover Guides for the Evaluation of Permanent Impairment

This option is similar to option three, as the NSW Guide is based on AMA 5. However, Comcare can ask NSW if the Commonwealth can base modifications to the AMA Guides on the modifications contained in the NSW Guide. The NSW Guide has been used as the basis for the Guides developed in WA and SA. In addition, the ACT designates the NSW Guide.

Having the same or similar modifications to the AMA Guides as NSW, WA, SA and ACT would be a key strength of this option as doctors in these jurisdictions would be familiar with the use of AMA 5 and the relevant modifications. This should result in more accurate assessments and resolve the issue of doctors not wanting to perform assessments under the Comcare Guide.

Another advantage would be a single set of medical practitioner training for both NSW and Comcare. However, it is likely there would be differences between the two guides (for example, if the option is accepted to create new tables to align with Comcare's threshold). This would still create some separate training needs. This has been the case in SA, where SA recognised, to some extent, the prior learning of practitioners who undertook impairment training based on AMA 5th edition elsewhere (although these practitioners still needed to complete the introductory model and competency assessment for each of the modules).

If Comcare was to base its Guide on the NSW Guide, Australian workers' compensation jurisdictions would be moving to a more harmonised approach to the assessment of PI.

The SRC Act is not the most widely used workers' compensation legislation in Australia. The majority of medical practitioners in Australia who are conducting PI assessments are more familiar with the methodology used in other jurisdictions. Adopting the option outlined above under the SRC Act would mean medical practitioners trained in undertaking impairment assessments in NSW, WA and SA would already have a sound understanding of how to conduct an impairment assessment under the SRC Act.

8.3 Preferred option

Comcare to ask NSW for permission to develop a modifier guide based on the NSW Workcover Guides for the Evaluation of Permanent Impairment.

9. An impairment of a kind which cannot be assessed in accordance with the provisions of the Guide

The current Comcare Guide is a stand alone Guide but is largely based on the 5th edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides). Chapter five – Psychiatric Conditions, is based on the 2nd edition of the AMA Guides. The chapters on the Visual System (Chapter 6) and the Hearing Loss part of Chapter 7 – Ear, Nose and Throat Disorders, depart from the AMA Guides due to the requirements of Australian clinical practice, but are broadly based on the 4th edition of the AMA Guides.

The Guide instructs that where an impairment is a kind which cannot be assessed in accordance with the provisions of the Guide, that assessment is made under the relevant part of the AMA Guides current at the time of assessment. This is of particular concern as Comcare and Australia in general, has little or no input into the construct of future editions of the AMA Guide, in part we are 'buying' future Guides sight unseen. At present, the current Guide is the 6th edition of the AMA Guides, an edition which is currently not in use by any Australian jurisdiction and is therefore 'untested' in the Australian context.

9.1 Issues raised

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

'We are uncertain how to comment on a Guide that is not in existence at this point in time and to say that it is reasonable or otherwise? For example, if the Obama administration introduces a new edition of the AMA Guide that may be fair and equitable when assessing psychiatric conditions compared to that introduced by the former Republican Party can we insist that it be implemented?'

ISPA stated:

'...it is not permissible for a statute, or in this case a disallowable instrument, to prospectively approve the use of an unseen assessment guide that has not been approved by Parliament. It would be more appropriate for Comcare to specify precisely which AMA Guides apply in the event that an impairment is of a kind which cannot be assessed under the Guide and then vary (if necessary) the Guide to adopt another edition of the AMA Guides should it prove to further the beneficial intent of the legislative scheme.'

9.2 Preferred option

Comcare proposes to amend the Guide to instruct that where an impairment is a kind which cannot be assessed in accordance with the provisions of the Guide, that assessment is made under the edition of the AMA Guides upon which that provision was based.

10. Slow onset conditions

There are many challenges associated with the determination of threshold liability for illnesses of long latency, or slow onset conditions, including skin cancer, lung cancer, emphysema and noise induced hearing. However most of these issues are resolved once liability has been determined.

Because of the nature of some of these conditions, progressing at different rates to an inevitable conclusion, Comcare has considered whether the current PI benefit package appropriately compensates for slow onset conditions.

10.1 Issues raised

Submissions received were generally viewed that there was no need to offer a different benefit package for slow onset conditions.

Australian Lawyers Alliance stated that PI compensation payable for slow onset conditions should not differ from the treatment of other conditions.

'It may be that the Comcare guide should be expanded to specifically include conditions of slow onset which are not catered for in the current guide. It is unclear from the question raised in the Issues Paper as to how the terms 'slow onset conditions' and 'other conditions' are to be defined and until there is agreement on the specific conditions being referred to, it is difficult to address this issue in any detail.'

Employer 1 considered that slow onset conditions should require an entitlement be established at an initial threshold level of 10 per cent whole person with subsequent payments being made against 10 per cent increments, similar to any other impairment.

Employer 2 submitted that the PI benefit package for slow onset conditions should not differ from the package offered for other conditions.

By contrast, the Law Council of Australia considered that there should be a PI benefits package that compensates for conditions of gradual onset.

'This can be achieved through provisions that allow accumulation of impairment ratings with deterioration as a result of the condition. This could be achieved through either an interim payment or, preferably, an accumulating total that is triggered by a 5 per cent or 10 per cent increase. For example, a worker who is initially assessed at 10 per cent and is offered a sum of \$29,000 may subsequently be assessed at 20 per cent impairment as a result of deterioration in their condition, resulting in a revised sum of \$54,000. This later sum might then be awarded, less the previous impairment sum for 10 per cent impairment of \$29,000, leading to a further payment of \$25,000.

'Such a system would put a worker with a gradually developing condition in the same position as anyone else with the same level of impairment but would provide greater access to entitlements at an earlier stage of the development of the condition.'

Note that the suggestion made by the Law Council of Australia has been considered under 5: The reasonableness of current impairment thresholds (option 4).

10.2 Options

Option one: Maintain current system where slow onset conditions are compensated for PI in the same manner as other conditions

A number of submissions state the PI package for slow onset conditions should not differ from the package offered for other conditions. In addition, if Comcare's other preferred options are implemented, there will be an improved benefit structure for all types of impairments.

Option two: Consider diseases, other than lung cancer and mesothelioma (that is malignant or terminal diseases), that can be compensated for permanent impairment upon diagnosis during the review of the PI Guide

At present, the Guide provides for a 70 per cent assessment upon diagnosis for lung cancer and an 85 per cent assessment upon diagnosis for mesothelioma. There are a number of other slow onset conditions, particularly cancers that may benefit from a similar approach where diagnosis is the only pre-requisite to obtaining a payment for PI. This approach could simplify and accelerate the PI process for some seriously ill people.

10.3 Preferred option

During the review of the PI Guide, Comcare proposes to work with an oncologist to consider diseases, other than lung cancer and mesothelioma, (that is, malignant or terminal diseases), that can be compensated for PI upon diagnosis.

11 Psychiatric conditions

Chapter five of the current Guide (Psychiatric Conditions) is based on the 2nd edition of the AMA Guides. This is largely because the authors of the AMA 5th edition did not provide a methodology for the assessment of psychiatric conditions that allowed a percentage rating to be established, making it unsuitable for translation to the 2nd Edition of the Guide. At the time that the 2nd Edition was published, Comcare was unable to obtain agreement among the psychiatry profession in Australia regarding an alternative approach, although the Psychiatric Rating Impairment Scale (PIRS) was considered. The result of this lack of agreement was that the methodology from the 1st edition of the Guide, with some modification, was used.

The AMA Guide 2nd edition was published in 1984, and was effectively out of date when the AMA 3rd edition was published in 1989.

NSW have adopted the PIRS model previously considered by Comcare, and Victoria has developed its own assessment tool, the *Guide to the Evaluation of Psychiatric Impairment for Clinicians* (GEPIC). Both systems have positive and negative aspects, and are worth considering for adoption by Comcare.

11.1 Issues raised

Submissions received generally agree that the current model requires revision.

The RSL submitted that the high variation in threshold for psychiatric conditions, from 0 per cent to 30 per cent confirms the unsuitability of the AMA guide to adequately address assessment.

‘The Veterans Entitlement Act (VEA) and Military Rehabilitation and Compensation Act (MRCA) both use the Guide to the Assessment of Rates of Veteran’s Pensions (GARP) when assessing emotional and behavioural consequences of an accepted psychiatric condition. We believe that GARP provides a fairer basis for assessing the permanent impairment associated with psychiatric conditions.’

The Australian Lawyers Alliance stated that the fairest and most equitable basis for assessing the PI associated with psychiatric conditions is to rely on the assessments provided by the employee’s treating GP, psychologist and or psychiatrist.

‘Comcare places too much emphasis on its own medico-legal psychiatric opinions, which are often based on a brief single examination and selective history.’

KCI were cautious what to propose might be the ‘fairest and most equitable’ basis for assessing a psychiatric condition.

‘...it should be a table, possibly the existing table 5.1 with simple modifications to make the assessment reasonable and without requiring [injured worker’s] to continually see psychiatrists and re tell their circumstances to establish the criteria in table 5.1. We also note the cumbersome requirement to satisfy the “activities of daily living” section of the guide for psychiatric conditions that does not adapt to a psychiatric condition as opposed to some physical conditions.’

'In our submission table 5.1 should be amended to ensure that, for example like the assessment for the permanent impairment of a spinal condition in table 9.6 or table 9.5 with respect to mobility that there is an easier range of questions to determine to the reasonable satisfaction of a delegate that the impairment of a psychiatric condition is readily identified at each particular level ie 10 per cent, 15 per cent. There should now be the complicated requirement to consider each and every circumstances with their 'activities of daily living' that. In many cases, makes it difficult for an [injured worker] to establish when determining a psychiatric condition.

'We also note that the current AMA Guide [AMA 6th Edition] does not assist an [injured worker] seeking to have the effects of their substance abuse condition, which in a lot of cases is secondary to their psychiatric condition being assessed and at least combined with their psychiatric condition under table 5 of the first edition guide.'

The Law Council of Australia has previously been critical of Table 5.1 of the Guide, echoing criticism of psychiatrists and psychologists who have attempted to use it, that it is a crude, mono-dimensional guide to measure impairment resulting from psychiatric injury.

'The attempt to measure psychiatric impairment in the Guide to the Assessment of Rates of Veterans Pensions (GARP) is more sophisticated and may provide a more effective measure for the purposes of any future WPI Guide.

'Table 5.1 requires review in any future guide in consultation with relevant medical professionals.'

Dr Michael Epstein provided a comprehensive submission addressing the issue of the assessment of psychiatric conditions. In summary, he submitted:

1. The American Medical Association Guides to the Evaluation of Permanent Impairment have provided an effective and efficient means of measuring impairment for all organ systems except for Mental and Behavioural Disorders.
2. The authors of chapter 14 on Mental and Behavioural Disorders in both the 4th and 5th editions have chosen to measure disability rather than impairment and failed to provide percentages related to different levels of impairment.
3. The lack of percentage impairment disadvantages users, claimants, courts, and tribunals.
4. This failure has led to every jurisdiction in Australia developing different methods of measuring psychiatric impairment, leading to a veritable Tower of Babel.
5. The consequences of the failure of the authors to do their job has reduced the credibility of psychiatric impairment assessments and has the potential to lead to the exclusion of psychiatric injury from statutory schemes.
6. Chapter 14, Mental and Behavioural Disorders in the AMA Guides 6th edition has used a modified form of the PIRS together with two other scales to produce a clumsy, inequitable and in my view unworkable system for determining percentages for different levels of psychiatric impairment and should not be used in any Comcare Guide.
7. Any guide for assessing psychiatric impairment should be assessing symptoms arising from a mental health disorder or mental illness in a stepwise fashion according to level of severity.

8. Any worthwhile guide to the assessment of psychiatric impairment should not be driven by the need to fit into any specific legislative framework.
9. The current chapter in the Comcare Guides, Chapter 5 – Psychiatric Conditions is very vague and limited in its scope, but the alternatives are worse and less equitable.

Employer 1 submitted:

‘...the manner of assessing a psychiatric permanent impairment should be consistent with the manner in which other permanent impairments are calculated so as to retain the 10 per cent threshold level. In addition the test should be referable to the sorts of psychiatric and social factors referred to in chapter 5, including the activities of daily living which were expanded upon from those contained in the first edition of the Comcare Guide.

‘Before any move is made to adopt another jurisdiction’s approach to psychiatric claims, the overall nature of the other scheme needs to be looked at. As an example while Victoria has a 30% threshold level for psychiatric permanent impairment, the actual Victorian legislation does not allow for a psychiatric sequela following on from a physical injury. This is contrary to the SRC scheme.’

While Comcare notes that the assessment methodology used in GARP has been submitted as an option for consideration, the advice is that this methodology is based on an outdated version of the AMA Guides (4th Edition), and so it has not been considered as an option in this paper.

11.2 Options

Option one: Adopt the Psychiatric Rating Impairment Scale (PIRS) for the assessment of psychiatric conditions (including 15 per cent WPI threshold for psychiatric conditions)

The PIRS model is now being extensively used in NSW and WA. It has also been validated by its inclusion as one of the three models used in the 6th Edition of the AMA Guides. In addition, if the option of basing the next edition of the Guide upon the NSW Guide is agreed, this is a further argument for using the PIRS model for the assessment of psychiatric conditions.

PIRS is primarily used in NSW where there is a 15 per cent WPI threshold for psychiatric conditions, and physical and psychiatric impairments cannot be combined. For this reason, if PIRS is adopted by the Commonwealth, Comcare’s preferred option is that the 15 per cent WPI threshold for psychiatric conditions is also adopted.

It is noted that PIRS measures the *disability* of an individual, rather than the *impairment* of that individual.

Option two: Adopt the Guide to the Evaluation of Psychiatric Impairment for Clinicians (GEPIC) model for the assessment of psychiatric conditions

Another model for the assessment of psychiatric conditions in use in Australia is the model in use in Victoria, GEPIC. While this model is not currently used in any other jurisdiction, it has been in use successfully for many years.

In Victoria, there is a 30 per cent WPI threshold for psychiatric conditions, and a person cannot claim for a psychiatric condition at all where it arises as a condition secondary to a physical injury. Consequently there may be some issues about whether GEPIC is suitable for the SRC scheme.

Option three: Work with psychiatrists to update the manner in which a permanent impairment for psychiatric conditions is assessed

As noted in the submissions received, there is currently no 'gold standard' for the assessment of impairment related to psychiatric conditions. Rather than adopt an option which may not in reality be better than the impairment assessment available in the current Guide, Comcare could work with psychiatrists to develop a model that meets the following criteria:

- measures impairment rather than disability
- simple to administer
- is accurate without being invasive.

This new model would be implemented at the same time that the new Guide is to be implemented, approximately six months after commencement of the review of Guide.

11.3 Preferred option

Comcare proposes to adopt the Psychiatric Rating Impairment Scale (PIRS) for the assessment of psychiatric conditions (including 15 per cent WPI threshold for psychiatric conditions)

12 Comcare PI Guide tables and the 10 per cent threshold

There have been concerns raised about particular tables in the Guide and their lack of alignment to the 10 per cent threshold.

By way of background, in the AMA 5th edition, when a condition meets set criteria, a medical practitioner may assess a permanent impairment within a range. In preparing the 2nd edition of the Guide, for clarity, Comcare made a decision to set the percentage amounts awarded at the highest end of the range. The outcome of this was that, for example, when assessing impairment due to lumbar spine injury, if a person met the criteria for 13 per cent WPI (significant signs of radiculopathy etc) it was clear from reading the AMA 5th edition that a person meeting this group could have a 10 per cent to 13 per cent WPI. Comcare decided to compensate employees meeting these criteria at 13 per cent WPI. Notwithstanding this fact, it is clear that there are some tables, of note the table for thoracic spine, where even using this logic it could be considered that there was a lack of alignment between the Comcare threshold and the AMA 5th edition grouping (AMA 5th edition groupings are 5 – 8 per cent and then jump to 15 – 18 per cent).

12.1 Issues raised

Australian Lawyers Alliance submitted:

'If a threshold is to remain in place (regardless of what the threshold percentage is), each table of the guide should identify the criteria that would attract:

- rating (or ratings) below that threshold
- rating at that threshold; or
- rating (or ratings) above that threshold.'

The Law Council of Australia submitted that there are a number of cases in which the Guide operates more broadly than its legislative intent.

'[this] includes...where the Guide introduces criteria that essentially negate the entitlement to permanent impairment compensation for a 10 per cent impairment. An example of this is the introduction to tables 9.6.1, 9.6.2 and 9.7.'

The ACTU submitted:

'In a number of key areas, such as spinal injuries, the current 2nd Edition Guide fails to provide an assessment of 10% forcing an assessor to determine whether the injured worker meets 8% or 13% (lower back), or 8% or 18% (upper back and neck), with nothing in between. The current 2nd Edition Guide also regularly sets unachievable impairment levels and sets criteria that are virtually impossible for an injured person to meet.'

12.2 Preferred option

In reviewing the guide, Comcare proposes to work with relevant medical bodies to consider whether tables in the Guide can be created to enable most, if not all conditions, to be assessed at the relevant threshold.

13 Review of percentage amounts – Comcare tables

As noted above, in AMA 5th edition, when a condition meets set criteria, a medical practitioner may assess a percentage impairment within a specific range.

In preparing the 2nd edition of the Guide, in an attempt for clarity, Comcare made a decision to set the percentage amounts at the highest end of that range.

13.1 Options

Option one: Retain the 'fixed' percentage methodology as used in the 1st and 2nd editions of the Comcare Guide.

Having a set percentage that a medical practitioner can allocate to a condition where specific criteria are met is simple to understand, and ensures that disputes are therefore confined to whether a particular condition meets the criteria for a specific category.

It should be noted that the Commonwealth is the only jurisdiction in Australia where a percentage is set at a single amount once specific criteria are met.

Option two: Review all tables to incorporate the 'ranges' used in edition 5 of the AMA Guide.

As mentioned above, in preparing the 2nd edition of the Guide, in an attempt for clarity, Comcare made a decision to set the percentage amounts at the highest end of that range. This attempt for clarity has in fact led to confusion as many employees perceive that, depending on the nature of their impairment, they must actually have an impairment of 13 per cent or perhaps 18 per cent, rather than the threshold amount of 10 per cent, in order to receive compensation for their impairment.

In addition, if the option to combine the s24 and s27 payment is accepted, it would be useful to have a methodology that would allow two people who meet the same criteria to be provided with different impairment ratings depending on the resolution or continuation of symptoms and their impact on the ability to perform activities of daily living.

A risk associated with this approach is that there may be an increased level of dispute involving the percentage within a range a person should be assessed (which might only be a matter of one to two per cent), rather than the current situation where disputes are confined to the issue of whether a particular condition meets the criteria for a specific category.

13.2 Preferred option

Comcare proposes to review all tables to incorporate the 'ranges' used in edition 5 of the AMA Guide.

14. Movement to future editions of the AMA Guides

Submissions received on this issue agreed that Comcare should not automatically move to any future editions of the AMA Guide without considering the appropriateness in the Australian context, and the SRC scheme context. However, Comcare should keep up with advances in the assessment of medical conditions.

14.1 Issues raised

ACTU submitted that any guides adopted by Comcare should be the subject of constant stakeholder review.

'...the adoption of Comcare Guides should be accompanied by the establishment of a Comcare tripartite working group to discuss, consider and recommend changes to the Guides to take account of the latest medical knowledge or the Australian context.'

14.2 Options

Option one: Establish a Permanent Impairment Working Party to consider topical permanent impairment issues such as the appropriateness of moving to future editions of the AMA Guides.

Create a Permanent Impairment Working Group. As part of the terms of reference of this committee, issues such as movement to future editions of the AMA Guide could be considered.

The membership of this committee could consist of Comcare, four to six medical practitioners, a legal representative, a licensee representative and a union representative. The committee would meet annually, although meetings might be more frequent during periods of high activity, such as the imminent review of the permanent impairment guide.

Option two: Report to the Minister on the feasibility of moving to future editions of the AMA Guide within an agreed timeframe.

Comcare reports at regular intervals to the Minister on the feasibility of moving to the then current edition of an AMA Guide (for example within 24 months after a future Guide is published).

Any timeframe agreed should have some 'lag' as each new edition of the AMA Guides has teething issues that need to be resolved, and significant errata are usually published within the first few years post publication.

14.3 Preferred option

Comcare proposes to establish a Permanent Impairment Working Party to consider topical permanent impairment issues such as the appropriateness of moving to future editions of the AMA Guides.

15. Ongoing training package

Comcare offers training on how to use the 2nd Edition of the Comcare Guide. This training was offered intensively when new the Guide was implemented but has only been offered on limited occasions since. One reason for this is that there are currently approximately 400 medical practitioners trained in the use of the Guide, but only a small percentage of these practitioners have actually been paid for conducting assessments. It was considered therefore that there were sufficient practitioners trained to meet the needs of the market. However, not supplying regular training limits the ability of new practitioners to become trained in the use of the Guide.

In addition, as time goes on, issues surrounding the use of the Guide are discovered and resolved. Comcare does not currently have a systematic way of disseminating this updated information to those who have been trained.

Another related issue is the ability of non-medical practitioners to use the Guide. While the Guide is primarily a tool for medical practitioners, and this is its target audience, there are many people within the community, for example legal practitioners, who would welcome the opportunity to understand the Guide in more detail.

15.1 Issues raised

ACTU noted that the AMA guides readily acknowledge that not every type of injury or incapacity is covered by the AMA Guides.

‘Page 2 of the 5th Edition Guide details that: “. . . the 5th Edition includes most of the common conditions, excluding unusual cases that require individual consideration.”

For consistency of decisions and so that over time a local body of knowledge can be gained on Guide interpretation and deficiency issues from a medical profession position, permanent impairment assessments should only be made by Doctors trained and accredited by Comcare to carry out such assessments. Further, Comcare should provide, at low cost, training in the interpretation and use of the guides to workers’ compensation and personal injury lawyers.’

15.2 Preferred option

Comcare proposes to structure an ongoing training schedule on the guide. Comcare also proposes to develop a training package for non-medical practitioners to obtain an ‘understanding’ of the Guide. Comcare also proposes to issue regular bulletins to trained medical practitioners on topical issues relating to the assessment of PI.

Attachment 1 – Issues Paper – Policy review of Comcare’s permanent impairment guide

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

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

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

Comments can be provided by:

Email: piguide@comcare.gov.au

Fax: **(02) 6274 8576**

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

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

Issues paper

Policy review of Comcare's permanent impairment guide

Background

Legislation

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

Should we be compensating injured employees for permanent impairment? If so, why is it not sufficient to reimburse weekly benefits, medical benefits and the like? If not, why not?

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

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

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

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

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

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

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

This legislative framework of access to permanent impairment and non economic loss benefits of at least 10 per cent, based on the provisions of an approved Guide, replaced the previous Act's more limited regime of statutory payments for impairments based on a 'table of maims'. However, the previous Act provided unrestricted (un-capped) access to common law damages action.⁷

Current Guide

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

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

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

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

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

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

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

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

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

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

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

Review of guide

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

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

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

Comcare review

Submissions made to the Review of the Comcare Scheme conducted in 2008 by the Department of Education, Employment and Workplace Relations highlighted a number of issues associated with compensation for permanent impairment in general and the current guide in particular.⁸

⁸ See Table 2 for a summary of issues raised by the review

Other issues

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

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

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

Should permanent impairment compensate holistically by combining all impairments resulting from multiple injuries which arise from a single occurrence (for example, a motor vehicle accident or a fall), or compensate separate injuries arising from a single occurrence separately? What are the impacts to claimants of each of these options? Are there any other options which should be considered?

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

Permanent impairment frameworks in other jurisdictions

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

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

Table 1 –

Summary jurisdictional comparison of permanent impairment frameworks

Jurisdiction	Based on AMA Guide edition	Stand alone Guide/ Designator Guide/ Modifier Guide	Thresholds (expressed as WPI) G – General H – Hearing P – Psychological N – NEL	Max benefit PI or <u>NEL/Pain and suffering</u> combined
Comcare	5th AMA	Stand alone	G – 10% H – 5% P – 10% N – 10%	PI \$150 369 NEL \$56 300 ————— \$209 795
New South Wales	5th AMA	Modifier	G – 1% H – 6% P – 15% N – 10%	PI \$231 000 P&S \$50 000 ————— \$281 000
Victoria	4th AMA	Designates	G – 10% H – 10% P – 30% N – N/A	PI \$396 690
Queensland	4th AMA	Designates	G – 1% H – 5% P – 1% N – N/A	PI \$227 575 If PI >15% additional gratuitous care up to \$257 785 If PI is >30% additional sum up to \$227 575 Latent onset diseases – \$477 890 – But all prior compensation/damages to be repaid
South Australia	5th AMA *starting April 2009	Modifier	G – 5% H – 5% P – N/A ⁹ N – 5% * starting April 2009	Currently \$230 982 From April 2009, \$400 000
Western Australia	5th AMA	Modifier	G – 1% H – 6% P – 15% N – N/A	PI \$168 499
Tasmania	4th AMA	Modifier	G – 5% H – 5% P – 10% N – N/A	PI \$223 824 369 x full-time average weekly ordinary earnings for Tasmania [currently \$606.57] (maximum entitlement for injuries > 70%)
ACT	4th and 5th AMA	Designates	G – no threshold H – 3.9% (approximately) ¹⁰ P – N/A ¹¹ N – N/A	\$100 000 – 1 injury \$150 000 – 2 or more injuries * subject to CPI increase
Northern Territory	4th AMA	Designates	G – 5% H – 5% P – 5% N – N/A	PI \$231 254 208 x full-time adult persons weekly ordinary time earnings for Northern Territory [currently \$1111.80] (maximum entitlement for injuries > 85%)

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

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

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

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

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

If an AMA guide is regarded as the most effective assessment tool, to what extent does it need to be modified to reflect Australian conditions?

Should the permanent impairment benefit package for slow onset conditions differ to the package offered for other conditions? If so, what do you consider the differences should be?

Process

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

Table 2 –

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

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

Attachment 2 – List of submissions to issues paper received

ACTU

KCI Lawyers

Australian Lawyers Alliance

Dr Michael Epstein

RSL

ISPA

Law Council of Australia

Comcare also received two confidential submissions from employers.

Attachment 3 – Table of preferred options

Table of preferred options

Part II: Legislation		
Issues	Preferred options	
01	The adequacy of current impairment benefits	Comcare's preferred option is to increase the maximum amount payable for permanent impairment/NEL to 90 per cent of the death benefit, i.e. \$360 000 (to be indexed annually) but not to increase the maximum amount available under Common Law
02	Separate payments for permanent impairment and non-economic loss	Comcare's preferred option is that the s24 benefit be increased to include the previous NEL component and by consequence, s27 of the SRC Act be repealed
03	The irrevocable election between permanent impairment and common law	Comcare's preferred option is that the irrevocable election between permanent impairment and common law be maintained
04	The reasonableness of current impairment thresholds	Comcare's preferred option is that the threshold of 10 per cent be retained and that the threshold for deterioration of impairment be reduced to five per cent
05	Multiple injuries (Canute)	Comcare's preferred option is that, for each employee, all impairments resulting from all injury occurrences under the SRC Act be combined
06	Pre-existing conditions	Comcare's preferred option is that a clear legislative mechanism be introduced for the discounting of pre-existing conditions
Part III: The Guide		
Issues	Preferred options	
07	General review of Guide	Comcare base the next edition of the Guide on the 5th edition of the AMA Guide and complete an in depth analysis of the appropriateness of a transition to AMA6
08	Stand alone guide	Comcare proposes to ask NSW to agree that it can develop a modifier guide based on the NSW Workcover Guides for the Evaluation of Permanent Impairment
09	An impairment of a kind which cannot be assessed in accordance with the provisions of the Guide	Comcare proposes to amend the Guide to instruct that where an impairment is of a kind which cannot be assessed in accordance with the provisions of the Guide, that assessment is to be made under the edition of the AMA Guides upon which that provision was based
10	Slow onset conditions	Comcare proposes to work with an oncologist to consider diseases, other than lung cancer and mesothelioma, (i.e. malignant or terminal diseases), that can be compensated for permanent impairment upon diagnosis
11	Psychiatric conditions	Comcare proposes to adopt the Psychiatric Rating Impairment Scale (PIRS) for the assessment of psychiatric conditions (including 15 per cent WPI threshold for psychiatric conditions)
12	Comcare tables and the 10 per cent threshold	In reviewing the guide, Comcare proposes to work with relevant medical bodies to consider whether tables in the Guide can be created to enable most, if not all conditions, to be assessed at the relevant threshold
13	Review of percentage amounts - Comcare tables	Comcare proposes to review all tables to incorporate the "ranges" used in edition 5 of the AMA Guide
14	Movement to future editions of the AMA Guides	Comcare proposes to establish a Permanent Impairment Working party to consider topical permanent impairment issues such as the appropriateness of moving to future editions of the AMA Guides
15	Ongoing training package	Comcare proposes to structure an ongoing training schedule on the guide. Comcare also proposes to develop a training package for non-medical practitioners to obtain an "understanding" of the Guide. Comcare proposes to issue regular bulletins to trained medical practitioners on topical issues relating to the assessment of permanent impairment

Attachment 4 – Comparison of workers’ compensation arrangements – Australia

Jurisdiction	As at 1 October 2002 Max benefit PI or NEL/Pain and suffering combined	As at 1 May 2009 Max benefit PI or NEL/Pain and suffering combined
Comcare	PI \$127 064 NEL \$47 649 <hr/> \$174 713	PI \$150 369 NEL \$56 300 <hr/> \$209 795
New South Wales	PI \$200 000 P&S \$50 000 <hr/> \$250 000	PI \$231 000 P&S \$50 000 <hr/> \$281 000
Victoria	PI \$337 380	PI \$396 690
Queensland	PI \$157 955 (except for payments for injuries resulting in death) If PI >15% additional gratuitous care up to \$195 960 If PI is >50% additional sum up to \$157 955 After decision to accept offer of lump sum, all compensation ceases.	PI \$227 575 If PI >15% additional gratuitous care up to \$257 785 If PI is >30% additional sum up to \$227 575 Latent onset diseases – \$477 890 – But all prior compensation/damages to be repaid
South Australia	PI \$115 500 If PI > 55% - Supplementary benefit of up to \$77 962 available	PI \$400 000
Western Australia	PI \$130 609 (less any amount paid in weekly benefits)	PI \$168 499
Tasmania	PI \$166 925	PI \$223 824 369 x full-time average weekly ordinary earnings for Tasmania [currently \$606.57] (maximum entitlement for injuries > 70%)
ACT	\$101 506 – 1 injury \$152 258 – 2 or more injuries * subject to CPI increase	\$100 000 – 1 injury \$150 000 – 2 or more injuries * subject to CPI increase
NT	PI \$170 060.80	PI \$231 254 208 x full-time adult persons weekly ordinary time earnings for Northern Territory [currently \$1111.80] (maximum entitlement for injuries > 85%)

Attachment 5 – Permanent impairment requests by nature of impairment

Permanent impairment requests determined by nature of impairment

Premium paying agencies only

Nature of impairment - major group	Accepted	Rejected	Undetermined	Grand total
Request received in 2007-08				
Mental disease	43	47		90
Traumatic ligament and tendon injury	23	61	3	87
Musculoskeletal and connective tissue diseases	19	64	1	84
Nervous system and sense organ diseases	14	12		26
Fractures	4	8	1	13
Neoplasms	10	3		13
Unspecified			11	11
Other injuries	4	4		8
Wounds, amputations and organ damage	1	4		5
Respiratory	3	1		4
Digestive system diseases	3			3
Circulatory system diseases	1	1		2
Intracranial injuries	1			1
Other diseases		1		1
Skin and subcutaneous tissue diseases			1	1
Total	126	206	17	349
Request received in 2006-07				
Mental disease	25	34		59
Traumatic ligament and tendon injury	15	56	1	72
Musculoskeletal and connective tissue diseases	17	76	1	94
Nervous system and sense organ diseases	17	10	1	28
Fractures	7	6		13
Neoplasms	8			8
Other injuries	2	2		4
Wounds, amputations and organ damage	2	2		4
Respiratory	1	2		3
Digestive system diseases	1	3		4
Circulatory system diseases		2		2
Intracranial injuries		1		1
Infectious and parasitic diseases		2		2
Skin and subcutaneous tissue diseases	2			2
Burns		1		1
Total	97	197	3	297

Attachment 6 – Summary jurisdictional comparison of permanent impairment frameworks

Summary jurisdictional comparison of permanent impairment frameworks

Jurisdiction	Based on AMA Guide edition	Stand alone Guide/ Designator Guide/Modifier Guide
Comcare	5th AMA	Stand alone
New South Wales	5th AMA	Modifier
Victoria	4th AMA	Designates
Queensland	4th AMA	Designates
South Australia	5th AMA	Modifier
Western Australia	5th AMA	Modifier
Tasmania	4th AMA	Modifier
ACT	4th and 5th AMA	Designates
Northern Territory	4th AMA	Designates

Attachment 7 – Extracts from the SRC Act

4 Interpretation

“**impairment**” means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function;

“**permanent**” means likely to continue indefinitely;

24 Compensation for injuries resulting in permanent impairment

- 24(1) Where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury.
- 24(2) For the purpose of determining whether an impairment is permanent, Comcare shall have regard to:
- (a) the duration of the impairment;
 - (b) the likelihood of improvement in the employee’s condition;
 - (c) whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and
 - (d) any other relevant matters.
- 24(3) Subject to this section, the amount of compensation payable to the employee is such amount, as is assessed by Comcare under subsection (4), being an amount not exceeding the maximum amount at the date of the assessment.
- 24(4) The amount assessed by Comcare shall be an amount that is the same percentage of the maximum amount as the percentage determined by Comcare under subsection (5).
- 24(5) Comcare shall determine the degree of permanent impairment of the employee resulting from an injury under the provisions of the approved Guide.
- 24(6) The degree of permanent impairment shall be expressed as a percentage.
- 24(7) Subject to section 25, if:
- (a) the employee has a permanent impairment other than a hearing loss; and
 - (b) Comcare determines that the degree of permanent impairment is less than 10%;
- an amount of compensation is not payable to the employee under this section.

24(7A) Subject to section 25, if:

- (a) the employee has a permanent impairment that is a hearing loss; and
- (b) Comcare determines that the binaural hearing loss suffered by the employee is less than 5%;

an amount of compensation is not payable to the employee under this section.

24(8) Subsection (7) does not apply to any one or more of the following:

- (a) the impairment constituted by the loss, or the loss of the use, of a finger;
- (b) the impairment constituted by the loss, or the loss of the use, of a toe;
- (c) the impairment constituted by the loss of the sense of taste;
- (d) the impairment constituted by the loss of the sense of smell.

24(9) For the purposes of this section, the maximum amount is \$80,000.

25 Interim payment of compensation

25(1) Where Comcare:

- (a) makes a determination that an employee is suffering from a permanent impairment as a result of an injury; and
- (b) is satisfied that the degree of the impairment is equal to or more than 10% but has not made a final determination of the degree of impairment;

Comcare shall, on the written request of the employee made at any time before the final determination is made, make an interim determination of the degree of permanent impairment under section 24 and assess an amount of compensation payable to the employee.

25(2) The amount assessed by Comcare under subsection (1) shall be an amount that is the same percentage of the maximum amount specified in subsection 24(9) as the percentage determined by Comcare under subsection (1) to be the degree of permanent impairment of the employee.

25(3) Where, after an amount of compensation has been paid to an employee following the making of an interim determination, Comcare makes a final determination of the degree of permanent impairment of the employee, there is payable to the employee an amount equal to the difference (if any) between the amount payable under section 24 on the making of the final determination and the amount paid to the employee under this section.

25(4) Where Comcare has made a final assessment of the degree of permanent impairment of an employee (other than a hearing loss), no further amounts of compensation shall be payable to the employee in respect of a subsequent increase in the degree of impairment, unless the increase is 10% or more.

- 25(5) If Comcare has made a final assessment of the degree of permanent impairment of an employee constituted by a hearing loss, no further amounts of compensation are payable to the employee in respect of a subsequent increase in the hearing loss, unless the subsequent increase in the degree of binaural hearing loss is 5% or more.

26 Payment of compensation

- 26(1) Subject to this section, an amount of compensation payable to an employee under section 24 or 25, shall be paid to the employee within 30 days after the date of the assessment of the amount.
- 26(2) Where an amount of compensation is not paid to an employee in accordance with subsection (1), interest is payable to the employee on that amount in respect of the period commencing on the expiration of the period of 30 days referred to in that subsection and ending on the day on which the amount is paid.
- 26(3) Interest payable under subsection (2) shall be paid at such rate as is from time to time specified by the Minister for the purposes of this section by legislative instrument.
- 26(4) This section does not apply where:
- (a) Comcare has been requested under Part VI to reconsider a determination under section 24 or 25, as the case may be; or
 - (b) a proceeding in respect of such a determination has been instituted under Part VI.

27 Compensation for non-economic loss

- 27(1) Where an injury to an employee results in a permanent impairment and compensation is payable in respect of the injury under section 24, Comcare is liable to pay additional compensation in accordance with this section to the employee in respect of that injury for any non-economic loss suffered by the employee as a result of that injury or impairment.
- 27(2) The amount of compensation is an amount assessed by Comcare under the formula:
 $(\$15,000 \times A) + (\$15,000 \times B)$
where:
A is the percentage finally determined by Comcare under section 24 to be the degree of permanent impairment of the employee; and
B is the percentage determined by Comcare under the approved Guide to be the degree of non-economic loss suffered by the employee.
- 27(3) This section does not apply in relation to a permanent impairment commencing before 1 December 1988 unless an application for compensation for non-economic loss in relation to that impairment has been made before the date of introduction of the Bill for the Act that inserted this subsection.

28 Approved Guide

- 28(1) Comcare may, from time to time, prepare a written document, to be called the “Guide to the Assessment of the Degree of Permanent Impairment”, setting out:
- (a) criteria by reference to which the degree of the permanent impairment of an employee resulting from an injury shall be determined;
 - (b) criteria by reference to which the degree of non-economic loss suffered by an employee as a result of an injury or impairment shall be determined; and
 - (c) methods by which the degree of permanent impairment and the degree of non-economic loss, as determined under those criteria, shall be expressed as a percentage.
- 28(2) Comcare may, from time to time, by instrument in writing, vary or revoke the approved Guide.
- 28(3) A Guide prepared under subsection (1), and a variation or revocation under subsection (2) of such a Guide, must be approved by the Minister.
- 28(3A) A Guide prepared under subsection (1), and a variation or revocation under subsection (2) of such a Guide, is a legislative instrument made by the Minister on the day on which the Guide, or variation or revocation, is approved by the Minister.
- 28(4) Where Comcare, a licensee or the Administrative Appeals Tribunal is required to assess or re-assess, or review the assessment or re-assessment of, the degree of permanent impairment of an employee resulting from an injury, or the degree of non-economic loss suffered by an employee, the provisions of the approved Guide are binding on Comcare, the licensee or the Administrative Appeals Tribunal, as the case may be, in the carrying out of that assessment, re-assessment or review, and the assessment, re-assessment or review shall be made under the relevant provisions of the approved Guide.
- 28(5) The percentage of permanent impairment or non-economic loss suffered by an employee as a result of an injury ascertained under the methods referred to in paragraph (1)(c) may be 0%.
- 28(6) In preparing criteria for the purposes of paragraphs (1)(a) and (b), or in varying those criteria, Comcare shall have regard to medical opinion concerning the nature and effect (including possible effect) of the injury and the extent (if any) to which impairment resulting from the injury, or non-economic loss resulting from the injury or impairment, may reasonably be capable of being reduced or removed.
- 28(8) Comcare shall make copies of the “Guide to the Assessment of the Degree of Permanent Impairment” that has been approved by the Minister, and of any variation of that Guide that has been so approved, available upon application by a person and payment of the prescribed fee (if any).

44 Action for damages not to lie against Commonwealth etc. in certain cases

- 44(1) Subject to section 45, an action or other proceeding for damages does not lie against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee in respect of:
- (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the Commonwealth, Commonwealth authority or licensed corporation would, but for this subsection, be liable (whether vicariously or otherwise) for damages; or
 - (b) the loss of, or damage to, property used by an employee resulting from such an injury;
- whether that injury, loss or damage occurred before or after the commencement of this section.
- 44(2) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section.
- 44(3) If:
- (a) an employee has suffered an injury in the course of his or her employment; and
 - (b) that injury results in that employee's death;
- subsection (1) does not prevent a dependant of that employee bringing an action against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee in respect of the death of the first-mentioned employee.
- 44(4) Subsection (3) applies whether or not the deceased employee, before his or her death, had made an election under subsection 45(1).

45 Actions for damages - election by employees

- 45(1) Where:
- (a) compensation is payable under section 24, 25 or 27 in respect of an injury to an employee; and
 - (b) the Commonwealth, a Commonwealth authority, a licensed corporation or another employee would, but for subsection 44(1), be liable for damages for any non-economic loss suffered by the employee as a result of the injury;
- the employee may, at any time before an amount of compensation is paid to the employee under section 24, 25 or 27 in respect of that injury, elect in writing to institute an action or proceeding against the Commonwealth, the Commonwealth authority, the licensed corporation or other employee for damages for that non-economic loss.

- 45(2) Where an employee makes an election:
- (a) subsection 44(1) does not apply in relation to an action or other proceeding subsequently instituted by the employee against the Commonwealth, the Commonwealth authority, the licensed corporation or the other employee for damages for the non-economic loss to which the election relates; and
 - (b) compensation is not payable after the date of the election under section 24, 25 or 27 in respect of the injury.
- 45(3) An election is irrevocable.
- 45(4) In any action or proceeding instituted as a result of an election made by an employee, the court shall not award the employee damages of an amount exceeding \$110,000 for any non-economic loss suffered by the employee.
- 45(5) The election by an employee under this section to institute an action or proceeding against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee does not prevent the employee, before, or instead of, formally instituting such action or proceeding, doing any other thing that constitutes an action for non-economic loss.

46 Notice of common law claims against third party

- 46(1) Where:
- (a) compensation is payable under this Act in respect of the death of an employee, an injury to an employee or the loss of, or damage to, property used by an employee;
 - (b) the death, injury, loss or damage occurred in circumstances that appear to create a legal liability in a person (other than the Commonwealth, a Commonwealth authority, a licensed corporation or another employee) to pay damages in respect of the death, injury, loss or damage; and
 - (c) the employee or a dependant of the deceased employee, as the case may be, makes a claim against that person for the recovery of such damages;

the employee or dependant must, as soon as practicable but in any event not later than 7 days after the day on which he or she first became aware of the claim, notify Comcare in writing of the claim.

Penalty: 5 penalty units

- 46(2) Subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

47 Notice of common law claims against Commonwealth

47(1) If:

- (a) compensation is payable under this Act in respect of the death of an employee or an injury to an employee; and
- (b) the employee, or a dependant of the deceased employee, as the case may be, makes a claim for damages in respect of the death or injury against the Commonwealth, a Commonwealth authority, a licensed corporation or another employee;

the employee or dependant must, as soon as practicable but in any event not later than 7 days after the day on which he or she first became aware of the claim, notify Comcare in writing of the claim.

Penalty: 5 penalty units.

47(2) Subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

48 Compensation not payable where damages recovered

48(1) This section applies where:

- (a) an employee recovers damages in respect of an injury to the employee or in respect of the loss of, or damage to, property used by the employee, being an injury, loss or damage in respect of which compensation is payable under this Act; or
- (b) damages are recovered by, or for the benefit of, a dependant of a deceased employee in respect of the death of the employee and compensation is payable under this Act in respect of the injury that resulted in that death.

48(2) The employee or dependant shall, not later than 28 days after the day on which the damages were recovered, notify Comcare in writing of the recovery of the damages and the amount of the damages.

Penalty: 10 penalty units.

48(2A) Subsection (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- 48(3) If, before the recovery of the damages by, or for the benefit of, the employee or dependant, any compensation under this Act was paid to, or for the benefit of, the employee in respect of the injury, loss or damage, or to, or for the benefit of, the dependant in respect of the injury that resulted in the death of the employee, as the case may be, the employee or dependant is liable to pay to Comcare an amount equal to:
- (a) the amount of that compensation; or
 - (b) the amount of the damages;
- whichever is less.
- 48(4) Compensation is not payable under this Act to the employee in respect of the injury, loss or damage, or to, or for the benefit of, the dependant in respect of the injury that resulted in the death of the employee, after the date on which the damages were recovered by the employee or by, or for the benefit of, the dependant, as the case may be.
- 48(4A) Subsection (3) does not apply if the damages were recovered in an action for non-economic loss or by way of a settlement of such an action.
- 48(5) Subsection (4) does not apply if the damages were recovered:
- (a) as a result of a claim, or fresh claim, made by Comcare under section 50 (whether or not that claim progressed to the formal institution of proceedings); or
 - (b) as a result of Comcare's taking over the conduct of a claim under that section; or
 - (c) as a result of an action for non-economic loss; or
 - (d) by way of a settlement of such a claim or of such an action (whether or not that claim or that action progressed to the formal institution of proceedings).
- 48(6) A reference in subsection (3) to compensation under this Act that was paid for the benefit of a dependant does not include a reference to compensation paid under subsection 17(5).
- 48(7) Where an employee, or a dependant of an employee, establishes to the satisfaction of Comcare that a part of the damages referred to in subsection (1) did not relate to an injury, loss or damage in respect of which compensation is payable under this Act, subsection (3) applies in relation to that employee or dependant as if the amount of the damages were an amount equal to so much of the amount of the damages as did relate to an injury, loss or damage in respect of which compensation is payable under this Act.

- 48(8) Subsections (3) and (4) do not apply where the damages are recovered on or after the commencement of this section in respect of a claim for damages made before that day (whether or not legal proceedings were instituted) but section 99 (other than subsection 99(1)) of the 1971 Act, as in force immediately before that day, continues to apply as if:
- (a) references in that section to the Commonwealth were references to Comcare;
 - (b) references in that section to the Commissioner were references to Comcare;
 - (c) references in that section to compensation payable under the 1971 Act were references to compensation payable under this Act; and
 - (d) the reference in subsection 99(9) to subsection 43(5) or (7) of the 1971 Act were a reference to subsection 17(5) of this Act.
- 48(9) In this section, “**damages**” does not include an amount of damages paid to the Commonwealth in accordance with section 76 of the *Veterans’ Entitlements Act 1986*.

