

## *Safety, Rehabilitation and Compensation Act 1988 (Cth)* *(the SRC Act)*

### Summary of review undertaken by Peter Hanks QC

The review of the SRC Act undertaken by Peter Hanks QC has recently been released. Mr Hanks (taking into account the recommendations of Allan Hawke AC) conducted a comprehensive review of the SRC Act and the Comcare scheme as a whole. A full copy of the report is available online at <http://foi.deewr.gov.au/node/31849>.

Mr Hanks has made a vast number of recommendations, based on the following principles:

1. Work is generally good for health and wellbeing, and rehabilitation should be the number one priority of all claims;
2. Improving the way in which permanent impairment is assessed will improve consistency and fairness;
3. Modernising the provision of incapacity payments will provide for fairer remuneration for injured employees and assist in reducing age barriers to work; and
4. Disputes should be resolved as quickly, economically and fairly as possible.

For your convenience, we have briefly summarised a number of the recommendations made by Mr Hanks which are likely to have the greatest relevance to licensees.

### Structure of the SRC Act

- 3.1** The SRC Act be amended so that there is a clear distinction between legislative references to “Comcare”, and references to “determining authorities”, including licensees.
- 3.3** The SRC Act be restructured to reflect that priority is to be given to rehabilitation, and to follow the typical course of a claim.

### Hawke Report recommendations

- 4.2** A new paragraph be inserted into s 89B to provide the SRCC regulatory oversight over determining authorities’ claims management functions including the power to develop and implement a performance monitoring framework.
- 4.4 to 4.6** Amendments be made to the SRC Act to allow the granting of group licenses to related bodies corporate and eligible group of corporations.

The moratorium be repealed and also the eligibility requirement for the Minister to approve a potential licensee. Rather, the scheme should be opened to all corporations that are a national employer.

## Eligibility for compensation

- 5.1 The definition of “employee” be amended to deem contractors employees for the purposes of the SRC Act.
- 5.2 The SRC Act be amended to remove the effects of *Wiegand v Comcare*, so that an employee’s perception of a state of affairs will only provide a connection with employment where that perception has a reasonable basis.
- 5.3 The SRC Act be amended so that liability for incidents which are a manifestation of an underlying disease (eg. heart attacks, strokes etc) will be determined as a “disease” and must have been contributed to, to a significant degree, by the employee’s employment.
- 5.5 The reasonable administrative action exclusion in s 5A(1) be amended to operate only when that reasonable administrative action has contributed, to a significant degree, to the disease, aggravation or injury.
- 5.6 The list of reasonable administrative actions set out in s 5A(2) be considered exhaustive, rather than illustrative.
- 5.7 The journey provisions be extended to include situations where an employee is “on call”, but only to include the journeys between the place where the employee receives the call and the place of work.

## Rehabilitation

- 6.1 The SRC Act specifically provide for early rehabilitation as the primary form of rehabilitation.
- 6.2 The SRC Act be amended to include a system of provisional liability, which allows employees to access up to 12 weeks of incapacity payments and up to \$3,000 in medical expenses.
- 6.5 The role of “rehabilitation authority” be removed and replaced with the concept of the liable employer, which will always have the right and responsibility to arrange rehabilitation.
- 6.6 Employer representatives vested with the authority to assist in the rehabilitation of employees be required to undergo appropriate training.

- 6.7** Where an employee moves between two employers covered by the SRC Act, dual responsibility exist between the employers for the employee’s rehabilitation. Where the employee moves to an employer not covered by the SRC Act, responsibility reverts to the liable employer.
- 6.8** Comcare be given the power to commence and/or take over rehabilitation where the liable employer fails to meet its obligations or ceases to exist.
- 6.9** Comcare issue an “injury management and rehabilitation code of practice” with which employers must comply. The code of practice should provide that employees can propose their own suitable duties (**6.19**).
- 6.10** Development of an injury management plan by employers be compulsory where an employee has been incapacitated for 28 days or more.
- 6.12** Determining authorities be required to conduct a review of each active claim at 12 and 52 weeks.
- 6.13** Section 36, which provides for assessments to determine capability of undertaking a rehabilitation program, be repealed.
- 6.16** The definition of “suitable employment” be amended so that employment with any employer can be considered “suitable employment”.
- 6.17** The SRC Act be amended so that where the employer’s obligation to provide suitable duties under section 40 is not met, penalty units can apply.
- 6.20** An inspectorate be developed within Comcare to supervise and sanction employers with rehabilitation obligations, to ensure compliance with those obligations, and outcome and service delivery standards.
- 6.21** Comcare be given the power to issue improvement notices and accept undertakings from employers in relation to contravention of the employer’s rehabilitation obligations, including the duty to provide suitable employment.

## Compensation

- 7.1 and 7.2** The concept of NWE be renamed “average remuneration”, which is the average amount paid to the employee each week in the relevant period. The relevant period be fixed at 13 weeks, unless a 13 week period would not produce a fair and equitable outcome.
- 7.5 to 7.7** Sections 20, 21 and 21A, dealing with a reduction in incapacity payments where the employee is in receipt of superannuation benefits or a lump sum payment, be repealed. Alternatively, the sections be amended to remove the deduction of 5% of the employee’s normal weekly earnings from the formula, and the reference to the employee’s retirement.

- 7.12** Section 37(5), which specifies when compensation is payable while an employee is participating in a rehabilitation program, be repealed.
- 7.13** Weekly compensation for incapacity be paid at 100% of the employee's NWE for the first 13 weeks, 90% for weeks 14 to 26, and 80% thereafter.
- 7.16** Sections 23(1) and (1A) be amended so that the cut-off age is tied to the qualifying age for the old-age pension, and that employees who are injured up to 5 years prior to the cut-off age can receive 260 weeks of incapacity payments.
- 7.17** Employees be required to notify the determining authority of any absence from Australia of more than 60 days, and weekly payments be suspended during this period.
- 7.18** Employees be permitted to redeem their compensation payments on a voluntary basis.
- 7.21 to 7.25** The definition of "medical treatment" be amended to ensure that treatment is provided by a legally qualified and registered health practitioner, or by health practitioners who have been recognised and accredited by Comcare, and to only include medicines prescribed by an appropriate practitioner and dispensed by a registered pharmacist.
- 7.33** Section 29 of the SRC Act be repealed and new tiered system of services be implemented, allowing for household and post-acute care services for three years from the date of injury, and ongoing household and attendant care services only be allowed for the severely injured.

## Permanent impairment

- 8.1** The National Guide be the Approved Comcare Guide.
- 8.2** The SRC Act be amended to allow for separate impairments arising from the same injury to be combined into one permanent impairment score.
- 8.3** Any worsening of an accepted permanent impairment satisfy a 5% worsening threshold rather than the current 10% (other than for hearing loss).
- 8.4** The section 24 amount be 72.72% (\$346,120.14) of the death benefit and section 27 amount 27.27% (\$129,795.05).

## Claim determination, reconsideration and review

- 9.1** Electronic notification of injury and lodgement of claim forms be permitted;
- 9.3** The SRC Act be amended to include statutory timeframes for the determination of claims, and that if the claim is not determined within that period, the claim is deemed to have been rejected. For injuries, the time would be 30 days. Diseases, 60 days. If provisional liability has been accepted, by the end of the provisional liability period.

- 9.4 For psychological claims with liability for incapacity payments extending beyond 12 weeks, a diagnosis must be confirmed by a psychiatrist, clinical psychologist or general practitioner with sufficient mental health training.
- 9.5 The SRC Act be amended to allow for payment of the employee's costs at the reconsideration stage, including capped costs of obtaining medical support (it is proposed that the cap be the cost of one report including incidental diagnostic costs and legal fees of \$1,500 indexed).
- 9.6 Regulations be made to prescribe the period within which a reconsideration must be made, specifically, within 60 days of receiving the request.
- 9.9 Licensees be required to follow the model litigant framework.
- 9.13 The Administrative Appeals Tribunal (**the AAT**) be permitted to hear matters not the subject of a reviewable decision, with consent of the parties.
- 9.14 Where Fair Work Australia (**FWA**) has made a decision regarding the reasonableness of an employer's action, the parties and the AAT should be entitled to rely on that decision when determining whether an action constitutes reasonable administrative action.
- 9.15 and 9.16 Consideration should be given to providing jurisdiction to FWA for the determination of disputes involving workplace issues, rather than these being decided by the AAT. Consideration should also be given to FWA having jurisdiction to review all decisions relating to rehabilitation programs (**Recommendation 9.16**).

## Liabilities arising apart from the SRC Act

- 10.1 Comcare and licensees be provided with a statutory right of recovery.

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