Comprehensive Review of the *Safety, Rehabilitation and Compensation Act 1988* (Cth)

Submission to the Independent Panel: Ms Justine Ross, Professor Robin Creyke AO and Mr Gregory Isolani

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Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal people of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Independent Panel reviewing the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('*SRC Act*').

2. Our members represent injured workers and assist those workers in navigating the Comcare scheme ('scheme'). ALA members also have deep experience in the design characteristics and the efficacy of state and territory schemes.

3. We support the objective of this review, as outlined in the public consultation issues paper ('Issues Paper') released by the Independent Panel, "to make recommendations that can be used to reform the Comcare scheme to ensure that it produces fair, sustainable and optimal outcomes for injured workers and at the same time is predictable, affordable and financially sound".[2]

4. The ALA's submission responds to the matters raised in the Independent Panel's Issues Paper, as well as to the matters raised at the roundtable between the Independent Panel and the ALA on Monday, 25 November 2024.

5. The ALA urges the Independent Panel to closely and centrally consider the experiences of injured workers and their representatives as part of this review, in order to improve the scheme. The scheme must be focused on helping injured workers navigate their healing and their workers' compensation claims, and certainly must not traumatise or re-traumatise those workers in the process of seeking compensation.

6. We will note at this point that ALA members have not determined that a complete redrafting of the *SRC Act* is necessary, as long as the sections identified in our submission are properly amended. There is, the ALA notes, existing jurisprudence dealing with many sections of the *SRC Act* that is still of value.

7. Our submission addresses the following matters:

    - best practice in workers' compensation;

[2] Independent Panel, Department of Employment and Workplace Relations, Australian Government, *Getting the Best Outcomes for Injured Workers: Public Consultation Issues Paper* (21 October 2024) 14 <www.dewr.gov.au/workers-compensation/resources/getting-best-outcomes-injured-workers-public-consultation-issues-paper>. ('Issues Paper')

- employees' experiences of the scheme;
- scheme coverage;
- scheme entitlements; and
- resolving disputes in the scheme.

Best practice in workers' compensation

Identifying the principles of best practice

8. The ALA supports the objectives of the *SRC Act* being expressly stated in the *SRC Act*.

9. The ALA submits that the primary objectives of a workers' compensation scheme must be supporting an injured worker with all necessary treatment and rehabilitation at the earliest opportunity in order to achieve maximum recovery and, if appropriate, also assisting that worker returning to work (in accordance with advice from the worker's treatment provider) to undertake suitable and safe duties that are not likely to cause further injury/injuries or to aggravate existing injury/injuries.

10. With regards to best practice design, this should include the ability to meaningfully commute claims to enable employees to walk away, where it is safe and in an employee's best interests to do so. While returning to work is desirable in principle, it can be unsafe – especially for employees experiencing psychological injuries.

11. Best practice design must include meaningful access to common law benefits. This is a key feature of most state and territory schemes, and is based on hundreds of years of legal history. Meaningful access to common law, which Comcare lacks, confers benefits including:

    - safer workplaces and communities through the accountability provided by the tort of negligence, as price signals are given to employers who take unacceptable risks with the health, safety and lives of their workers; and
    - that it is a vehicle of finality of claims, thereby shortening the 'tail' and making the administrative infrastructure required to run a scheme smaller and more sustainable.

12. Further, the ALA submits that best practice for a workers' compensation scheme must also include a non-adversarial approach being adopted and encouraged for all parties to disputes concerning the scheme. A non-adversarial approach, in the experience of the clients of ALA members, is not reflective of how disputes concerning Comcare are playing out currently.

13. With regards to areas of the scheme needing reform to help workers understand access their entitlements, the ALA submits that information about entitlements and the claims process (including timeframes) should immediately be provided to employees – including information like the ability to apply for lump sum whole person impairment, where applicable.

14. The ALA also recommends that workers are provided with two claims managers (instead of one). Currently, workers fear that exploring their claims options with their claims manager could be used against them should disputes arise. Instead, one claims manager would be empowered to provide information about a worker's entitlements and guide that worker, while another is empowered to make the final decisions.

Ensuring the scheme is responsive to changing workforce conditions

15. As the Issues Paper details,[3] the nature of work and workplaces has significantly changed since the *SRC Act* commenced. As such, the ALA contends that the scheme should better reflect different working arrangements and options, including working from home arrangements.

16. The ALA also supports better management of claims for psychological injuries, including complex psychological claims, under the scheme. The ALA submits that the Independent Panel should review the provisions in the *SRC Act* regarding "reasonable administrative action".[4] Those provisions are currently too broad and ill-defined.

17. Further, mismanaged psychological rehabilitation processes can give rise to a non-compensable injury, which is used by unscrupulous employers to push workers out of employment. Those workers are left without the ability to meaningfully commute their claims, and this has left some workers in a worse position and without adequate compensation.

18. Additionally, the ALA calls on the Independent Panel to review the date of injury provisions and the calculation of Normal Weekly Earnings (NWE). ALA members report many

[3] Ibid 15.

[4] See: *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5A.

circumstances where an employee has continued working after noticing initial psychological symptoms but has decreased their hours and/or duties to accommodate their deteriorating mental health. When those workers do become incapacitated, their NWE and date of injury are determined, generally speaking, based on the date of incapacity. This has significant financial implications for those workers and what assistance they will receive from Comcare. The ALA submits that NWE and date of injury should be determined in accordance with when the psychological injury first produced symptoms, rather than at incapacity.

19. Finally, the ALA notes that workers are increasingly employed in a range of jobs and by different employers throughout their working lives. This trend is playing out particularly with younger workers.[5] In recognition of this, the ALA submits that the Independent Panel should consider the adoption of the "last noisy employer" rule for Comcare in the provisions relating to hearing loss. In the context of workers compensation, the "last noisy employer" rule is a legal principle applied in cases of industrial deafness in state and territory schemes. This rule typically holds the last employer where the worker was exposed to harmful noise levels responsible for the compensation, even if the hearing loss developed over time and across multiple employers. The *SRC Act* does not have this rule. The current requirement to apportion responsibility between employers is causing complications and is resulting in detriment to injured workers in terms of their entitlements and their experience during the claims process.

Employees' experiences of the scheme

20. ALA members, whose practices encompass state and territory schemes as well as Comcare, are in an excellent position to compare state and territory schemes with Comcare. Comcare compares poorly especially with respect to employee's experiences. Comcare is poorly designed, its processes are demeaning to injured workers, and it facilitates insurer and licensee behaviours which both exacerbate the distress of injured workers and add to the administrative costs of the scheme.

[5] Australian Bureau of Statistics, Australian Government, 'Age', *Job mobility* (July 2024) <www.abs.gov.au/statistics/labour/jobs/job-mobility/latest-release#job-mobility>.

Improving health outcomes for injured workers

21. In the experience of ALA members and their clients, the following factors are undermining the scheme offering improved health outcomes for injured workers:

    - Comcare pressuring workers (usually by taking a technical argument and using the complexity of the *SRC Act* to confuse a claimant) during the claims process to make decisions which will not be in those workers' interests – examples include:

        - Comcare pressuring workers to walk away from making their claims or receiving ongoing payments on the basis of an assessment from one independent medical examiner (IME);

        - A failure to hold employers accountable for using rehabilitation processes as a way to traumatise workers and force those workers back into completing unsafe duties at work; and

        - The inability to be able to meaningfully commute claims in circumstances where it is appropriate to do so, including where claimants are being put in a position of needing to continually prove their injury and undertake assessments, and so are unable to move on and focus on their recovery. Commutation/Redemptions should be part of any reform recommendations.

    - Early support under the scheme is inconsistent.

    - Employers challenging workers on even simple and straightforward claims.

22. The ALA supports processes being clarified and the relevant provisions amended (for example, section 30 of the *SRC Act*) such that workers can meaningfully commute claims where appropriate.

23. The ALA contends that employers should be educated about the no-fault nature of the scheme. This is consistent with the ALA's earlier recommendation for all parties to the scheme being encouraged to adopt a non-adversarial approach to disputes. However, we reiterate the need for scheme changes to introduce meaningful access to common law. Compulsory, non-adversarial, pre-court processes – a feature of all state and territory schemes with access to common law – can be part of Comcare. A small proportion of matters may require adjudication by courts. State and territory experience has shown that common law access

drives improved employer behaviour, as referred to earlier in our submission. The sunlight of common law accountability is a powerful disinfectant against employers who think that workplace health and safety is a slogan and not a cultural and behavioural non-negotiable.

24. The ALA recommends that early support under the scheme must be immediate and supportive, in coordination with a worker's General Practitioner (GP).

25. With regards to psychological injuries and illnesses, the ALA recommends that the scheme works closely with a worker's GP and psychologist to identify and address stressors in the workplace. Workers with a psychological injury should also not be forced back into the same role with the same employer and colleagues. Further, the scheme could offer provisional payments for workers with a psychological injury – see, for example, the entitlement to provisional payments in Victoria.[6]

26. The ALA also recommends that claims managers be required to undertake better, more comprehensive and ongoing training.

Experiences and outcomes of specific groups

27. ALA members report that older clients and female clients feel discriminated against within the scheme because certain IMEs routinely attribute their injuries to their age or gender – for example, degeneration for older people.

28. The ALA urges the Independent Panel to assess how processes can be improved to reduce the risk of discrimination within the scheme.

Scheme coverage

National coverage of private sector employees

29. Many ALA members note with concern that some scheme participant employers who have become part of the national scheme then take extraordinary positions on liability in relatively obvious and straightforward claims. Furthermore, those employers take advantage of lengthy administrative review processes through the Administrative Appeals Tribunal (AAT) – now the

[6] *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 263B.

Administrative Review Tribunal (ART) – to obfuscate entitlements being paid. Those employers wage a war of attrition on vulnerable workers on a playing field which is unfairly tilted by scheme design in employers' favour.

30. The ALA submits that it is still appropriate for employers to operate within state- and territory-based schemes, which have an adequate state of connection test. Companies that are large enough to be a self-insured licensee of the scheme should be able to manage the state of connection in a claim and be insured in various jurisdictions. Instead, those employers are operating through Comcare which they know is less favourable to workers than state- and territory-based workers' compensation schemes.

The ALA's opposition to a broader national workers' compensation scheme

31. The Issues Paper for this review notes the following:[7]

> In 2004, the Productivity Commission recommended developing a national workers' compensation scheme to reduce compliance complexities and costs for multi-state employers. Part of this recommendation included actively encouraging self-insurance applications under the Comcare scheme while at the same time commencing the establishment of alternative models for national self-insurance and premium-paying insurance schemes.

32. **The ALA strongly opposes the establishment of a broader national workers' compensation scheme recommended by the Productivity Commission**. That proposal fails to recognise the vital role of State and Territory Governments when it comes to enforcement of health and safety standards.

33. Expanding the current scheme would dilute health and safety protections for workers nationwide and would not provide the treatment and support needed by workers currently covered by Comcare or for workers currently covered by other schemes.

34. Every reduction in rights for workers to pursue employers who run unsafe workplaces would, the ALA submits, ultimately increase the burden on the Commonwealth and the taxpayer, as injured workers often become reliant long-term on Centrelink and Medicare. Under existing state and territory arrangements, those imposts on the Commonwealth are minimised.

35. In this regard, the Commonwealth's experience of the National Disability Insurance Scheme (NDIS) is instructive. The nationalisation of the disability services sector has been the subject

[7] Issues Paper 19.

of multiple major inquiries since the inception of the NDIS over a decade ago. The NDIS has had major design, implementation and operational flaws, and policy makers from across the political spectrum have described the NDIS as unsustainable. The results of recent legislative changes to the NDIS are as yet unknown. However, the NDIS sounds a clear warning to any government which believes that a national behemoth can deliver better overall outcomes than under the federated model.

36. The ALA also considers that the establishment of such a national workers' compensation scheme could lead to an increase in premiums for small to medium size employers in state and territory compensation schemes nationwide, to compensate for the movement of large employers into the national scheme.

Scheme entitlements

Eligibility for compensation

37. The ALA recommends the following with regards to best practice for determining injuries and diseases:

    - That these provisions of the *SRC Act* should be updated and clarified to reflect the changing nature of the workplace, especially employees working offsite or from home (as discussed earlier in this submission).

    - A reconsideration of "reasonable administrative action", which is too broad and should instead be based on the workable exclusion tests in some state- and territory-based legislation – such as, in the ACT's scheme.[8]

    - Further, ALA members report that claims managers default to using the disease test to assess all injuries. Clients are unaware of these nuances and it is only when lawyers point out the error that claims managers use the appropriate injury test. The ALA submits that both tests should be routinely applied (injury test first, then disease test) but they are not. This means that there is an entire cohort of people whose injuries should be accepted under the scheme but they are not.

[8] See, eg, *Workers Compensation Act 1951* (ACT) s 4(2).

Scheme entitlements

38. With regards to improving permanent impairment provisions, the ALA submits that:

    - the scheme should allow payment where the amount of impairment is under 10%, as more injured workers would have their claims resolved sooner;

    - there must be clarification provided about terms like "permanency" and "stabilisation" in relation to injuries, as ALA members report that some treating practitioners find these terms confusing which can mean that some injured workers miss out on WPI payments when treating practitioners misunderstand the terminology on the relevant forms; and

    - the "need for assistance" element (as part of assessing the level of impairment) also needs clarification, as it is frequently misinterpreted as actually *requiring* "assistance" as opposed to the *need* for such "assistance", which discriminates against those who are not in a family or support structure and have not been receiving assistance at home even though they do need that assistance.

39. Regarding workers who have no potential to return to work, the ALA remains concerned that Comcare's approach to those workers is such that workers always feel at risk of being 'cut off' or of being forced to return to work against their will. This occurs even in circumstances where those workers have an invalidity retirement pension approved by the Commonwealth Superannuation Corporation for the same injury, which means that by definition their injury has been accepted as a permanent inability to work.

40. The ALA supports initiatives to facilitate fair options to finalise claims, including lump sum payments for future treatment or incapacity, or reducing the percentage of whole person impairment to qualify for payment. New arrangements would need to be vastly different in design than the current arrangements.

Interactions with other schemes and sources of income

41. The ALA does not support any restrictions to accessing common law.

42. Currently, the only common law gateway is to establish permanent impairment of 10% or more, and then expect to pursue a limited common law claim for non-economic loss. The ALA

notes that a common law claim is capped at $110,000.[9] By pursuing a common law claim, an injured worker abandons the option for payment for impairment.

43. In the experience of ALA members and their clients, therefore, it is not a commercially viable option in almost all cases, since the injured worker still has to prove negligence as well. As mentioned earlier, for all practical purposes, Comcare has no common law access.

44. As such, the ALA contends that the existing limited gateway to common law in section 45 of the *SRC Act* should be reviewed. Injured workers should be able to retain a permanent impairment benefit and also pursue a common law damages claim. We further submit that the cap of $110,000 should be significantly increased, as this amount has remained non-indexed since 1988. Progressing common law claims would be viable for injured workers if the cap was indexed to at least $350,000. Permitting common law access should include allowing all heads of damage to be claimed against employers.

45. With regards to preventing double-dipping and adjustments for support from other sources, the ALA submits that all these provisions in the *SRC Act* require review and clarification as they are overly complicated and difficult for workers to understand.[10] This becomes especially problematic with 'crossover' claims – that is, when an injured worker has a claim through Comcare but also through another scheme or common law process. For example, a Comcare-eligible worker injured while operating a motor vehicle pursues a common law claim against the TAC (on behalf of the negligent driver).

Interaction with superannuation

46. The ALA submits that Comcare's regulations relating to Comcare recipients accessing superannuation payments under disability seem outdated, overly complex and inequitable.

47. Sections 20 and 21 of the *SRC Act* refer to the formula to reduce Comcare payments when accessing superannuation benefits as a pension or a lump sum. Those arrangements are unique to Comcare.

48. When accessing a lump sum from a superannuation accumulation account, Comcare applies a calculation to reduce the recipient's weekly payments. The calculation has two components

[9] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 45(4).

[10] See, egs, *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 48, 50 and 119.

to reduce Comcare payments – one component based on the Comcare statutory interest rate and another a standard 5% of NWE.

49. The 5% NWE reduction is applied to every lump sum withdrawal made, so the Comcare recipient is disadvantaged by making multiple withdrawals rather than one withdrawal. The lump sum withdrawal is proportioned based on the superannuation account.

50. The ALA notes that *Archer v Comcare* (1999) confirmed "access" to super benefits included "rolling over" non-preserved superannuation funds. This means Comcare recipients cannot rollover super after meeting TPD / Permanent Incapacity without having a reduction to their Comcare payment.

51. The "withdrawal" amount is proportioned based on the amount of the superannuation balance that relates to Commonwealth superannuation contributions, so other super contributions and/or earnings are not included in this proportion, this can advantage those with a higher level of earnings or superannuation accrued from non-Commonwealth funded sources.

Case study: Client A

Client A was in their mid-40s, a former Australia Post employee with a superfund through AustralianSuper. The super balance was $400.

TPD recently approved of $150,000, which was paid into the AustralianSuper account.

As over $400 of the super balance relates to Commonwealth Government super contributions, 100% of any withdrawal (note TPD proceeds are included in this proportioning) is assessed under section 21 of the *SRC Act*.

The Comcare reduction formula based on full withdrawal: $150,400 x Comcare statutory interest rate (4.08%) + 5% x NWE ($78,000 for this person) = $6,136 + $3,900 = $10,036 per annum, or $193 per week.

This $193 per week reduction continues for the life of the Comcare payments, it can fluctuate if the statutory interest rate changes, and/or if NWE changes.

52. The above case study demonstrates that the proportioning of the lump sum withdrawal seriously disadvantages workers with lower or falling superannuation balances.

53. The ALA notes that other schemes and government services (for example, state-based scheme payments, Centrelink) do not assess lump sum TPD withdrawals to reduce benefits. We question, therefore, why Comcare does? The present arrangements are unfair and should be removed.

54. The ALA urges the Independent Panel to review this practice and consider options to mitigate the disadvantage caused by this practice (for example, TPD insurance proceeds could be excluded from the Comcare reduction formula).

Rehabilitation, return to work and early intervention

55. As detailed earlier in our submission, the ALA is deeply concerned about the antagonistic approach to return to work from employers, despite the scheme being no fault.

56. Further, and also detailed earlier in our submission, the ALA supports the introduction of provisional payments which would be helpful for injured workers. It would provide some initial financial relief for injured workers and their families.

Resolving disputes in the scheme

57. ALA members report that requesting a reconsideration of a decision is a circular and ineffectual process. A decision is often only reconsidered by Comcare once administrative review processes have been initiated. The present scheme design places workers in a severely disadvantaged position, commonly giving rise to financial hardship and additional distress.

58. The ALA supports making pre-litigation dispute resolution processes mandatory before external administrative review, which would minimise the risk of re-traumatising workers by resolving issues before needing to take litigation further.

59. In the experience of ALA members and their clients in the AAT (now, the ART), Comcare lawyers too often take the view of not wanting to negotiate to reach a resolution of claims or to negotiate figures. Matters are then sent back to Comcare where there are delays in doing the necessary calculations.

60. Meanwhile, injured workers are not receiving payments and are distressed by the length of the litigation. This places additional, unnecessary burdens on Centrelink.

61. These pre-litigation dispute resolution processes should be funded by the decision-maker (not out of workers' entitlements).

62. The ALA refers the Independent Panel to the model in the ACT, where informal settlement discussions (conciliation) are required before arbitration can take place.[11] The parties must then attend a formal dispute resolution conference with a conciliator before the application progresses through the courts. These processes could be replicated for Comcare and incorporated into the *SRC Act*.

63. The ALA also refers the Independent Panel to the model in the Northern Territory, where an "independent, fair and impartial" mediator is assigned to workers' compensation disputes for mediation.[12] The ALA submits that this would be an appropriate measure for Comcare too.

64. The ALA would support abolishing reconsideration (see: *SRC Act* Part IV) and replacing that process with a dispute resolution process. Reconsiderations are rarely successful (because the reviewer is not independent) and cause significant delay. We submit that it is pertinent that there is a provision for party/party costs being recoverable in the formal dispute resolution process.

65. The ALA does not support medical panels contributing to Comcare's dispute resolution processes as, in the experience of ALA members, the issues for dispute can include legal issues not medical ones.

Conclusion

66. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Independent Panel regarding the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

67. The ALA is available to provide further assistance to the Independent Panel on the issues raised in this submission.

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[11] See: *Workers Compensation Regulation 2002* (ACT).

[12] NT WorkSafe, Attorney-General's Department, Northern Territory Government of Australia, *Mediation process for workers compensation* (January 2023) <https://worksafe.nt.gov.au/forms-and-resources/bulletins/mediation-process-for-workers-compensation>.

68. We would be particularly interested in contributing to a process where scheme design fundamentals were revisited and analysed. We believe that scheme design changes can occur which significantly ameliorate many of the problems to which this submission refers, and which do not add premium costs to the vast majority of employers.

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