

3. Work Health and Safety and Workers' Compensation

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Summary

3.1 This chapter makes a range of law reform proposals with respect to work health and safety and workers' compensation aimed at addressing and removing potential barriers to workforce participation for mature age workers.

3.2 The first part of the chapter examines work health and safety. The ALRC proposes that Safe Work Australia, in its activities and research, should consider and recognise health and safety issues that may affect mature age workers. Safe Work Australia should also, in conjunction with state and territory work health and safety regulators, develop guidance material around these issues.

3.3 The second part of the chapter focuses on workers' compensation. In this part the ALRC considers potential reform to the retirement provisions in the Commonwealth workers' compensation system in order to remove the barriers to mature age workers remaining in, or returning to, the workforce. In principle, the removal of barriers should require the elimination of all age-based restrictions from Commonwealth workers' compensation legislation. However, given the potential cost implications and unintended consequences for other workers in receipt of workers' compensation benefits, the ALRC considers it may be necessary to take a three-tiered approach to reform. First, retirement provisions should be legislatively tied to Age

Pension age. Secondly, the ALRC asks whether incapacity payment periods should be extended. Thirdly, the ALRC asks whether workers over Age Pension age who can prove that, had they not been injured, they would have continued to work should receive a supplementary payment.

3.4 The second part also discusses the inconsistent coverage of volunteers under workers' compensation and the ALRC proposes that Safe Work Australia consider this issue. Finally, the ALRC asks whether the treatment of superannuation payments in the calculation of workers' compensation incapacity payments creates a barrier to workforce participation for mature age workers.

Work health and safety

3.5 A basic premise in the Australian Work Health and Safety Strategy 2012–2022 is that all workers have the 'fundamental right to be free from the risk of work-related death, injury and illness'.¹ Increasingly however, governments, work health and safety regulators, and employers and their workers need to recognise and accommodate the differing work health and safety needs and priorities of 'an intergenerational workforce'.²

3.6 Legislative and regulatory duties under the Commonwealth work health and safety system appear to be sufficiently broad to protect mature age workers. Therefore, the ALRC does not consider it necessary to amend legislative work health and safety duties and obligations. Rather, the ALRC suggests that it may be necessary to adjust workplace processes and practices to account for the needs of mature age workers, and to provide assistance to organisations and workers to do so. In making proposals for reform in this area the ALRC notes that, while the health and safety needs and priorities of mature age workers may differ from workers in other age groups, changes to work environments and processes and positive organisational cultures around work health and safety are likely to benefit all workers.

Workplace injuries and age-related changes to workers

3.7 As outlined in earlier chapters, there are a range of significant differences within the mature age worker cohort, defined as aged 45 years and over. For example, statistics indicate that workers aged 65 years and over have the lowest rate of work-related illness or injury, but workers aged 45 to 49 years have the highest rates of work-related illness or injury.³

3.8 In considering the implications of ageing in work health and safety terms, because everyone 'ages differently', it is unhelpful to generalise about mature age workers or to assume that they will have certain characteristics or requirements.⁴ Comcare submitted that 'issues associated with older workers' employability are not

1 *Australian Work Health and Safety Strategy 2012–2022*.

2 Comcare, *Submission 29*.

3 Australian Bureau of Statistics, *Work-Related Injuries, Australia, 2009–10, Cat No 6324.0* (2010).

4 Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the Safety and Health Needs of Your Workplace: Older workers and safety* (2010), 2.

wholly age-related, and in fact, there may be greater similarities with other measures of disadvantage'.⁵ However, age-related factors that can affect an individual's ability to work safely

in some cases may include age-related wear and tear and degenerative changes to the body and ill health. There are different types of long-term physical conditions associated with older age groups, such as cardiovascular disease, diabetes and arthritis or osteoporosis, which may impact on a person's ability to work safely.⁶

3.9 Nonetheless, even where workers experience common physical and cognitive changes associated with ageing, these 'can be easily be managed in the workplace through an effective work health and safety policy and appropriate supporting practices'.⁷

3.10 The Consultative Forum on Mature Age Participation has emphasised the beneficial health effects of working:

improving the quality of the working environment not only attracts mature age people into the workforce, but also it can increase longevity in employment. The creation of roles and work practices specific to mature age workers, such as the creation of more ergonomic working conditions, has been suggested as a means to recruit and retain such employees.⁸

3.11 In complying with work health and safety obligations and requirements, and in fulfilling their responsibilities to provide safe and healthy work environments and processes, Safe Work Australia submitted that it is important that organisations 'accommodate the abilities, diversity and vulnerabilities of all Australian workers'.⁹

Legislative framework

3.12 On 1 January 2012, mirror work health and safety legislation commenced in several Australian jurisdictions, including the *Work Health and Safety Act 2011* (Cth) (WHS Act),¹⁰ based on model legislation, regulations and codes of practice released by Safe Work Australia—the statutory agency tasked with improving occupational health and safety (OHS) and workers' compensation arrangements in Australia.¹¹ These reforms have been described as 'the most significant reform' to OHS laws in Australia in the last 30 years.¹²

5 Comcare, *Submission 29*.

6 Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the Safety and Health Needs of Your Workplace: Older workers and safety* (2010), 2.

7 Diversity Council of Australia, *Submission 40*.

8 National Seniors Productive Ageing Centre, *Ageing and the Barriers to Labour Force Participation in Australia* (2011), prepared for the Consultative Forum on Mature Age Participation, 31.

9 Safe Work Australia, *Submission 18*.

10 The following legislation has been passed: *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT). The *Work Health and Safety Act 2011* (Tas) is due to commence on 1 January 2013. Mirror legislation has not yet passed in Victoria, South Australia or Western Australia.

11 Safe Work Australia is the statutory agency tasked with improving OHS and workers' compensation arrangements in Australia: *Safe Work Australia Act 2008* (Cth) ss 3, 6.

12 B Sherriff and M Tooma, *Understanding the Model Work and Health Safety Act* (2010), ix.

3.13 The WHS Act provides for a primary duty of care under which a person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable: the health and safety of workers while they are at work; the health and safety of others is not put at risk from work carried out; the provision and maintenance of a safe work environment; and a range of other requirements.¹³ Workers also have a primary duty to take reasonable care for their own safety at work, and that their own acts or omissions do not adversely affect the health and safety of others as well as to cooperate with reasonable policies and instructions from the PCBU.¹⁴

Australian Work Health and Safety Strategy 2012–2022

3.14 The Australian Work Health and Safety Strategy 2012–2022 (the Strategy) has been approved by Safe Work Australia members and is awaiting endorsement by the Select Council on Workplace Relations. It will be launched across Australia in late 2012.

3.15 The Strategy aims to support organisations and workers to improve work health and safety and has seven action areas:

- healthy and safe by design;
- supply chains and networks;
- work health and safety capabilities;
- culture and leadership;
- research and evaluation;
- government; and
- responsive regulatory framework.¹⁵

3.16 While the Strategy ‘does not specifically mention mature age workers’,¹⁶ the action area ‘Healthy and Safe by Design’, which includes the strategic outcome that ‘work and work processes and systems of work are designed and managed to eliminate or minimise hazards or risks’, is of particular relevance to this cohort.¹⁷

3.17 Following the launch of the Strategy, ‘national activities will be developed in consultation with key stakeholders to address specific issues for a range of vulnerable

13 The other requirements include, for example: to provide information and training to protect all persons from risks to their health and safety; monitoring of the health of workers for the purposes of preventing illness or injury arising from the conduct of the business or undertaking; and a duty to consult: *Work Health and Safety Act 2011* (Cth) ss 19(1)–(3), 28, 47.

14 Ibid s 28. Officers also have a range of duties: *Work Health and Safety Act 2011* (Cth) ss 27–29.

15 *Australian Work Health and Safety Strategy 2012–2022*.

16 Comcare, *Submission 29*.

17 *Australian Work Health and Safety Strategy 2012–2022*. See also Comcare, *Submission 29*.

workers including mature age workers'.¹⁸ The aim is to 'eliminate or minimise hazards by improving the design of structures, plant, substances, work and work systems'.¹⁹

3.18 Stakeholders like the Australian Council of Trade Unions (ACTU) have emphasised that they would not support forms of implementation, such as the 'development of strategic plans, which propose differing treatment based on the age of workers'.²⁰

3.19 The ALRC understands that implementation of the Strategy will occur at a Commonwealth, state and territory level. The specific nature of implementation is unclear at this stage. However, the implementation of the Strategy across jurisdictions presents an opportunity for work health and safety issues potentially affecting mature age workers to be considered, in particular through activities aimed at improving the design of work and work systems. In light of the high level nature of the Strategy, the ALRC suggests that in the course of implementation, specific consideration should be given to tailoring solutions and approaches to ensure they meet the needs of all workers, including mature age workers.

Proposal 3-1 Safe Work Australia and state and territory work health and safety regulators should consider health and safety issues that may affect mature age workers in implementing the Australian Work Health and Safety Strategy 2012-2022.

Research, guidance material and awards

3.20 There is a need for further research into work health and safety issues facing mature age workers. There is also a need for the development and distribution of guidance material in order to increase PCBU and worker understanding and recognition of these issues. The ALRC therefore proposes that Safe Work Australia: include health and safety issues that may affect mature age workers in its research agenda; be involved in the development of guidance material; and promote recognition of best practice approaches to work health and safety initiatives involving mature age workers.

Research

3.21 One of the key action areas under the Strategy is research and evaluation. The Strategy acknowledges that development of effective work health and safety policies, programs and practices needs to be informed by robust evidence.²¹

3.22 In its submission Safe Work Australia stated that its research 'typically includes age as an analysis variable' and that this research 'informs the development of related

18 *Australian Work Health and Safety Strategy 2012-2022.*

19 *Safe Work Australia, Submission 18.*

20 *ACTU, Submission 38.*

21 *Australian Work Health and Safety Strategy 2012-2022.*

national policy, practice and programs'.²² In addition, Safe Work Australia indicated that it monitors 'relevant national and international research including those relating to changing workforce demographics' through its 'emerging issues surveillance program'.²³

3.23 The ALRC considers that additional and targeted research by Safe Work Australia, as well as other relevant bodies, should be undertaken into work health and safety issues facing mature age workers.²⁴ Conducting such research in an Australian context, informed by relevant developments and evidence across jurisdictions, is central to ensuring best practice approaches to work health and safety. This research should underlie the development of evidence-based guidance material.

3.24 As a preliminary step, the ALRC proposes that Safe Work Australia should include health and safety issues that may affect mature age workers in its research agenda.

Guidance material

3.25 There is a range of guidance material currently provided to PCBUs, workers and duty holders about work health and safety matters in the form of regulations, Codes of Practice and other material produced by Safe Work Australia, Comcare and similar bodies.²⁵

3.26 In the Issues Paper, the ALRC asked where it is best to include information about work health and safety issues relevant to mature age workers.²⁶ Stakeholders expressed strong support for the development and dissemination of guidance material of this type, and suggested a range of formats and forms.

3.27 The Ai Group opposed the inclusion of such information in Codes of Practice, instead favouring its inclusion in bulletins and other informal documents intended to provide guidance, 'without creating onerous legal obligations on the employer'.²⁷ The Government of South Australia submitted that

certain industries employing older workers with particular hazards in place may benefit from guidance material specific to those industry sectors. However, this may be addressed by way of more informal guidance such as information sheets, hazard alerts or bulletins.²⁸

3.28 In addition, stakeholders suggested work health and safety bodies should develop a health and safety kit for mature age workers, to 'address misconceptions about older persons, ageing and occupational health and safety risks'.²⁹ It was

22 Safe Work Australia, *Submission 18*.

23 Ibid.

24 See, eg, Diversity Council of Australia, *Submission 40*.

25 For example: Safe Work Australia, *Code of Practice: How to Manage Work Health and Safety Risks* (2010); Safe Work Australia, *Code of Practice: How to Consult on Work Health and Safety* (2010); and Safe Work Australia, *Code of Practice: Managing the Work Environment and Facilities* (2010).

26 Issues Paper, Question 41.

27 Australian Industry Group, *Submission 37*.

28 Government of South Australia, *Submission 30*.

29 JobWatch, *Submission 25*.

suggested that it could 'also deal with issues such as work task and job design, work organization and work environment'.³⁰

3.29 In an Australian Public Service context, Comcare identified a number of potential opportunities for the collection of data and publication of guidance material, such as the publication of a chapter focused on mature age workers in the Australian Public Service State of the Service Report or Census Survey, and periodic 'pulse surveys' along the lines of the Department of Human Services Mature Age Worker Survey conducted in late 2011'.³¹

3.30 Comcare suggested that Safe Work Australia should also play a role in 'brokering industry benchmarks on work ability and ageing to guide national or industry directed strategies and interventions'.³²

3.31 The ALRC proposes that Safe Work Australia and state and territory work health and safety regulators should develop guidance material around work health and safety issues that may affect mature age workers. Guidance material should contain information about: legislative responsibilities and duties; best practice work design and processes; risk assessment; and health and wellbeing. The *Investing in Experience* guide and WorkSafe WA bulletin, *Understanding the Safety and Health Needs of Your Workplace: Older Workers and Safety*, provide useful models.³³ Such guidance material should be developed to suit a range of industries and professions, and widely available from a range of sources.³⁴

3.32 The ALRC suggests that the development of guidance material should be linked to the national education and awareness campaign proposed in Chapter Two.

Awards

3.33 The annual Safe Work Australia Awards acknowledge excellence in work health and safety innovation and practice at a governmental, organisational and individual level. The awards include a number of categories, such as best workplace health and safety management system; best solution to an identified workplace health and safety issue; and best individual contribution to workplace health and safety.³⁵

3.34 The awards play a key role in raising awareness about work health and safety and could play an important role in placing this issue on the national work health and safety agenda. There may be scope for recognition of systems, solutions and individuals that address mature age-related work health and safety issues within these

30 Ibid.

31 Comcare, *Submission 29*. For example, s 44 of the *Public Service Act 1999* (Cth) provides that the Australian Public Service Commissioner must provide a report each year to the Minister for presentation to the Parliament, which includes a report on the state of the Australian Public Service during the year.

32 Ibid.

33 Australian Government, *Investing in Experience Tool Kit* (2012), ch 7; Government of Western Australia, Department of Commerce WorkSafe Division, *Understanding the Safety and Health Needs of Your Workplace: Older workers and safety* (2010).

34 ACTU, *Submission 38*.

35 Safe Work Australia, *Annual Safe Work Australia Awards* <www.safeworkaustralia.gov.au> at 13 September 2012.

existing categories. Alternatively, it may be appropriate to establish a new category. Regardless of the approach taken, in the ALRC's view, Safe Work Australia should recognise best practice approaches to work health and safety involving mature age workers in its Safe Work Australia Awards.

Proposal 3–2 Safe Work Australia should include work health and safety issues that may affect mature age workers in its research agenda.

Proposal 3–3 Safe Work Australia and state and territory work health and safety regulators should develop guidance material to assist persons conducting a business or enterprise, workers, and the representatives of each to respond to health and safety issues that may affect mature age workers. Such material should contain information about:

- (a) legislative responsibilities and duties;
- (b) best practice work design and processes;
- (c) risk assessment; and
- (d) health and wellbeing.

Proposal 3–4 Safe Work Australia should recognise best practice approaches in work health and safety with respect to mature age workers in its Safe Work Australia Awards.

Volunteers

3.35 The WHS Act expands the class of persons to whom a duty is owed to 'workers', rather than employees. Workers include employees, subcontractors, outworkers, apprentices, students and volunteers.³⁶ In this way, the WHS Act applies to a range of volunteering organisations, but only those with paid staff. In 2010, 32.5% of volunteers were aged 55 and over.³⁷

3.36 In the Issues Paper, the ALRC asked in what ways, if any, OHS duties and responsibilities act as a barrier to volunteering by mature age persons.³⁸

3.37 COTA Australia (COTA) submitted that 'there is some evidence that the increasing OHS responsibilities of volunteers are a deterrent' to mature age participation in volunteering and for organisations in offering volunteering opportunities for mature age people. COTA also noted that 'the compliance cost of OHS for volunteers is often high, particularly for small community organisations and this acts as a disincentive for volunteers'.³⁹

36 Both definitions expand previous definitions of 'employer' and 'employee': *Work Health and Safety Act 2011* (Cth) s 7.

37 Australian Bureau of Statistics, *General Social Survey: Summary Results, Cat No 4159.0* (2010).

38 Issues Paper, Question 42.

39 COTA, *Submission 51*.

3.38 Suncorp observed that work health and safety 'duties and responsibilities place a compliance burden on volunteering organisations, and may act as a barrier to volunteering'.⁴⁰

3.39 While emphasising that volunteers deserve the same health and safety protections as other workers,⁴¹ other stakeholders expressed the view that work health and safety laws are 'not a barrier to encouraging volunteers and potential volunteers from undertaking volunteer work'.⁴²

3.40 Issues associated with the regulatory burden for volunteers and voluntary organisations and compliance costs associated with work health and safety laws are systemic and extend beyond the scope of this Inquiry. Safe Work Australia has examined issues relating to volunteers and work health and safety and developed a dedicated volunteer resource kit.⁴³ However, as volunteering is a significant form of other productive work, the ALRC suggests that Safe Work Australia should continue its work with the volunteering sector to address any remaining concerns.

Workers' compensation in Australia

3.41 Workers' compensation is compensation payable to a worker who suffers an injury or disease arising from, or during, his or her employment. Workers' compensation benefits encompass the payment of: incapacity payments to compensate for lost earnings; medical and related expenses; and lump sum payments for permanent impairment or death. Each state and territory has its own workers' compensation scheme and the Commonwealth has three schemes.⁴⁴

3.42 The purposes of workers' compensation are to:

- provide injured workers with financial support;
- provide injured workers with medical benefits and other forms of non-economic support;
- enable employers and workers to work cooperatively to maintain an injured worker at work, or to achieve an early, safe and appropriate return to work.⁴⁵

3.43 At a Commonwealth level, the workers' compensation system is a 'long tail' rather than a 'short tail' system; that is, it pays benefits for the duration of a worker's incapacity rather than imposing a benefit period or amount restriction.

3.44 A range of stakeholders in this Inquiry have emphasised the importance of all workers receiving appropriate support and being 'protected against financial hardship

40 Suncorp Group, *Submission 39*.

41 See, eg, Government of South Australia, *Submission 30*.

42 Comcare, *Submission 29*.

43 Safe Work Australia, *Volunteers and the New Work Health and Safety Laws* <www.safeworkaustralia.gov.au> at 13 September 2012.

44 In addition, there are also a number of minor schemes not discussed in this Discussion Paper. See, eg, *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth).

45 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

associated with sustaining a work-related injury'.⁴⁶ In addition, the ALRC emphasises that, in order to encourage the ongoing participation of mature age persons in the workforce, the focus of workers' compensation schemes needs to be on appropriately supporting and compensating workers, but also ensuring post-injury rehabilitation and return to work programs.

3.45 As the Insurance Council of Australia has emphasised, 'effective workers' compensation systems focus on preventing injuries and providing appropriate care for injured workers'.⁴⁷ This necessarily results in the interaction of work health and safety and workers' compensations schemes. Indeed, the workers' compensation scheme operates within a broader policy framework of work health and safety, industrial relations, the entitlement to social security and superannuation policy and access. In circumstances where mature age workers are not covered by workers' compensation, such as self-employed people, insurance becomes increasingly important. Insurance, including income protection insurance, is discussed in Chapter Four.

3.46 To operate effectively, workers' compensation schemes need to be financially viable. As stakeholders such as Suncorp emphasised, to 'maintain an affordable and sustainable scheme, it is important to regularly review and define benefit periods and amounts, to ensure the scheme is cost effectively supporting injured workers'.⁴⁸ This Inquiry and the upcoming review of the Commonwealth workers' compensation system provide a useful opportunity to provide such review. While the particular focus of this Inquiry is on removing age barriers, the aim in this area should be to 'enable greater workforce participation without unduly impacting the sustainability and affordability of workers' compensation schemes nationally'.⁴⁹

Commonwealth workers' compensation

3.47 The *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) establishes the workers' compensation scheme covering employees of the Commonwealth and statutory authorities, the ACT Government and its agencies, and the employees of licensed corporations. Military personnel injured prior to 1 July 2004 during non-operational service are covered by the SRC Act as well as the *Veterans' Entitlements Act 1986* (Cth).

3.48 The SRC Act also establishes Comcare, which is responsible for workplace safety, rehabilitation and compensation, and the Safety, Rehabilitation and Compensation Commission (SRCC)—a statutory body with regulatory functions relating to workers' compensation and OHS.

3.49 The *Military Rehabilitation and Compensation Act 2004* (MRC Act) provides rehabilitation, medical treatment and compensation for members and former members of the Australian Defence Force and their dependants in respect of injury, disease or

46 Suncorp Group, *Submission 39*.

47 Insurance Council of Australia, *Submission 21*.

48 Suncorp Group, *Submission 39*.

49 Ibid.

death related to service rendered on or after 1 July 2004.⁵⁰ The workers' compensation provided under the MRC Act is 'based on the SRC Act and VEA provisions'.⁵¹

3.50 Seacare is the national scheme of OHS, workers' compensation and rehabilitation arrangements that applies to defined seafaring employees.⁵² The Seacare scheme is overseen by the Seafarers Safety, Rehabilitation and Compensation Authority which monitors and administers the operation of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act).⁵³

3.51 The focus of this chapter is on the Commonwealth statutory arrangements. At a Commonwealth level there is also limited access to common law remedies against employers. To have access to common law remedies the worker must have a successful permanent impairment claim.⁵⁴ Common law remedies are restricted to damages for non-economic loss; and election of common law is irrevocable.⁵⁵

Safe Work Australia

3.52 Safe Work Australia is the statutory agency tasked with improving OHS and workers' compensation arrangements in Australia.⁵⁶ Safe Work Australia is a representative body and mainly consists of members who represent the Commonwealth, states and territories, workers and employers.⁵⁷

3.53 As part of its work, Safe Work Australia's Strategic Issues Group for Workers' Compensation (SIG) developed the National Workers' Compensation Action Plan 2010–2013. There are two key action areas under the National Plan relevant to this Inquiry. The first is to 'investigate and report on policy matters referred to or relevant to Safe Work Australia', which includes considering 'recommendations from the Older People and the Law report relating to ageing and retirement, and develop[ing] policy responses'.⁵⁸ Relevantly, the report recommended that

50 The *Safety, Rehabilitation and Compensation Act 1988* (Cth) provides cover for service rendered before 1 July 2004.

51 Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (March 2011), 28.

52 See *Seafarers Rehabilitation and Compensation Act 1992* (Cth).

53 The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) establishes a workers' compensation and rehabilitation scheme for seafarers employed on certain trips engaged in trade or commerce within a territory, interstate or overseas and on other vessels declared by the Australian Maritime Safety Authority. The Seacare Authority also oversees the operation of a range of other legislation and regulations made under that legislation.

54 That is, a benefit payable under the relevant Commonwealth Act: *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 45; *Military Rehabilitation and Compensation Act 2004* (Cth) s 389; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 55.

55 See *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 45; *Military Rehabilitation and Compensation Act 2004* (Cth) s 389; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 55.

56 *Safe Work Australia Act 2008* (Cth) ss 3, 6.

57 *Ibid* s 10.

58 *National Workers' Compensation Scheme Action Plan 2010–2013*.

the Australian Government, in cooperation with state and territory governments, review the application of workers' compensation legislation to ensure that older workers are not disadvantaged.⁵⁹

3.54 The second action area is to 'investigate and report on options for nationally consistent definitions for the purposes of workers' compensation'.⁶⁰ One of the seven temporary advisory groups (TAGs) established to investigate and report to the SIG on policy options for improving national consistency in key priority areas will consider definitions. In April 2012, the SIG reviewed the definitions to be investigated and agreed that the Definitions TAG should focus its work on 'retirement age and any barriers for older workers in workers' compensation schemes'.⁶¹

3.55 Safe Work Australia indicated that it is

currently developing an options paper for alignment or removal of the age limit to address age discrimination and avoid income gaps for older workers. This will be considered in late 2012. The options paper will take into consideration the views of governments, employers and workers through representation at the working group level.⁶²

Inquiry into Commonwealth workers' compensation scheme

3.56 On 24 July 2012, the Hon Bill Shorten MP, Minister for Employment and Workplace Relations, announced a review of the Commonwealth workers' compensation scheme, in particular the SRC Act. It is expected that the review panel will report to the Australian Government in February 2013.

3.57 The review is inquiring into any legislative anomalies and updates that need to be addressed, the performance of the Comcare scheme and ways to improve its operation. The terms of reference include

ensuring the application of workers' compensation legislation does not disadvantage workers over the age of 65 and there is no gap between the workers' compensation age limit and the foreshadowed increase to the age pension eligibility age to 67 by 2023.

3.58 In September 2012, an issues paper was released for consultation as part of the review.⁶³ The issues paper includes discussion of appropriate coverage arrangements when the Age Pension age is increased as well as in relation to injured workers who receive incapacity payments and superannuation benefits.⁶⁴

3.59 The ALRC expresses a preliminary view with respect to the necessary reforms to Commonwealth workers' compensation in this Discussion Paper. In making

59 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007), rec 42.

60 *National Workers' Compensation Scheme Action Plan 2010–2013*.

61 Safe Work Australia, *National Workers' Compensation Action Plan 2010–2013, Progress to April 2012* <www.safeworkaustralia.gov.au/sites/SWA/WorkersCompensation/Action%20Plan/Pages/progress-WC-Action-Plan-2010-2013.aspx> at 11 September 2012.

62 Safe Work Australia, *Submission 18*.

63 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

64 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012), 20, 21, 23–25.

recommendations in the final Report, the ALRC will consider the work of Safe Work Australia and the outcome of this review of the Commonwealth workers' compensation scheme.

Workers' compensation and mature age workforce participation

3.60 The Law Council of Australia suggests that the inability to access workers' compensation in the event of a work-related accident may, in some circumstances, act as a disincentive for mature age workers to remain in, or return to, the workforce.⁶⁵

3.61 This barrier has been emphasised by bodies such as the Advisory Panel on the Economic Potential of Senior Australians,⁶⁶ and a number of stakeholders in the course of this Inquiry.⁶⁷ It is also acknowledged by Safe Work Australia in its current development of policy options to address retirement provisions in workers' compensation legislation—in part to remove legislative barriers that 'stop older people working'.⁶⁸ Removing this disincentive was also one of the key drivers of recent Western Australian workers' compensation reform.⁶⁹

Retirement provisions

3.62 Most jurisdictions have retirement provisions that restrict access to incapacity payments when a worker reaches the age of 65. Under the Commonwealth scheme there is no limit to total incapacity or medical payments, but the following restrictions apply to incapacity payments:

- Employees of the Commonwealth and statutory authorities, the ACT Government and its agencies, licensed corporations, and military personnel injured before 1 July 2004: If a worker suffers an injury before reaching 63 years of age, incapacity payments cease when the worker reaches aged 65. However, a worker injured at any age after 63 years of age may receive incapacity payments for up to 104 weeks.⁷⁰
- Military personnel injured on or after 1 July 2004: If a member or former member suffers an injury before reaching 63 years of age, incapacity payments cease when the member or former member reaches aged 65. However, a member or former member injured at any age after 63 years of age may receive incapacity payments for up to 104 weeks.⁷¹
- Seacare: If a worker suffers an injury before reaching 64 years of age, incapacity payments cease when the worker reaches aged 65. However, a worker injured at

65 Law Council of Australia, *Submission 46*.

66 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27.

67 Law Council of Australia, *Submission 46*; WA Equal Opportunity Commission, *Submission 23*; Olderworkers, *Submission 22*; Safe Work Australia, *Submission 18*.

68 Safe Work Australia, *Submission 18*.

69 Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 2012, 1689d–1697a (S O'Brien—Minister for Commerce).

70 *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23.

71 *Military Rehabilitation and Compensation Act 2004* (Cth) s 121.

any age after 64 years of age may receive incapacity payments for up to 12 months after the date of injury.⁷²

3.63 The original rationale for such restrictions was that once an injured worker reached aged 65 it was assumed that, but for the injury, that was the point at which the worker would ‘retire’.

3.64 During the Second Reading Speech of the Commonwealth Employees’ Rehabilitation and Compensation Bill 1988 (Cth), which introduced age restrictions, the Minister for Social Security justified these restrictions on the basis that the government did not ‘consider it appropriate that employees should continue to receive workers’ compensation benefits after the normal retirement age’.⁷³ In addition, at the time the restrictions were introduced, at 65 years of age workers would have access to superannuation or other forms of income support, such as the Age Pension. The imposition of age restrictions may also have been an attempt to restrict benefits paid under the scheme, as between 1976 and 1986—prior to the introduction of the age restrictions—‘Commonwealth expenditure on workers’ compensation increased by over 700 percent’.⁷⁴

3.65 A number of states and territories have provisions similar to those under the Commonwealth system. However, neither Queensland nor Western Australia has retirement provisions.⁷⁵ The key difference in these jurisdictions is that other restrictions apply, such as to the benefit period and the maximum amount of compensation a worker can receive during the life of the claim in terms of weekly payments for loss of earnings.⁷⁶

Why is there a need for reform?

3.66 A number of other bodies and reviews have considered age restrictions in workers’ compensation. In particular, the Advisory Panel on the Economic Potential of Senior Australians recommended, in its 2011 report, that the ‘federal government work with state and territory governments to amend workers’ compensation regimes (including incapacity payments) to ensure older workers are not disadvantaged’.⁷⁷ The Australian Human Rights Commission (AHRC) also raised a number of concerns in its 2012 report, *Working Past our 60s*.⁷⁸

3.67 In the course of the Inquiry, a range of stakeholders have expressed concern about the existence of age restrictions on the payment of workers’ compensation

⁷² *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

⁷⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

⁷⁵ On 1 October 2011 amendments to the *Workers’ Compensation and Injury Management Act 1981* (WA) commenced which removed all age-based limits on workers’ compensation.

⁷⁶ *Ibid* and *Workers’ Compensation and Rehabilitation Act 2003* (Qld).

⁷⁷ Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27.

⁷⁸ Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012).

benefits. The key concerns include: the potential disincentive to workforce participation for mature age workers if they are not covered; the impending age gap in light of increases in Age Pension age; and the vulnerability of mature age workers where access to workers' compensation is restricted.

3.68 The Age Pension age for women has incrementally increased from aged 60 in 1995 to the current age of 64.5 years. It will align with the qualifying age for men, which is 65 years, from 1 July 2013. From 1 July 2017, the qualifying age for the Age Pension will increase from 65 to 65.5 years. The qualifying age will then rise by six months every two years, reaching 67 years of age by 1 July 2023.

3.69 With the incremental increase in Age Pension age, a mature age worker whose incapacity payments cease at aged 65 may face a gap between the cessation of workers' compensation and eligibility for Age Pension.⁷⁹ In such circumstances, a worker may be forced to access alternative forms of income support such as the Disability Support Pension, superannuation and other forms of private savings. Where this results in a depletion or exhaustion of superannuation or private savings, he or she may then need to access additional income support on a long-term basis, rather than self-funding retirement. This outcome is at odds with government policy objectives aimed at keeping people in work rather than in receipt of the Age Pension, and supporting people into self-funded retirement.

3.70 Stakeholders expressed the view that this situation is of 'serious concern'.⁸⁰ The Law Council of Australia noted 'inequity in the cessation of compensation at age 65 when pension and other entitlements are increasing'.⁸¹ Safe Work Australia noted in its submission that changes to Age Pension age

have the potential to increase disparities between jurisdictional workers' compensation arrangements. Safe Work Australia views addressing age issues in workers' compensation as a priority and is developing policy options to balance reducing barriers for older workers with ensuring that entitlements for the wider work force are not reduced.⁸²

3.71 A related concern expressed by the Advisory Panel on the Economic Potential of Seniors Australians is that limited access to workers' compensation 'increases the vulnerability of older workers, leaving them in a potential situation of being suddenly without an income for an extended time'.⁸³

3.72 However, the Australian Industry Group (Ai Group) has suggested that, rather than acting as a disincentive to remain in, or return to, the workforce, 'the retirement

79 From July 2017, eligibility for the Age Pension will rise to 65.5 years of age then by 6 months every 2 years to age 67 by 2023.

80 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

81 Law Council of Australia, *Submission 46*.

82 Safe Work Australia, *Submission 18*.

83 Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27.

provisions act as an incentive to mature age workers to recover and return to work, rather than rely on weekly benefits'.⁸⁴ The Ai Group also noted that

studies suggest that the longer a person is away from work because of a workplace injury, the less likely the person will return back to the workplace. If mature age employees are able to access weekly benefits for an indefinite period of time, this may act as a disincentive to continued participation in the workforce.⁸⁵

3.73 The ALRC recognises the highlighted connection between period of time out of the workplace and the likelihood of returning to work and emphasises the importance of the focus on post-injury rehabilitation and return to work programs.

3.74 The ability of mature age workers to access incapacity payments is likely to ensure that they receive adequate financial support and remain engaged with rehabilitation services and appropriate return to work programs. Where a worker does not receive such payments they may decide to leave the workforce, or abandon attempts to return to work, in order to access superannuation or the Age Pension. The inability to access workers' compensation may therefore, in some circumstances, act as a disincentive for mature age workers to remain in, or return to, the workforce. As a result, there is a need for reform in this area. The ALRC considers a number of possible reform approaches below and welcomes stakeholder feedback on the most appropriate approach.

The pathway to reform

3.75 There are a number of possible approaches to reform at a Commonwealth level to address issues arising from age-based restrictions on workers' compensation. These include:

- the removal of all age-based restrictions;
- the removal of all age-based restrictions, but the imposition of benefit period or amount restrictions; or
- linking retirement provisions to Age Pension age.

3.76 The ALRC supports the principle that there should be no age-based restrictions in Commonwealth workers' compensation legislation. However, there are a number of difficulties and cost implications of such an approach. As a result, it may be necessary to take a more nuanced approach to reform, involving three key components. First, retirement provisions should be legislatively tied to Age Pension age. Secondly, there may be a need to extend the incapacity payment period. Thirdly, workers over Age Pension age who can prove that, had they not been injured, they would have continued to work should potentially receive a supplementary payment.

84 Australian Industry Group, *Submission 37*.

85 *Ibid.*

Should all age-based restrictions be removed?

3.77 The most substantial approach to reform would involve the removal of all age-based restrictions from Commonwealth workers' compensation legislation. A number of stakeholders supported this approach. For example, the ACTU submitted that it considers age-based restrictions to be 'exclusionary and discriminatory':

Mature age workers should have access to compensation for all injuries that arise out of, or in the course of work, including during their breaks.⁸⁶

3.78 Similarly, National Seniors Australia, COTA and organisations such as Olderworkers supported the removal of such restrictions.⁸⁷ For example, COTA submitted that 'all upper age limits on workers' compensation should be abolished'.⁸⁸ The AHRC has also expressed its support for the removal of age-based restrictions in workers' compensation.⁸⁹

3.79 However, Comcare emphasised that removal of all age-based restrictions altogether, with no other limits in place,

would appear to be outside the generally accepted norms of workers' compensation schemes in Australia. As incapacity payments are the biggest drivers of claim costs, scenarios such as paying incapacity until a person died as they 'never intended to retire at x age and planned on continuing work' could pose substantial scheme sustainability issues.⁹⁰

3.80 Further, the Law Council of Australia noted that the forerunner to the SRC Act

provided for incapacity payments until the death of the worker. However, given that the current Commonwealth workers' compensation scheme is a 'long tail' compensation scheme, the Law Council Committees consider it unlikely that a return to such a provision would be affordable.⁹¹

3.81 The ALRC welcomes stakeholder feedback on this approach. However, recognising its potential cost implications, the second possible approach to reform may involve the removal of age-based restrictions from workers' compensation legislation, but the imposition of benefit period or amount restrictions. This would ensure that the scheme remains financially viable. A number of stakeholders supported this approach,⁹² and this is the approach taken in Western Australia.

3.82 For example, My Longevity acknowledged that the removal of age-based restrictions 'may require more strict criteria for entitlements to be continued but such

86 ACTU, *Submission 38*.

87 COTA, *Submission 51*; National Seniors Australia, *Submission 27*; Olderworkers, *Submission 22*.

88 COTA, *Submission 51*.

89 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

90 Comcare, *Submission 29*.

91 Law Council of Australia, *Submission 46*.

92 Suncorp Group, *Submission 39*; Government of South Australia, *Submission 30*; My Longevity Pty Limited, *Submission 15*.

an approach allows for relevant individual differences to be taken into account, for which age is an unreliable proxy'.⁹³

3.83 The reasoning underlying the 2011 removal of all age-based limits on workers' compensation in WA, but the imposition of benefit amount restrictions in the form of a 'prescribed amount',⁹⁴ was that:

Apart from addressing the clear inequity of the current arrangements, the removal of the discriminatory provisions will also have a positive impact on the State's economy. The State has an ageing workforce, record low unemployment and a need to maintain a skilled and experienced workforce. There is a need to encourage older workers to remain at work and the State's workers' compensation scheme must adequately reflect this environment. Past relationships between workers' compensation and the aged pension are increasingly irrelevant in an environment where many workers are continuing to work beyond the age at which pension entitlements become available.⁹⁵

3.84 While supporting the removal of age-based restrictions, Suncorp emphasised that it is important

to always consider how increased cover will impact the overall sustainability and affordability of the workers' compensation scheme. To maintain an affordable and sustainable scheme, it is important to regularly review and define benefit periods and amounts, to ensure the scheme is cost effectively supporting injured workers.⁹⁶

Difficulties with removing age-based restrictions

3.85 There are a number of potential difficulties associated with the removal of all age-based restrictions, even with the imposition of benefit period or amount restrictions. These include:

- cost implications, including potential cost blow-out and cost shifting;
- reduction in entitlements for workers with a long-term reduction in their capacity to earn; and
- difficulty in determining and addressing the link between work-related injuries and the ageing process.

3.86 While removal of age-based restrictions would clearly benefit mature age workers, such a move has cost implications. For example, statistics indicate that persons aged 65 years and over record the lowest rate of work-related injuries and illnesses.⁹⁷ However, age groups 35–44 and 65 years and over had the highest average

93 My Longevity Pty Limited, *Submission 15*.

94 The maximum 'prescribed amount' for the year beginning 1 July 2012 in WA is \$198,365: *Workers' Compensation and Injury Management Act 1981* (WA) s 5; WorkCover WA, *Variations in Prescribed Amount and Other Workers' Compensation Payments* (2012).

95 Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 2012, 1689d–1697a (S O'Brien—Minister for Commerce).

96 Suncorp Group, *Submission 39*.

97 30 per 1,000 persons (28.3 per 1,000 men and 33.5 per 1,000 women): Australian Bureau of Statistics, *Work-Related Injuries, Australia, 2009–10, Cat No 6324.0* (2010).

total cost of claims for Australian Government premium payers accepted during 2010–11.⁹⁸

3.87 Stakeholders highlighted a number of cost-related concerns. For example, Ai Group submitted that the removal of age-based restrictions in workers' compensation legislation 'would have significant cost implications for employers'.⁹⁹

3.88 The report prepared by PriceWaterhouseCoopers in the context of the removal of age-based restrictions from WA workers' compensation legislation noted that 'the potential cost impacts can take several years to emerge, while individuals reach the affected ages and changes in claimant behaviour occur'.¹⁰⁰

3.89 Comcare submitted that removing all age-based restrictions, but limiting the benefit period 'imposes risks for significant costs shifting to social security benefits and changes the scheme from a long tail to short tail claims model'.¹⁰¹

3.90 The ALRC considers that the removal of age-based restrictions and the imposition of benefit period or amount restrictions may have unintended consequences for other workers receiving incapacity payments under the scheme. In particular, any such restriction may disadvantage workers injured at a young age. Such workers may be reliant on workers' compensation for long periods and therefore may exhaust their entitlements and become reliant on Commonwealth income support, essentially transferring the cost from one Commonwealth scheme to another.

3.91 Comcare echoed this concern, emphasising that such a change would 'represent a significant reduction in the entitlements under the SRC Act for workers with a long-term reduction in their capacity to earn'.¹⁰²

3.92 Finally, a range of stakeholders also expressed concern about the 'difficulty in determining and addressing the link between injuries and the ageing process'.¹⁰³ For example, Suncorp noted that

a significant consideration of an ageing workforce is the growing issue of degenerative conditions, and the subsequent complication of separating these from workplace injuries. This problem will become more prevalent in manual industries and will potentially lead to increased claims management costs, which in turn will impact claims costs and employer engagement with the workers' compensation system.¹⁰⁴

3.93 Overall, the ALRC supports the principle that there should be no age-based restrictions in Commonwealth workers' compensation legislation. However, there appear to be a range of difficulties associated with such a reform. The first is the significant potential cost implications. The second difficulty is, given the likely need to

98 Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers' Compensation Statistics* (2011), 28.

99 Australian Industry Group, *Submission 37*.

100 PriceWaterhouseCoopers, *WorkCover WA: Removal of Age Limits Costings* (September 2011), ii.

101 Comcare, *Submission 29*.

102 *Ibid.*

103 Australian Industry Group, *Submission 37*.

104 Suncorp Group, *Submission 39*.

have accompanying payment period or amount restrictions to address cost concerns, a number of unintended consequences for other workers. Further analysis of these potential approaches to reform, including assessment of cost implications would be useful in guiding reform. The ALRC therefore welcomes stakeholder feedback on this issue and welcomes the contribution to be made by Safe Work Australia and the upcoming Commonwealth review to this discussion.

Linking retirement provisions to Age Pension age

3.94 In light of the above, in the ALRC’s view it may be necessary to take a three-tiered approach to reform. This would involve:

- legislatively tying retirement provisions under the SRC Act, MRC Act and Seafarers Act to Age Pension age;
- extending the incapacity payment period under the Seafarers Act, and possibly also under the SRC Act and MRC Act; and
- provision of a supplementary payment in certain circumstances.

3.95 As the qualifying age for Age Pension increases, there will be an increasing gap between the current age restriction of 65 years under workers’ compensation and the new Age Pension age. In order to address this issue a number of stakeholders, including Comcare, suggested that retirement provisions in workers’ compensation be legislatively tied to Age Pension age.¹⁰⁵ Comcare expressed the view that such a change is ‘consistent with the original policy intent’.¹⁰⁶

3.96 The Diversity Council of Australia supported this approach:

given concerns that removing all age-based restrictions could lead to significant increases in costs of premiums to employers, DCA recommends that as a first step, the age at which compensation is no longer payable be pegged to the age of Age Pension eligibility.¹⁰⁷

3.97 This approach was also noted in the terms of reference for the upcoming review of the Commonwealth workers’ compensation scheme, which include ensuring that workers’ compensation legislation

does not disadvantage workers over the age of 65 and there is no gap between the workers’ compensation age limit and the foreshadowed increase to the age pension eligibility age to 67 by 2023.

3.98 Similarly, in April 2012, the Workers Rehabilitation and Compensation (Retirement Age) Amendment Bill 2012 (SA) was introduced to increase age

105 Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; Comcare, *Submission 29*.

106 Comcare, *Submission 29*.

107 Diversity Council of Australia, *Submission 40*.

restrictions under South Australian workers' compensation legislation to reflect future changes to Age Pension age.¹⁰⁸

3.99 In order to achieve consistency across Commonwealth workers' compensation legislation with respect to age restrictions, the ALRC suggests that the SRC Act, MRC Act and Seafarers Act should be amended to provide that retirement provisions under these Acts be legislatively tied to the age at which the worker would, subject to satisfying other requirements, be eligible to receive the Age Pension.

3.100 The ALRC anticipates these reforms operating in practice as follows. From 1 July 2017 there would be incremental increases in the age restrictions under Commonwealth workers' compensation legislation. Ultimately, under the SRC Act and MRC Act, if a worker suffered an injury before reaching 65 years of age, incapacity payments would cease when the worker reached aged 67. However, a worker injured at any age after 65 years may receive incapacity payments for up to 104 weeks. Under the Seafarers Act, if a worker suffered an injury before reaching 66 years of age, incapacity payments would cease when the worker reached aged 67. However, a worker injured at any age after 66 years of age may receive incapacity payments for up to 12 months. The potential extension of these payment periods is considered below.

3.101 Any amendment should only operate to the advantage of workers. For example, it should not operate to disadvantage women in the period prior to 1 July 2013, at which time the Age Pension ages for men and women align.

3.102 Other benefits, such as access to medical treatment, would remain unaffected. This includes 'access to medical treatment, attendant care, household service and permanent impairment lump sum, which continue for the life of the compensation claim'.¹⁰⁹

3.103 Comcare has noted that this option would

increase Comcare's outstanding claims liabilities under the SRC Act, which will reduce Comcare's reported funding ratio and require premium increases to fund the additional liability.¹¹⁰

3.104 While noting the potential increase in premiums associated with such a change, the ALRC considers this approach appropriately balances cost and equity considerations.

108 Workers' Rehabilitation and Compensation (Retirement Age) Amendment Bill 2012 (SA). See also Government of South Australia, *Submission 30*.

109 Comcare, *Submission 29*.

110 *Ibid.*

Proposal 3–5 The Australian Government should amend the *Safety, Rehabilitation and Compensation Act 1988* (Cth), *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) to ensure that retirement provisions are tied to the qualifying age for the Age Pension.

Should the incapacity payment period be extended?

3.105 Another issue which arises is the sufficiency of the incapacity payment period for those workers who suffer an injury any age after age 63 under the SRC Act and MRC Act, or age 64 under the Seafarers Act.

3.106 Under the SRC Act and MRC Act, if a worker is injured at any age after age 63 they are entitled to a maximum of 104 weeks incapacity payments. Under the Seafarers Act, if a worker is injured at any age after age 64 they are entitled to a maximum of 12 months incapacity payments.

3.107 In order to ensure consistency between Commonwealth legislation and to ensure there are no barriers to persons wishing to work beyond Age Pension age doing so, the ALRC proposes that the Seafarers Act be amended to provide that workers who are injured at any age after two year prior to Age Pension age (rather than one year) should receive incapacity payments for up to 104 weeks.

3.108 As outlined in Chapter One, there are difficulties in defining the line between working age and retirement. In recognition of the changing nature of work and the ‘work-retirement continuum’, the ALRC is interested in comments on whether it is appropriate and necessary to amend the SRC Act, MRC Act and Seafarers Act to provide that workers who are injured at any age after two years prior to Age Pension age should receive incapacity payments for a period longer than 104 weeks.

3.109 The ALRC is conscious of the concerns expressed by stakeholders that ‘extension of coverage would impact workers’ compensation insurance premiums’.¹¹¹ However, SRCC statistics indicate that for premium payers’ claims accepted in 2010–11, in only 4% of claims for injury and 10% for disease was 26 or more weeks of time lost to date. These figures were 1% and 2% respectively for licensed self-insurers.¹¹² In terms of mature age workers, the 2009 Legislative Review of the WA workers’ compensation scheme indicated that ‘in the three years to 2007–08 only 0.02% of claims involved a worker aged more than 65 years receiving weekly compensation’ for the full year to which they were entitled.¹¹³

3.110 Any additional period of incapacity payment would need to be accompanied by ongoing rehabilitation and return to work support to ensure the focus is on increasing

111 Suncorp Group, *Submission 39*.

112 Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers’ Compensation Statistics* (2011), 45.

113 WorkCover WA, *Workers’ Compensation and Injury Management Act 1981 (WA) Legislative Review* (2009), 57.

workforce participation, rather than simply providing additional workers' compensation benefits to injured mature age workers.

A supplementary payment?

3.111 The third step in the ALRC's suggested reform approach—in addition to ensuring that retirement provisions are legislatively tied to Age Pension age and the potential extension of the incapacity payment period, involves a supplementary payment. In light of the ALRC's focus on capacity rather than age, the ALRC seeks stakeholder feedback on the appropriateness of introducing a supplementary payment for mature age workers.

3.112 Some Australian jurisdictions have legislation which provides that workers over age 65 years are entitled to a weekly supplementary payment, after normal incapacity payments have ceased, if the worker can prove that they would have continued working after the age of 65, had they not been injured.¹¹⁴ The supplementary amount is generally based on the amount a person receiving the Age Pension is eligible to earn before the pension is affected.

3.113 The ALRC is interested in stakeholder feedback on whether a similar provision should be introduced at a Commonwealth level and, if so, how it should operate. For example, should workers over age 67 be entitled to a weekly supplementary amount after normal incapacity payments have ceased, if the worker can prove that they would have continued working after the age of 67, had they not been injured?

Proposal 3–6 The Australian Government should amend the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) to provide that workers who are injured at any age after two years prior to Age Pension age may receive incapacity payments for up to 104 weeks.

Question 3–1 Should the Australian Government amend the *Safety, Rehabilitation and Compensation Act 1988* (Cth), *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) to provide that in circumstances where a worker is injured after two years prior to Age Pension age, he or she should receive incapacity payments for a period longer than 104 weeks?

Question 3–2 Should the Australian Government introduce a supplementary payment for mature age workers similar to the one provided for under the *Workers' Rehabilitation and Compensation Act 1988* (Tas)?

114 See, eg, *Workers' Rehabilitation and Compensation Act 1988* (Tas) s 87. See also *Workers' Compensation and Injury Management Act 1981* (WA) prior to its amendment to remove all age-based restrictions.

Jurisdictional inconsistency

3.114 Each jurisdiction currently has its own workers' compensation arrangements. This has 'resulted in numerous inconsistencies in the operation and application' of these arrangements.¹¹⁵

3.115 A range of bodies, including the AHRC have emphasised that 'there is a need for a nationally consistent workers' compensation framework that provides coherence and fairness' for those who work beyond the age at which they may be eligible for Age Pension.¹¹⁶ The ACTU emphasised that it supports the 'development of nationally consistent workers' compensation standards which are available to all members of the workforce regardless of the retirement age (including the self-employed)'.¹¹⁷

3.116 Similarly, Suncorp submitted that it 'believes that nationally consistent reform is important to improve the way in which all Australians are protected at work' and particularly noted inconsistent coverage of volunteers.¹¹⁸

3.117 In order to progress reform, the AHRC has recommended that 'State and Territory governments should now review the age limits on their workers' compensation schemes with the view to removing them'.¹¹⁹ The Law Council of Australia has suggested that 'it would be appropriate for the Commonwealth to take a "leadership" role in attempting to standardise entitlements across State, Territory and Commonwealth jurisdictions'.¹²⁰

3.118 However, the Government of South Australia observed that while the ideal is to have consistent provisions in place across jurisdictions, this would 'have significant cost impacts for workers' compensation authorities'.¹²¹

3.119 The functions of Safe Work Australia include the development of: national policy relating to workers' compensation; proposals relating to harmonising workers' compensation arrangements across the Commonwealth, states and territories; and national workers' compensation arrangements for employers with workers in more than one of those jurisdictions.¹²² The ALRC acknowledges the difficulties associated with harmonising workers' compensation legislation but, in light of Safe Work Australia's functions, and the importance of clarity and fairness for workers with respect to their entitlements, supports consistency across jurisdictions.

115 Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (March 2011), 9.

116 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

117 ACTU, *Submission 38*.

118 Suncorp Group, *Submission 39*.

119 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

120 Law Council of Australia, *Submission 46*.

121 Government of South Australia, *Submission 30*.

122 *Safe Work Australia Act 2008* (Cth) s 6, items 1 and 11.

Volunteer coverage

3.120 In addition to concerns about jurisdictional inconsistency with respect to age restrictions under workers' compensation, stakeholders also expressed concerns about inconsistency with respect to the coverage of volunteers.

3.121 A significant number of mature age people participate in voluntary work. Australian Bureau of Statistics (ABS) figures indicate that 32.5% of Australians who volunteer are aged 55 years and over.¹²³ However, there is no consistent coverage of volunteers under workers' compensation schemes. Volunteers in some jurisdictions are eligible, either because they are deemed to be workers under the relevant legislation, or the legislation specifically provides compensation for certain categories of volunteers.

3.122 At a Commonwealth level, the SRC Act deems a number of classes of people to be employees of the Commonwealth for the purposes of being eligible to receive workers' compensation, provided they perform certain duties.¹²⁴ It also allows for the coverage of volunteers, as declared by the Minister.¹²⁵ Comcare indicated that there are a number of declarations made under the SRC Act covering volunteers, for example:

persons who, under the control or direction of a Commonwealth officer, take part, without receiving any remuneration (excluding payment of expenses incurred), in search and rescue activities or training exercises carried out by the Department of Infrastructure and Transport or the Civil Aviation Safety Authority, and persons who, under the control or direction of a Commonwealth officer, render services, without receiving remuneration (excluding payment of expenses incurred), in an institution or for a service conducted by the Department of Veterans' Affairs.¹²⁶

3.123 Under the MRC Act, the Defence Minister may make a similar determination.¹²⁷ The Seafarers Act does not include any category of deemed worker.

3.124 The issues paper released as part of the review of the SRC Act raises questions about the definition of 'employee' under the SRC Act.¹²⁸ The ALRC will consider the outcome of the review in making recommendations in the final Report. However, there are two key action areas under the National Plan relevant to volunteers in the context of this Inquiry. First, to 'investigate and report on options for nationally consistent definitions for the purposes of workers' compensation' and, secondly, to 'investigate and report on issues of concern for multi-state employers'.¹²⁹ Given the inconsistent coverage of volunteers and the focus of this Inquiry on both paid employment and 'other productive work', including volunteering, the ALRC suggests that the Safe Work Australia SIG should ensure this matter is considered in the course of its work in this area.

123 Australian Bureau of Statistics, *General Social Survey: Summary Results, Cat No 4159.0* (2010).

124 *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5(2), (6), (15).

125 *Ibid* s 5(6).

126 Comcare, *Submission 29*.

127 *Military Rehabilitation and Compensation Act 2004* (Cth) s 8.

128 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

129 *National Workers' Compensation Scheme Action Plan 2010–2013*.

Proposal 3–7 Safe Work Australia’s Strategic Issues Group on Workers’ Compensation should consider the definition of ‘worker’ under Commonwealth, state and territory workers’ compensation legislation to ensure consistency of coverage of volunteers.

Workers’ compensation and superannuation

3.125 Under the ‘superannuation-offset provisions’ of the SRC Act, the incapacity payments of workers are affected by their receipt of superannuation.¹³⁰ The effect of the retirement income system and, in particular, superannuation, on workforce participation is considered in Chapter Eight of this Discussion Paper. However, in the context of workers’ compensation, the Law Council of Australia expressed concern about the potential disincentive that the treatment of superannuation payments in the calculation of incapacity payments may create:

the Commonwealth scheme is the only scheme in Australia to deduct monies received by way of superannuation pension or, based on a formula, a lump sum received by the injured worker from incapacity entitlements. At a policy level, superannuation entitlements ought not to have any effect on compensation entitlements however stakeholder comment is sought on whether it creates a barrier to workforce participation and what changes could be made.¹³¹

3.126 Conversely, the Department of Veterans’ Affairs indicated that, upon separation from the Australian Defence Force, superannuation payments are offset against MRC Act incapacity payments, and expressed the view that ‘this is consistent with the principle that the Government should not make duplicate income maintenance payments to the same person through superannuation and compensation’.¹³²

3.127 In the issues paper released as part of the review of the SRC Act, a number of broad questions were asked about whether the superannuation-offset provisions should be modernised, simplified or amended.¹³³ The ALRC is interested in specific stakeholder feedback on whether the treatment of superannuation payments in the calculation of incapacity payments under the Commonwealth workers’ compensation system creates a barrier to workforce participation for mature age workers.

Question 3–3 Does the treatment of superannuation payments in the calculation of incapacity payments under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) create a barrier to workforce participation for mature age workers? If so what, if any, changes should be made?

130 *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 20, 21, 21A.

131 Law Council of Australia, *Submission 46*.

132 Department of Veterans’ Affairs, *Submission 52*.

133 *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012), 21.