

5. Work Health and Safety and Workers' Compensation

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Summary

5.1 This chapter makes a range of recommendations for reform with respect to work health and safety and workers' compensation aimed at removing barriers to workforce participation for mature age workers. The first part of the chapter examines work health and safety; the second, workers' compensation.

5.2 With respect to work health and safety, the ALRC recommends that Safe Work Australia, in implementing the Australian Work Health and Safety Strategy 2012–2022 and in its other activities and research, should consider and recognise health and safety issues that may affect mature age workers. Safe Work Australia should also review guidance material and promote recognition of best practice approaches to work health and safety involving mature age workers.

5.3 In the second part of the chapter the ALRC recommends amendments to Commonwealth workers' compensation legislation to align retirement provisions with the qualifying age for the Age Pension and the extension of incapacity payment periods. The second part also discusses the inconsistent coverage of volunteers under workers' compensation and the ALRC recommends that Safe Work Australia consider this issue. Finally, the ALRC recommends that the superannuation offset provisions under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) be repealed.

Work health and safety

5.4 Ensuring that work environments, practices and processes are safe and conducive to worker health and wellbeing is central to facilitating the ongoing participation of mature age workers in paid employment and other productive work. The Consultative Forum on Mature Age Participation has emphasised that

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.¹

5.5 To facilitate this, the ALRC recommends that Safe Work Australia and state and territory work health and safety regulators consider health and safety issues that may affect mature age workers in implementing the Australian Work Health and Safety Strategy 2012–2022 (Australian Strategy). The ALRC also recommends that Safe Work Australia:

- include health and safety issues that may affect mature age workers in its research agenda; and
- review guidance material and promote recognition of best practice approaches to work health and safety initiatives involving mature age workers.

5.6 In 2012 and early 2013, mirror work health and safety legislation commenced in several Australian jurisdictions, including the *Work Health and Safety Act 2011* (Cth) (WHS Act).² The legislation is based on model legislation, regulations and codes of practice released by Safe Work Australia—the statutory agency with the responsibility for improving occupational health and safety (OHS) and workers’ compensation arrangements in Australia.³ The key objects of the WHS Act include: protecting all workers against harm to their health, safety and welfare through the elimination or minimisation of risks; promotion of improvements in work health and safety practices; and provision of advice, information, education and training in relation to work health and safety.⁴

1 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.

2 The following legislation has commenced: *Work Health and Safety Act 2011* (Cth); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2011* (Tas). Mirror legislation has not yet been enacted in Victoria or Western Australia.

3 Safe Work Australia is a representative body and consists mainly of members who represent the Commonwealth, states and territories, workers and employers: *Safe Work Australia Act 2008* (Cth) ss 3, 6, 10.

4 *Work Health and Safety Act 2011* (Cth) s 3. The *Work Health and Safety Act 2011* (Cth) provides for a primary duty of care under which a person conducting a business or undertaking (PCBU)—formerly an employer—must ensure, so far as is reasonably practicable: the health and safety of workers while they are at work; that 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. Workers also have a primary

5.7 It is increasingly necessary to recognise and accommodate the differing work health and safety needs and priorities of 'an intergenerational workforce'.⁵ Evidence suggests that age-related factors can affect an individual's ability to work safely.⁶ However, it is unhelpful to generalise about mature age workers or to assume that they will have certain characteristics.⁷ For example, statistics indicate that workers aged 45 to 49 years have the highest rates of work-related illness or injury, but workers aged 65 years and over have the lowest rate.⁸

5.8 Even where workers experience common physical and cognitive changes associated with ageing, these 'can easily be managed in the workplace through an effective work health and safety policy and appropriate supporting practices'.⁹ Indeed, Comcare noted that 'issues associated with older workers' employability are not wholly age-related, and in fact, there may be greater similarities with other measures of disadvantage'.¹⁰

5.9 Organisations are required to comply with work health and safety obligations and requirements and to fulfil their responsibilities to provide safe and healthy work environments and processes. In doing so it is important that organisations 'accommodate the abilities, diversity and vulnerabilities of all Australian workers'.¹¹

5.10 Accordingly, while the focus of the ALRC's recommendations in this chapter is on mature age workers, work health and safety strategies should aim to improve work environments, practices, processes or organisational culture more broadly. Recommendations that result in changes to these are likely to benefit a wide range of workers.

Australian Work Health and Safety Strategy 2012–2022

5.11 The ALRC recommends that Safe Work Australia and state and territory work health and safety regulators consider health and safety issues that may affect mature age workers in implementing the Australian Strategy.

duty to take reasonable care for their own safety at work, and to ensure that their own acts or omissions do not adversely affect the health and safety of others and to cooperate with reasonable policies and instructions from the PCBU: *Work Health and Safety Act 2011* (Cth) ss 19(1)–(3), 28, 47. Officers and other persons at the workplace also have a range of duties: *Work Health and Safety Act 2011* (Cth) ss 27–29.

5 Comcare, *Submission 29*.

6 These factors 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': 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 *Ibid.*, 2.

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

9 Diversity Council of Australia, *Submission 40*. See also Women in Social & Economic Research (WiSER), *Submission 72*.

10 Comcare, *Submission 29*.

11 Safe Work Australia, *Submission 18*.

5.12 The Australian Strategy was launched on 31 October 2012 and aims to support organisations and workers to improve work health and safety.¹² Comcare submitted that the Australian Strategy provides an

opportunity to work with workers, workplaces, across government, general practice and the wider community to strengthen the capacity of workplaces to provide safe, healthy and supportive workplaces for an age diverse workforce and better equip workplaces to accommodate differences in the health status of workers.¹³

5.13 The Australian Strategy does not specifically mention mature age workers.¹⁴ However, the action area, ‘Healthy and Safe by Design’, including 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 mature age workers.¹⁵

5.14 Improving the ‘design of structures, plant, substances, work and work systems’¹⁶ will positively affect the health and safety of all workers—including mature age workers. Age should be viewed as ‘one aspect of diversity present in today’s working population’.¹⁷ As the Australian Strategy is implemented, consideration should be given to meeting the work health and safety needs of all workers. Safe Work Australia, as well as a range of other stakeholders supported such an approach.¹⁸ This is also in keeping with statements in the Australian Strategy which indicate its implementation will involve development of national activities ‘in consultation with key stakeholders to address specific issues for a range of vulnerable workers including mature age workers’.¹⁹

5.15 There will be annual reporting in relation to the Australian Strategy and a review in 2017.²⁰ This provides timely opportunities for further consideration and review of the Strategy broadly, and with respect to the needs of particular cohorts of workers, including mature age workers.

Recommendation 5–1 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.

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

13 Comcare, *Submission 91*.

14 Comcare, *Submission 29*.

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

16 Safe Work Australia, *Submission 18*.

17 European Agency for Safety and Health at Work, *Workforce Diversity and Risk Assessment: Ensuring Everyone is Covered* (2009), 31.

18 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; Comcare, *Submission 91*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Safe Work Australia, *Submission 68*; R Christiansen, *Submission 58*; Diversity Council of Australia, *Submission 40*.

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

20 *Ibid.*

Research, guidance material and awards

5.16 There is a need for research that considers both the work health and safety issues facing mature age workers and work re-design more broadly. This will ensure evidence-based policy development and implementation of the Australian Strategy. Guidance material should also be developed to increase the understanding of these issues by persons conducting a business or undertaking (PCBU) and workers. The ALRC therefore recommends that Safe Work Australia include health and safety issues that may affect mature age workers in its research agenda and review guidance material. It should also promote recognition of best practice approaches to work health and safety initiatives involving mature age workers.

Research

5.17 One of the key action areas under the Australian 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

5.18 In the Discussion Paper, the ALRC proposed that Safe Work Australia include health and safety issues that may affect mature age workers in its research agenda.²² A range of stakeholders expressed support for the proposal.²³ For example, the Diversity Council submitted that it supports

further research being undertaken into the occupational health and safety issues facing mature age workers and the dissemination of evidence-based information to employers about these issues, including their rights and responsibilities.²⁴

5.19 Safe Work Australia stated that it 'continues to include age as an analysis variable in its research to inform the development or evaluation of national policy relating to work health and safety and workers' compensation'.²⁵ Safe Work Australia also indicated it is undertaking a longitudinal study, *Personality and Total Health Through Life*, in collaboration with the Centre for Research on Ageing, Health and Wellbeing at the Australian National University. The project involves a community survey that includes three age groups: 20–24 years; 40–44 years; and 60–64 years.

Each cohort will be interviewed every four years for 20 years at which point the age groups will overlap thus capturing the total adult life span. Safe Work Australia has included work related questions to allow a broader examination of issues specific to the workplace. The project enables study of the inter-relationship between work and health across the life course.²⁶

21 Ibid.

22 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 3–2.

23 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Government of South Australia, *Submission 95*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Diversity Council of Australia, *Submission 71*; Suncorp Group, *Submission 66*.

24 Diversity Council of Australia, *Submission 71*.

25 Safe Work Australia, *Submission 68*.

26 Ibid.

5.20 This project represents a positive research development and may assist not only in responding to work health and safety issues that may affect mature age workers, but also in the establishment of preventative measures.

5.21 Research and initiatives in other jurisdictions, such as the European Union, also provide instructive models with respect to changes to work and workplace design and broader health and wellbeing initiatives.²⁷

5.22 Safe Work Australia and other relevant bodies should undertake additional research into work health and safety issues facing mature age workers, as well as job and workplace re-design. Safe Work Australia has committed to continuing ‘to look for opportunities to include the work health and safety issues that may affect mature age workers as part of its research and evaluation strategy and work plans’.²⁸ 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 inform the development of evidence-based guidance material.

Recommendation 5–2 Safe Work Australia should include work health and safety issues that may affect mature age workers in its research and evaluation strategy and work plans.

Guidance material

5.23 Guidance material should include information about work health and safety issues that may affect mature age workers. There is a range of guidance material currently provided to PCBUs, workers and duty holders about work health and safety matters. This material takes the form of regulations, Codes of Practice and other material produced by Safe Work Australia, Comcare and similar bodies.²⁹ Safe Work Australia explained that it has produced a wide range of guidance material, some of which

is aimed at all work and workplaces (for example the Code of Practice on How to Manage Work Health and Safety Risks) while others relate to specific risks (for example the Code of Practice on Managing Noise and Preventing Hearing Loss at Work). Such guidance applies to all workers including mature age workers.³⁰

27 See, eg, J Ilmarinen, *Promoting Active Ageing in the Workplace* (2012), European Agency for Safety and Health at Work; Eurofound, *Living Longer, Working Better—Active Ageing in Europe* <www.eurofound.europa.eu/resourcepacks/activeageing.htm> at 21 March 2013; A Walker and P Taylor, *Combating Age Barriers in Employment: A European Portfolio of Good Practice* (1998), European Foundation for the Improvement of Living and Working Conditions.

28 Safe Work Australia, *Submission 68*.

29 For example: Safe Work Australia, *Code of Practice: How to Manage Work Health and Safety Risks* (2011); Safe Work Australia, *Code of Practice: Work Health and Safety Consultation, Co-operation and Co-ordination* (2011) and Safe Work Australia, *Code of Practice: Managing the Work Environment and Facilities* (2011).

30 Safe Work Australia, *Submission 68*.

5.24 The focus of guidance material should be on assisting PCBU's, workers and others to understand and comply with their obligations and address work environments, practices and processes that pose a risk to health and safety. However, guidance should also address the particular issues that may affect different groups of workers, including mature age workers.

5.25 Safe Work Australia agreed that guidance could be developed for mature age workers if 'issues which are specific to the needs of mature age workers are identified and are not adequately covered' in existing material.³¹ Stakeholders made a range of suggestions about ways to ensure material is appropriate and effective.³² For example, Suncorp suggested that guidance material should be supported by 'effective education and communication mechanisms' to 'ensure the information reaches the intended audience'.³³ JobWatch submitted that 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'.³⁴ JobWatch also suggested that it could 'also deal with issues such as work task and job design, work organisation and work environment'.³⁵

5.26 The Government of South Australia noted 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.³⁶

5.27 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'.³⁷

5.28 The Australian Industry Group (Ai Group) opposed the inclusion of such information in binding guidelines or Codes of Practice that 'import an element of legislative significance'.³⁸ Ai Group favoured the inclusion of information in bulletins and other informal documents intended to provide guidance, 'without creating onerous legal obligations on the employer'³⁹ or adding an 'unnecessary layer of prescriptive regulation on employers'.⁴⁰

31 Ibid.

32 Law Council of Australia, *Submission 96*; Comcare, *Submission 91*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Diversity Council of Australia, *Submission 71*; Suncorp Group, *Submission 66*.

33 Suncorp Group, *Submission 66*.

34 JobWatch, *Submission 25*.

35 Ibid.

36 Government of South Australia, *Submission 30*.

37 Comcare, *Submission 29*.

38 Australian Industry Group, *Submission 97*.

39 Australian Industry Group, *Submission 37*.

40 Australian Industry Group, *Submission 97*.

5.29 The ALRC recommends that Safe Work Australia and state and territory work health and safety regulators review guidance material to ensure it includes information about work health and safety issues that may affect mature age workers in particular. 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 Toolkit* and guidance such as *Understanding the Safety and Health Needs of Your Workplace: Older Workers and Safety*, provide instructive models, as do the approaches suggested by stakeholders.⁴¹ Such guidance material should be developed to suit a range of industries and professions and should be available from a range of sources. Guidance material should also be appropriate and accessible for all sections of the community.⁴²

Recommendation 5–3 Safe Work Australia and state and territory work health and safety regulators have developed guidance material to assist persons conducting a business or enterprise, workers, and the representatives of each to respond to health and safety issues of all workers. Such material should be reviewed to ensure it includes information about issues that may affect mature age workers, including information about:

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

Awards

5.30 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: workplace health and safety management system; solution to an identified workplace health and safety issue; and individual contribution to workplace health and safety.⁴³

5.31 In the Discussion Paper, the ALRC suggested that Safe Work Australia recognise best practice approaches in work health and safety with respect to mature age workers in the Awards. The award finalists are the winner of each of the relevant categories in the respective jurisdictional awards.⁴⁴ As a result, the cooperation of all

41 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).

42 See, eg, Federation of Ethnic Communities' Council of Australia (FECCA), *Submission 80*; ACTU, *Submission 38*.

43 Safe Work Australia, *Annual Safe Work Australia Awards* <www.safeworkaustralia.gov.au> at 21 March 2013.

44 Safe Work Australia, *Submission 68*.

jurisdictions is required to ensure that mature age-related work health and safety responses are recognised in existing award categories. Where this is not possible within existing categories, it may be necessary to establish a new category. To facilitate this, the ALRC recommends that Safe Work Australia work in consultation with state and territory health and safety regulators, unions and industry representatives.

Recommendation 5-4 Safe Work Australia should work with state and territory health and safety regulators, unions and industry representatives to recognise best practice in work health and safety with respect to mature age workers in Commonwealth, state and territory work health and safety awards.

Workers' compensation

5.32 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. The purposes of workers' compensation include:

- providing injured workers with financial support, medical benefits and other non-economic support;
- enabling employers and workers to work cooperatively to maintain an injured worker at work; or
- achieving an early, safe and appropriate return to work.⁴⁵

5.33 Each state and territory in Australia has its own workers' compensation scheme. The Commonwealth has three schemes.⁴⁶ Under the Commonwealth schemes, mature age workers are entitled to workers' compensation benefits.⁴⁷ There are no age-related restrictions on the payment of medical or related expenses or lump sum payments for

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

46 The key legislation for each scheme is: *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Military Rehabilitation and Compensation Act 2004* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth); *Veterans' Entitlements Act 1986* (Cth). There are also a number of minor schemes not discussed in this final Report. See, eg, *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth). Unlike other workers' compensation schemes, there is limited access to common law actions at the Commonwealth level.

47 Provided they are eligible to make a claim for workers' compensation because they are injured or become ill arising out of, or in the course of, their employment.

permanent impairment.⁴⁸ However, ‘retirement provisions’⁴⁹ impose some age-related restrictions on incapacity payments.⁵⁰

5.34 A number of states and territories have provisions similar to those under the Commonwealth scheme. However, neither Queensland nor Western Australia has age-related limits on workers’ compensation payments.⁵¹ Instead, these jurisdictions restrict the benefit period or maximum amount of compensation a worker can receive by way of weekly payments for loss earnings during the life of the claim.⁵²

5.35 There are two categories of mature age workers for the purposes of Commonwealth workers’ compensation. Those injured:

- before age 63 or 64 are entitled to incapacity payments until age 65; and
- after age 63 or 64 are entitled to up to one or two years of incapacity payments, whether consecutive or not.⁵³

5.36 In the course of the Inquiry, concerns were raised in relation to both categories and the effect of entitlement to workers’ compensation on mature age workforce participation. In particular, stakeholders expressed concern about the potential disincentive to workforce participation created by not being entitled to incapacity payments, or only being entitled to limited incapacity payments.⁵⁴

5.37 To address such concerns, the ALRC recommends a three-fold approach to reform. First, it recommends that Commonwealth workers’ compensation legislation be amended to align retirement provisions with the qualifying age for the Age Pension. This will address the impending age gap between cessation of incapacity payments and eligibility for the Age Pension and is particularly important for mature age workers injured before age 63 or 64.

48 For example, a person’s access to medical treatment, attendant care, household services and permanent impairment lump sum continues for the life of any compensation claim.

49 See *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23; *Military Rehabilitation and Compensation Act 2004* (Cth) s 121; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

50 The original rationale for the ‘retirement provisions’ was that, once an injured worker reached 65 years of age, it was assumed that, but for the injury, this was the point at which the worker would ‘retire’. At the time the restrictions were introduced, at age 65 workers would have access to superannuation or other forms of income support. 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’: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 27 April 1988, 8.01 (B Howe—Minister for Social Security).

51 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.

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

53 See *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23; *Military Rehabilitation and Compensation Act 2004* (Cth) s 121; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

54 See, eg, Law Council of Australia, *Submission 46*; WA Equal Opportunity Commission, *Submission 23*; Olderworkers, *Submission 22*; Safe Work Australia, *Submission 18*. See also: Advisory Panel on the Economic Potential of Senior Australians, *Realising the Economic Potential of Senior Australians—Turning Grey into Gold* (2011), 27. Removing this disincentive was also one of the key drivers of Western Australian workers’ compensation reform: Western Australia, *Parliamentary Debates*, Legislative Council, p1689d (S O’Brien—Minister for Commerce).

5.38 Secondly, the ALRC recommends that the incapacity payment period under Commonwealth workers' compensation legislation be extended. This would benefit the workers injured after age 63 or 64 who are currently entitled to up to one or two years of incapacity payments.

5.39 Thirdly, the ALRC recommends that there be consistency across Commonwealth workers' compensation legislation. The ALRC also makes a number of other recommendations in relation to volunteer coverage and the interaction between superannuation and incapacity payments under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act). These recommendations would benefit all mature age workers, regardless of the age at which they were injured.

Age-based restrictions on workers' compensation

5.40 The ALRC recommends that Commonwealth workers' compensation legislation be amended to align retirement provisions with the qualifying age for the Age Pension. The ALRC considers this approach is preferable to other possible reform options including, for example, removing all age-based restrictions or imposing benefit period or amount restrictions.

The eligibility gap

5.41 The ALRC's recommendation involves amendments to the SRC Act,⁵⁵ *Military Rehabilitation and Compensation Act 2004* (Cth) (MRC Act),⁵⁶ and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act).⁵⁷

5.42 Under the SRC Act and MRC Act, if a worker, member, or former member suffers an injury before reaching 63 years of age, incapacity payments cease when they reach age 65. A worker, member, or former member injured at any age after 63 years of age, however, may receive incapacity payments for up to 104 weeks.⁵⁸

55 The 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 which self-insure under the scheme. 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) (VE Act).

56 The 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 death related to service rendered on or after 1 July 2004. The workers' compensation provided under the MRC Act is based on the SRC Act and VE Act provisions: Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (March 2011), 28.

57 The Seafarers Act 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 scheme is overseen by the Seafarers Safety, Rehabilitation and Compensation Authority which monitors and administers the operation of the Seafarers Act.

58 *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23, *Military Rehabilitation and Compensation Act 2004* (Cth) s 121.

5.43 Under the Seafarers Act, if a worker suffers an injury before reaching 64 years of age, incapacity payments cease when the worker reaches age 65. A worker injured at any age after 64 years of age however, may receive incapacity payments for up to 12 months after the date of injury.⁵⁹

5.44 In light of future changes to Age Pension age there is an impending age gap between the cessation of incapacity payments at age 65 and the qualifying age for the Age Pension.⁶⁰ In such circumstances, an injured worker may be forced to access alternative forms of income support—such as the Disability Support Pension, superannuation or other forms of private savings. Where this results in a depletion or exhaustion of superannuation or private savings, the worker may then need to access additional income support on a long-term basis, rather than self-funding retirement.

5.45 The unavailability of workers' compensation incapacity payments may, in some circumstances, act as a disincentive for mature age workers to remain in, or return to, the paid workforce. Access to incapacity payments ensures workers receive financial support and remain engaged with rehabilitation services and appropriate return to work programs. Where a worker does not receive such payments, he or she may decide to leave the workforce, or abandon attempts to return to work, to access superannuation or the Age Pension. As a result, there is a need for reform in this area.

5.46 Comcare has recognised that 'present arrangements can be unfair for older workers', highlighting the following example:

A federal worker on a 5-year contract who is injured at age 65 will have a maximum entitlement to 104 weeks' incapacity payments, even if the compensable injury is sustained early in their contract. This means they might effectively lose several years' worth of potential earnings as the provisions of the Act do not recognise the fact the worker would have been able to complete their contract but for the injury.⁶¹

5.47 The Australian Human Rights Commission (AHRC) expressed the view that this situation is of 'serious concern'.⁶² The Law Council of Australia noted 'inequity in the cessation of compensation at age 65 when pension and other entitlements are increasing'.⁶³ Safe Work Australia submitted 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.⁶⁴

⁵⁹ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

⁶⁰ The Age Pension age for women has incrementally increased from age 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: *Social Security Act 1991* (Cth) ss 23(5A)–(5D).

⁶¹ Comcare, *Submission 91*.

⁶² Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 11.

⁶³ Law Council of Australia, *Submission 46*.

⁶⁴ Safe Work Australia, *Submission 18*.

5.48 The Advisory Panel on the Economic Potential of Senior Australians highlighted 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'.⁶⁵

5.49 The Ai Group suggested, however, that 'the retirement provisions act as an incentive to mature age workers to recover and return to work, rather than rely on weekly benefits'.⁶⁶ 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.⁶⁷

5.50 The ALRC recognises the highlighted connection between the period of time out of the workplace and the likelihood of returning to work. This connection underscores the importance of ensuring injured workers remain engaged in the workers' compensation system to facilitate post-injury rehabilitation and return to work programs.

Closing the eligibility gap

5.51 To close the eligibility gap, the ALRC recommends that Commonwealth workers' compensation legislation be amended to align retirement provisions with the qualifying age for Age Pension.

5.52 This approach was supported by a range of stakeholders.⁶⁸ For example, Comcare expressed the view that such a change is 'consistent with the original policy intent'.⁶⁹ This was also the approach taken and recommended by a number of other bodies. In April 2012, a bill was introduced to increase age restrictions under South Australian workers' compensation legislation to reflect future changes to Age Pension age.⁷⁰ In November 2012, the Safe Work Australia Strategic Issues Group (SIG) for Workers' Compensation considered a draft options paper informed by the ALRC's Discussion Paper which recommended that all jurisdictions legislatively tie their retirement provisions to Age Pension age.⁷¹

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

66 Australian Industry Group, *Submission 37*.

67 *Ibid.*

68 Law Council of Australia, *Submission 46*; Diversity Council of Australia, *Submission 40*; Comcare, *Submission 29*. See also: Suncorp Group, *Submission 66*; Australian Shipowners Association, *Submission 65*; Department of Defence, *Submission to Safety, Rehabilitation and Compensation Act 1988 (Cth) Review* (2012); ACTU, *Submission to Safety, Rehabilitation and Compensation Act 1988 (Cth) Review* (2012).

69 Comcare, *Submission 29*.

70 Workers' Rehabilitation and Compensation (Retirement Age) Amendment Bill 2012 (SA). See also Government of South Australia, *Submission 30*. At the time of writing, the bill was before the SA Legislative Council.

71 Safe Work Australia, *Submission 68*.

5.53 In July 2012, a review of the Commonwealth workers' compensation schemes, in particular the SRC Act, was announced.⁷² In September 2012, an issues paper was released for consultation as part of the review. The issues paper includes discussion of appropriate coverage arrangements when the Age Pension age is increased. It also includes discussion in relation to injured workers who receive incapacity payments and superannuation benefits.⁷³ However, at the time of writing, the final report of the Review was not publicly available.

5.54 Stakeholders also acknowledged the potential flow-on effects of aligning retirement provisions with Age Pension age. For example, Comcare noted that

increasing the incapacity entitlement cut off to age 67 also increases Comcare's outstanding claims liabilities and subsequently reduces Comcare's reported funding ratio, something that would also affect the licensed self-insurers in the Comcare scheme. The impact of this would be increased premiums to fund the additional liability (for premium-paying employers in the scheme) or increased liabilities (for self-insurers). These scheme implications will need to be fully considered in any change to current legislative age limits.⁷⁴

5.55 The ALRC anticipates its recommendation would be implemented by incrementally increasing age restrictions in Commonwealth workers' compensation legislation in line with increases in Age Pension age. 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 age 67. However, a worker injured at any age after 65 years could receive incapacity payments for up to 104 weeks. Under the Seafarers Act as it currently operates, if a worker suffered an injury before reaching 66 years of age, incapacity payments would cease when the worker reached age 67. However, a worker injured at any age after 66 years of age could receive incapacity payments for up to 12 months. The ALRC recommends the extension of these payment periods below.

5.56 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. Other benefits, such as access to medical treatment, should remain unaffected.

Removing all age-based restrictions and other options

5.57 A range of stakeholders preferred the removal of all age-based restrictions under Commonwealth workers' compensation legislation. The Australian Council of Trade Unions (ACTU) submitted that age-based restrictions are 'exclusionary and discriminatory' and that 'mature age workers should have access to compensation for

72 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 for the review include ensuring that: 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 of Age Pension eligibility age to 67 by 2023. See P Hanks QC, *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

73 Ibid, 20, 21, 23–25.

74 Comcare, *Submission 91*.

all injuries that arise out of, or in the course of work, including during their breaks'.⁷⁵ Similarly, National Seniors Australia, COTA and Olderworkers, supported the removal of such restrictions.⁷⁶ For example, COTA submitted that 'all upper age limits on workers' compensation should be abolished'.⁷⁷ The AHRC has also expressed its support for the removal of age-based restrictions in workers' compensation.⁷⁸ Similarly, Comcare acknowledged that 'it is increasingly becoming unrealistic to assign an arbitrary end-point to the careers of workers simply because they have reached a particular age'.⁷⁹

5.58 However, there are difficulties associated with removing age-based restrictions from Commonwealth workers' compensation legislation. Some of these difficulties arise under the Commonwealth workers' compensation system because it 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.

5.59 The first key difficulty is the potential for cost blow-out and cost shifting. Statistics indicate that persons aged 65 years and over record the lowest rate of work-related injuries and illnesses.⁸⁰ However, age groups 35–44 and 65 years and over had the highest average total cost of claims for Australian Government premium payers accepted during 2010–11.⁸¹

5.60 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'.⁸² The Diversity Council of Australia stated that,

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.⁸³

5.61 To operate effectively, workers' compensation schemes need to be financially viable. As a result, 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'.⁸⁴

75 ACTU, *Submission 38*.

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

77 COTA, *Submission 51*.

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

79 Comcare, *Submission 91*.

80 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).

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

82 Australian Industry Group, *Submission 37*.

83 Diversity Council of Australia, *Submission 40*.

84 Suncorp Group, *Submission 39*.

5.62 If age-based restrictions were removed, some form of benefit period or amount restriction would be necessary to address cost concerns. However, this may have unintended consequences for other workers, such as a reduction in entitlements for workers with a long-term reduction in their capacity to earn.

5.63 Comcare submitted that removing all age-based restrictions, but limiting the benefit period, ‘imposes risks for significant costs shifting to Commonwealth social security benefits and changes the scheme from a long tail to short tail claims model’.⁸⁵ Similarly, Safe Work Australia said:

the introduction of time and/or payment limits to weekly incapacity payments irrespective of age would disadvantage younger workers with significant work-related injuries who may be reliant on incapacity payments for long periods and whose entitlements may be exhausted before they have recovered.⁸⁶

5.64 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. The risk is that they may exhaust their entitlements and become reliant on Commonwealth income support, essentially transferring the cost from one Commonwealth scheme to another.

5.65 As a result, and as outlined above, the ALRC considers that the most appropriate approach to reform is to align retirement provisions with the qualifying age for the Age Pension.

Recommendation 5–5 The *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) should be amended to align the retirement provisions with the qualifying age for the Age Pension under the *Social Security Act 1991* (Cth).

Consistency across Commonwealth workers’ compensation legislation

5.66 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.⁸⁷ 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.⁸⁸

5.67 The ALRC recommends that the Seafarers Act be amended to be consistent with the SRC Act and MRC Act. This would ensure consistency across Commonwealth

⁸⁵ Comcare, *Submission 29*.

⁸⁶ Safe Work Australia, *Submission 68*. See also Comcare, *Submission 29*.

⁸⁷ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 23; *Military Rehabilitation and Compensation Act 2004* (Cth) s 121.

⁸⁸ *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 38.

workers' compensation legislation and that there are no barriers to prevent persons wishing to work beyond Age Pension age from doing so. This would mean the Seafarers Act would provide that workers who are injured at any age after two years prior to Age Pension age (rather than one year), are entitled to receive incapacity payments for up to 104 weeks. Such an approach is consistent with the Terms of Reference for the review of the Seafarers Act, which include ensuring consistency between the Seafarers Act and the SRC Act.⁸⁹

5.68 The Australian Shipowners Association considered that 'as far as practicable entitlements under worker's compensation regimes should be consistent'.⁹⁰ However, it was concerned that, by

increasing the potential instances of eligibility for compensation and the period for which compensation is payable, the likely result would be an increase rather than decrease in the costs of premiums payable by employers under the Seacare scheme.⁹¹

5.69 Other stakeholders supported this approach.⁹² For example, Comcare noted that

the Seacare scheme is also populated by an ageing workforce. In recent years, mature aged seafarers contributed the highest proportion of employees to the Seacare scheme and this proportion is increasing. These statistics are indicative of the willingness and ability of mature aged employees to participate and contribute to the workforce in the Seacare scheme and highlights the need to remove the barriers that may restrict them from doing so.⁹³

Recommendation 5–6 The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) should be amended to provide that workers who are injured after two years prior to Age Pension age may receive incapacity payments for the same period as under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and *Military Rehabilitation and Compensation Act 2004* (Cth).

Incapacity payment periods

5.70 Under the SRC Act and MRC Act—and under the Seafarers Act if Recommendation 5–6 is implemented—a worker injured at any age after two years prior to Age Pension age is entitled to receive incapacity payments for up to 104 weeks, whether consecutive or not. The ALRC recommends that the Australian Government 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 non-consecutive weeks.

89 On 16 October 2012, the Hon Bill Shorten MP, Minister for Employment and Workplace Relations, announced a review of the Seafarers Act. The focus of the review is on coverage, scope and necessity for amending and updating any legislative inconsistencies, reducing scheme costs and governance arrangements. The review panel was due to report to the Australian Government on 22 February 2013, however at the time of writing, this report was not publicly available.

90 Australian Shipowners Association, *Submission 65*.

91 *Ibid.*

92 Eg, ACTU, *Submission 88*; Suncorp Group, *Submission 66*.

93 Comcare, *Submission 91*.

5.71 The focus of workers' compensation schemes needs to be not only on appropriately supporting and compensating workers, but also ensuring access to post-injury rehabilitation and return to work programs. Aligning retirement provisions with the qualifying age for the Age Pension and the extension of incapacity payment periods is likely to encourage ongoing engagement with the workers' compensation system. Access to rehabilitation services and supports increases the likelihood of mature age workers returning to work following work-related injury.

5.72 Comcare cautioned, however, about significantly extending the incapacity payment period. It submitted that, while it may encourage mature age workforce participation,

there would be drawbacks to the scheme more broadly. Incapacity payments are the biggest drivers of claim costs; hence any increase to a period significantly longer than 104 weeks could pose substantial scheme sustainability issues.⁹⁴

5.73 A number of key stakeholders opposed any extension of the incapacity payment period. For example, the Ai Group argued that it would result in increased workers' compensation premiums.⁹⁵ The Personal Injuries Committee of the Law Council of Australia also expressed concern about extension on the basis of cost, and argued that

a number of equity issues arise as a result of allowing a person to receive incapacity payments for more than 104 weeks in situations where they have been injured after two years prior to Age Pension age. Central to this is the fact that an injured worker would potentially receive more payment after retirement, compared to someone who had worked throughout the period.⁹⁶

5.74 Safe Work Australia advised that members of the SIG for Workers' Compensation have agreed to conduct actuarial assessments on two possible reform options. These include incapacity payment periods of 104 and 130 weeks for mature age workers.⁹⁷ The SIG for Workers' Compensation is due to consider an options paper in early 2013.

5.75 The ALRC is conscious of the concerns expressed by stakeholders that 'extension of coverage would impact workers' compensation insurance premiums'.⁹⁸ However, Safety Rehabilitation and Compensation Commission 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. These figures were 1% and 2% respectively for licensed self-insurers.⁹⁹ In terms of mature age workers, the 2009 Legislative Review of the WA workers' compensation scheme indicated that 'in the

94 Ibid.

95 Australian Industry Group, *Submission 97*.

96 Law Council of Australia, *Submission 96*.

97 Safe Work Australia, *Submission 68*.

98 Suncorp Group, *Submission 39*.

99 These figures represent time lost to date: Safety, Rehabilitation and Compensation Commission, *Compendium of OHS and Workers' Compensation Statistics* (2011), 45.

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.¹⁰⁰

5.76 The ALRC recommends that the SRC Act, MRC Act and Seafarers Act be amended 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 non-consecutive weeks. For example, with Age Pension age at 65, this would mean that workers and members injured at 63 or older would be entitled to receive incapacity payments for a period longer than 104 weeks. In 2023, with Age Pension age at 67, this would mean that workers and members injured at 65 or older would be entitled to receive incapacity payments for a period longer than 104 weeks.

5.77 The length by which the period should be extended should be determined following actuarial assessments and costings. 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 workforce participation.

Recommendation 5–7 If amended in line with Recommendations 5–5 and 5–6, the *Safety, Rehabilitation and Compensation Act 1988* (Cth), the *Military Rehabilitation and Compensation Act 2004* (Cth) and the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) will provide that workers and members injured after two years prior to Age Pension age are entitled to receive incapacity payments for a period of 104 weeks. This period should be extended.

Supplementary payments

5.78 Some Australian jurisdictions have legislation providing that workers over age 65 are entitled to a weekly supplementary payment, after normal incapacity payments have ceased. The entitlement follows a tribunal determination that the worker would have continued working after the age of 65, had they not been injured.¹⁰¹ The entitlement is decided on a case by case basis and the supplementary amount is generally based on the amount a person receiving the Age Pension is eligible to earn before the payment is affected.

5.79 The ALRC does not consider it is necessary or appropriate to introduce a supplementary payment of this type at a Commonwealth level.

5.80 Stakeholders expressed strong opposition to the introduction of such a supplementary payment.¹⁰² Comcare acknowledged that, although such a provision might be useful in some circumstances, 'it would not readily fit into the current

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

101 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.

102 Australian Industry Group, *Submission 97*; Law Council of Australia, *Submission 96*; Australian Chamber of Commerce and Industry, *Submission 85*.

legislative scheme of the SRC Act, particularly given the significant differences in the review processes for claims'.¹⁰³ Comcare also noted its potentially burdensome nature and the difficulty in implementing such a provision uniformly in the Comcare scheme—'given that certain workers in the scheme continue to be entitled to incapacity payments well after age 65 whereas others do not'.¹⁰⁴

5.81 ACCI highlighted that the provision

came about at another time and in a significantly different environment with respect to people working beyond normal retirement age and other changes some of which are already in place for a number of jurisdictions and are likely to be recommended for others (retirement age tied pension eligibility age).¹⁰⁵

5.82 The Law Council noted that 'the main benefit of the Tasmanian legislation is that medical expenses are tied to a person's entitlement to receive incapacity payments'.¹⁰⁶ This is not an issue under the Commonwealth scheme. Further, Safe Work Australia highlighted member concerns about the 'potential for disputation based on this provision'.¹⁰⁷

Volunteer coverage

5.83 Throughout this Inquiry, stakeholders have expressed concerns about inconsistency with respect to the coverage of volunteers under workers' compensation legislation. The ALRC recommends that Safe Work Australia consider the definition of those categories of people covered by Commonwealth, state and territory workers' compensation legislation.¹⁰⁸

5.84 A significant number of mature age people participate in voluntary work. Australian Bureau of Statistics figures indicate that 32.5% of Australians who volunteer are aged 55 years and over.¹⁰⁹ 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 employees under the relevant legislation, or the legislation specifically provides compensation for certain categories of volunteers.

5.85 At the 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.¹¹⁰ It also allows for the coverage of volunteers, by declaration of the Minister.¹¹¹ Comcare indicated that there

103 Comcare, *Submission 91*.

104 *Ibid.*

105 Australian Chamber of Commerce and Industry, *Submission 85*.

106 Law Council of Australia, *Submission 96*.

107 Safe Work Australia, *Submission 68*.

108 For example, 'employee' under the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) or 'member' under the *Military Rehabilitation and Compensation Act 2004* (Cth).

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

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

111 *Ibid* s 5(6).

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.¹¹²

5.86 Under the MRC Act, the Defence Minister may make a similar determination with respect to members.¹¹³ The Seafarers Act does not include any category of deemed employee or member.

5.87 As part of its work, Safe Work Australia's SIG for Workers' Compensation developed the National Workers' Compensation Action Plan 2010–2013. Two of the key action areas are to 'investigate and report on options for nationally consistent definitions for the purposes of workers' compensation' and 'investigate and report on issues of concern for multi-state employers'.¹¹⁴ In April 2012, the SIG for Workers' Compensation decided to defer work on a project to investigate the definition of worker. It agreed that the Definitions Temporary Advisory Group¹¹⁵ should focus its work on 'retirement age and any barriers for older workers in workers' compensation schemes'.¹¹⁶

5.88 As a result, in the Discussion Paper, the ALRC proposed that the SIG for Workers' Compensation should consider the definition of 'worker' under Commonwealth, state and territory workers' compensation legislation to ensure volunteers are consistently covered.¹¹⁷

5.89 A number of stakeholders supported this approach. For example, academics from the University of New England indicated their support, but suggested that

it is only a beginning but it is a start to an important recognition of the legislative inconsistency that exists with respect to the status of volunteers before the law as compared to the paid employee, and we would support the ALRC to go further and embrace legislative enquiry around the rights and protection of volunteers as productive workers in our society.¹¹⁸

112 Comcare, *Submission 29*.

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

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

115 A number of temporary advisory groups (TAGs) were established to investigate and report to the SIG on policy options for improving national consistency in key priority areas.

116 Safe Work Australia, *National Workers' Compensation Action Plan 2010–2013, Progress to April 2012* <www.safeworkaustralia.gov.au/> at 21 March 2013. See also Safe Work Australia, *Submission 68*.

117 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 3–7.

118 M Oppenheimer, A Kilarr and A Edwards, *Submission 75*.

5.90 The Brotherhood of St Laurence expressed the view that,

while it is imperative that volunteers are eligible for compensation, it may be problematic to include them as ‘workers’ as this could raise new barriers for volunteering eligibility and so discourage the voluntary contribution of many older Australians. Volunteers are not a substitute for paid employees and should not be deployed in such positions whether full-time, part-time or casual. A compensation scheme specific to volunteers should be established which includes criteria which encourage voluntary contribution to the community.¹¹⁹

5.91 The Ai Group submitted that volunteers should generally not be deemed to be workers for the purposes of workers’ compensation legislation.¹²⁰

5.92 The issues paper released as part of the review of the SRC Act raised questions about the definition of ‘employee’ under the SRC Act.¹²¹ However, at the time of writing, the final report of the Review was not publicly available.

5.93 In November 2012, Safe Work Australia considered the ALRC’s proposal and ‘agreed to defer a decision on whether to commence work on the definition of ‘worker’ until after the ALRC has presented its final report’.¹²²

5.94 There is inconsistent coverage of volunteers under workers’ compensation legislation and this may affect the participation of mature age volunteers. As a result, the ALRC recommends that the Safe Work Australia SIG for Workers’ Compensation should consider this matter.

Recommendation 5–8 Safe Work Australia’s Strategic Issues Group for Workers’ Compensation should consider the definition of those categories of people covered by Commonwealth, state and territory workers’ compensation legislation to ensure volunteers are covered consistently.

Workers’ compensation and superannuation

5.95 The treatment of superannuation payments in the calculation of incapacity payments under the SRC Act creates a potential barrier to participation in the paid workforce for mature age workers. To address this barrier the ALRC recommends that the superannuation-offset provisions under the SRC Act be repealed.

5.96 Under the SRC Act, the compensation payable to an employee who is incapacitated for work as a result of an injury is reduced where that employee has ‘retired’ and ‘received’ a superannuation pension and/or a lump sum benefit. The compensation is reduced by reference to the employer’s superannuation contributions and by a further 5% of the employee’s Normal Weekly Earnings.¹²³

119 Brotherhood of St Laurence, *Submission 86*.

120 Australian Industry Group, *Submission 97*.

121 P Hanks QC, *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012).

122 Safe Work Australia, *Submission 68*.

123 *Safety, Rehabilitation and Compensation Act 1988 (Cth)* ss 20(3), 21(3), 21A(3).

5.97 However, where an employee elects to preserve their superannuation, or remains employed and chooses to access his or her superannuation, the application and operation of the offset provisions is less clear and may have perverse outcomes. For example, in *Re Mirkovic and Telstra*, the Administrative Appeals Tribunal found that, in rolling over his superannuation, Mr Mirkovic had notionally 'received' the funds and had his incapacity payments reduced.¹²⁴

5.98 A number of stakeholders, including the Law Council of Australia, submitted that the treatment of superannuation in the calculation of incapacity payments creates a barrier to workforce participation for mature age workers:

This is particularly the case with respect to individuals who want to re-enter the workforce, where superannuation pensions would reduce incapacity payments after the first 45 weeks.¹²⁵

5.99 The Law Council also noted that

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.¹²⁶

5.100 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.¹²⁷ In submissions to the Review, stakeholders emphasised the unfairness of the 5% reduction in compensation. For example, the Superannuated Commonwealth Officers' Association submitted that

The 5% superannuation deduction should be removed to put those who are in receipt of superannuation on the same footing as those who are still in the contribution phase of a modern superannuation fund. The 5% deduction does not act to encourage severely injured and vulnerable people to return to the workforce, it merely adds to their financial and mental distress.¹²⁸

5.101 In its submission to this Inquiry, Comcare acknowledged that, in light of superannuation reforms since the introduction of the provisions, mature age workers are not always able—or may not choose—to access their superannuation benefit. As a result, 'the current superannuation offset provisions in the Act are out of step with the superannuation reforms'.¹²⁹ Comcare also noted a number of practical difficulties with the superannuation offset provisions.¹³⁰

124 *Re Mirkovic and Telstra Corporation* [1993] 18 AAR 492.

125 Law Council of Australia, *Submission 96*.

126 Law Council of Australia, *Submission 46*. See also Australian Industry Group, *Submission 97*.

127 P Hanks QC, *Review of Safety, Rehabilitation and Compensation Act 1988 (Cth): Issues Paper* (2012), 21.

128 Superannuated Commonwealth Officers' Association, *Submission to Safety, Rehabilitation and Compensation Act 1988 (Cth) Review* (2012).

129 Comcare, *Submission 91*.

130 *Ibid.*

5.102 However, stakeholders such as DOME expressed the view that there is no need for amendment. DOME submitted that ‘there is no evidence indicating individual’s decisions to participate in the workforce take any account of this potential impediment’.¹³¹

5.103 The ALRC favours consistency across Commonwealth workers’ compensation legislation and considers that schemes should provide incentives for injured employees who choose to preserve or roll over their superannuation, rather than superannuation affecting incapacity payment entitlements. The ALRC therefore recommends that the superannuation offset provisions under the SRC Act be repealed.

Recommendation 5–9 Sections 20, 21 and 21A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) reduce the amount of compensation payable to an employee by reference to the amount of superannuation derived from the employer’s contributions and by a further 5 % of the employee’s Normal Weekly Earnings. These sections should be repealed.

131 DOME Association, *Submission 62*.