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COMCARE'S SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION'S DISCUSSION PAPER: *GREY AREAS—AGE BARRIERS TO WORK IN COMMONWEALTH LAWS*

26 NOVEMBER 2012

COMCARE

Comcare is a federal agency within the workplace relations portfolio of the Department of Education, Employment and Workplace Relations (DEEWR). Comcare is the federal work health and safety regulator pursuant to the *Work Health and Safety Act 2011* (WHS Act) in respect of federal workplaces—both Australian Public Service (APS) and national companies licensed to be self-insured in the Comcare scheme—and for the Australian Defence Force (ADF).

Comcare also underwrites public sector workers' compensation liabilities under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) for workers employed by the APS and the ACT Government.

This submission clarifies some of the issues posed in the Australian Law Reform Commission's discussion paper, *Grey Areas—Age Barriers to Work in Commonwealth Laws* (ALRC's issues paper) and provides comment, where applicable, to work health and safety and workers' compensation issues relevant to the Comcare scheme.

Comcare strongly supports the intent of the ALRC's inquiry in recognising that workers in Australia now often choose to work beyond the statutory retirement age of 65, including in non-traditional arrangements. The SRC Act does currently provide a means for older workers (that is, those injured after age 63) to receive incapacity benefits for a limited period, and also allows for compensation for medical and other expenses regardless of age. However, Comcare is aware of the ongoing need to ensure fair arrangements are in place for older workers who are injured at work, while also ensuring equitable outcomes for workers of all ages, and ensuring that the scheme as a whole remains sustainable.

Comcare recognises that the diversity of modern working arrangements cannot always be adequately reflected in the design of a workers' compensation scheme. However, this submission sets out Comcare's broad preference for an alignment of the age cap for incapacity payments under the SRC Act with whatever age is set in legislation from time to time for the age pension and access to superannuation.

THE COMCARE SCHEME

The Comcare scheme is a national, integrated work health and safety, rehabilitation and compensation system. Comcare partners with workers, their employers and unions to keep workers healthy and safe, and reduce the incidence and costs of workplace injury and disease.

Comcare is established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and has a number of powers and functions that ensure injured workers have access to compensation and can return to work quickly and safely. Comcare's programs and services are used by more than 420,000 workers.

Comcare administers the Commonwealth workers' compensation scheme for all workers employed by APS agencies, the ACT Government and for workers of organisations which self-insure under the scheme. There are currently 30 licensed self-insurers, with most being significant employers in sectors such as banking, construction, transport and telecommunications.

Comcare also has a legislative duty to assist the Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority) to perform its functions and exercise its powers under the *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act). Accordingly, Comcare provides administrative and secretariat support for the Seacare Authority and performs the day to day regulatory functions of the Seacare Authority.

Comcare's core business is ensuring safe and healthy workplaces, supporting workers in their recovery and return to work and tackling the barriers to a life in work. Comcare has a strategic intent under the [Strategic Plan 2010–2015](#) to realise the health gains of good work, reduce unnecessary incapacity and promote culture and systems that support workers' ability to work.

COMCARE'S SUBMISSION

The ALRC's issues paper covers an extensive range of topics in relation to older workers. Comcare's submission is, however, limited to those questions or proposals that relate directly to the legislation it administers, namely work health and safety in the Commonwealth jurisdiction, and workers' compensation under the SRC and Seacare Acts.

People are spending more years at work, working to an older age and the way work gets done is changing. People are working from home, in new industries and with new technologies. We see changing expectations of work, flexibility, reward and engagement across four generations at work. People are choosing to work longer if the conditions are suitable¹.

This creates challenges and opportunities for work health and safety regulators and workers' compensation authorities. Good work design and management has been identified as a priority under the *National Work Health and Safety Strategy 2012–2022* released by Safe Work Australia in October 2012. It is 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.

Integrated human resource and work health and safety strategies are needed to remove barriers, and encourage workforce participation, of mature aged people who want to contribute to the workforce. Comcare recognises the strong evidence base that workforce engagement and skills development, work conditions and arrangements, the competence and attitudes of supervisors, and the health status of workers are all important elements.

Comcare made a submission to the ALRC's original issues paper earlier this year, and directs the Commission to its comments in that submission as relevant to the questions and proposals made in the later discussion paper.

It is important to note that when referring to legislative change, Comcare does not have policy responsibility for workers' compensation laws. This is the role of the Department of Education, Employment and Workplace Relations (DEEWR). Both the SRC Act and the Seafarers Act are currently subject to reviews announced by the Minister, the Hon Bill Shorten MP. Comcare draws the ALRC's attention to those reviews and the reports which are expected early in 2013.

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.

¹ In the APS there has been a consistent trend towards an older age profile. The 55 and over age group has more than doubled in the past 15 years (APSC State of the Service Report 2011).

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.

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.

Comcare response: As the Commonwealth regulator for work health and safety, Comcare fully supports Proposals 3–1 and 3–3.

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.

Comcare response: Comcare supports the proposal that the retirement provisions of the SRC Act should be tied to the qualifying age for the age pension, noting that this issue has also been raised in the current review of the SRC Act. Age restrictions in workers' compensation have historically reflected the fact that employees generally retire at age 65 and employees at this age have access to other means of financial support, such as the age pension and superannuation. The Government's policy direction is to ensure that workers' compensation coverage does not disadvantage employees over the age of 65. This policy seeks to encourage older workers to remain in the workforce and have access to the same income protections as other workers.

Comcare's view is that the provisions of the SRC Act should continue to align with this intent and therefore the Act should move in line with whatever statutory changes the Government applies to its mature age worker policy. Other benefits under the SRC Act should remain unchanged, including access to medical treatment, attendant care, household service and permanent impairment lump sum, which continue for the life of the compensation claim.

Comcare does recognise that, in some instances, present arrangements can be unfair for older workers. For 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.

More broadly, it is increasingly becoming unrealistic to assign an arbitrary end-point to the careers of workers simply because they have reached a particular age. These issues are complex and Comcare acknowledges there are not always simple solutions.

The most straightforward proposal is to change the current age limit under the SRC Act to age 67 in line with changes to the pension age. However, 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.

Comcare notes that any proposed change to the *Military Rehabilitation and Compensation Act 2004* is a matter for comment by the Department of Veterans' Affairs and the Military Rehabilitation and Compensation Commission.

Comcare also supports the proposal that the retirement provisions of the Seafarers Act should be tied to the qualifying age for the age pension. In addition to the above reasons, Comcare notes that the current review of the Seacare scheme promotes consistency between the Seafarers Act and the SRC Act.

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.

It is Comcare's view that this proposal should be considered as part of the Seacare scheme review following extensive stakeholder consultation.

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?

Comcare response: Comcare notes that section 23(1A) of the SRC Act was introduced with effect from 5 December 1999 to provide for 104 weeks of incapacity entitlements (whether consecutive or not) for a compensable injury suffered at or over the age of 63. This amendment extends the original coverage under the 1988 SRC Act to allow compensation to continue beyond age 65 and to provide coverage for incapacity payments for workers who remain in the workforce beyond age 65.

However, the amendment has created inequity. Injuries may result in intermittent periods of incapacity. For example, for an employee injured at age 62, incapacity entitlements cease at age 65 irrespective of whether the 104 weeks of entitlements has been paid. Whereas employees aged 63 and older may still be accessing 104 weeks of incapacity entitlements for many years thereafter—assuming there is evidence of intended continued employment.

Comcare has made a submission to the current SRC Act Review suggesting consideration be given to amending section 23(1A) to provide for incapacity entitlements to be payable for any incapacity suffered within 104 weeks of the injury to create a more equitable arrangement. This proposal may not fit readily with the ALRC's proposal in question 3–1, and further consideration should be given to the outcome of the SRC Act Review in this regard.

While increasing the current 104 weeks of incapacity entitlements for people injured after 63 years of age may potentially encourage more workforce participation by older workers in the Comcare scheme, 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. Consequently, Comcare supports retaining the current limit of 104 weeks.

Comcare notes that a similar provision to section 23(1A) of the SRC Act was not introduced into the Seafarers Act. Consequently, the Seafarers Act prescribes a maximum of 12 months incapacity where a worker is injured after 64 years of age. It is Comcare's view that this question should be considered as part of the Seacare scheme review following extensive stakeholder consultation.

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)*?

Comcare response: Comcare notes that the current review of the SRC Act includes a focus on ensuring equitable outcomes for workers beyond age 65.

Comcare understands that the Tasmanian workers' compensation legislation has a provision whereby the relevant tribunal can, on a case by case basis, rule to extend weekly payments to a specified date beyond 65. We understand that this can be done if the tribunal is satisfied that the worker's terms and conditions would have permitted them to work past 65 and the worker intended to do so and they will continue to be incapacitated beyond 65. While Comcare acknowledges this may be a useful provision in some circumstances, it would not readily fit into the current legislative scheme of the SRC Act, particularly given the significant differences in the review processes for claims in the two schemes.

In addition, while the Tasmanian provision does recognise that "normal retirement age" is no longer a fixed concept, the legislative solution (individual case-by-case determinations by a Tribunal) would be potentially very burdensome in the Comcare scheme.

Section 23(1A) of the SRC Act provides older workers in the Comcare scheme with 104 weeks of incapacity entitlements (whether consecutive or not) for a compensable injury suffered at or over the age of 63. This is beneficial to older workers because their access to 104 weeks of incapacity entitlements is not restricted by the pension age (currently 65)—assuming there is evidence of intended continued employment. On the other hand, workers who are injured before the age of 63 are not entitled to this provision. If an employee is injured at age 62, for example, their incapacity entitlements will cease at age 65, whereas an employee over the age of 63 will still be able to access 104 weeks of incapacity entitlements without regard to the age 65 restriction.

Consequently, due to the operation of section 23(1A), a 'weekly supplementary payment' for workers over the age of 65 (similar to the payment available under the Tasmanian legislation) would be difficult to implement 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.

Therefore, while recognising that not every individual case can be catered for, Comcare's broad preference is to retain the principle that social security (or superannuation) should replace workers' compensation when those forms of financial support become available, and change the SRC Act to integrate with current social security/superannuation practice.

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.

Comcare response: Under section 5 of the SRC Act, the relevant definition for coverage is 'employee' rather than 'worker'. At present, the definition of worker under the WHS legislation does not directly link with the definition of 'employee' under the SRC Act as coverage for workers' compensation is not as broad as the application of WHS obligations.

The question of whether there should be an alignment of the definitions under the two legislative schemes is currently being considered by the SRC Act review. Comcare considers this is, fundamentally, a policy question for government, but also notes that any proposal to expand coverage to include volunteers as a matter of course will require detailed actuarial costings and consideration of the implications for liabilities for the Comcare scheme and the licensed self-insurers.

It is important to note that, as set out in the Comcare response to the ALRC's original issues paper, the SRC Act does currently allow for coverage to be extended to volunteers under section 5 on the basis of a declaration by the Minister.

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?

Comcare response: The function of the superannuation provisions in the SRC Act is to prevent injured employees from receiving dual employer-funded benefits, a restriction that is underpinned by the concept that injured employees who exit employment should not be better off than those who are still employed.

For example, under section 20 of the SRC Act, an employee who retires on and from 27 April 2007 and is in receipt of a superannuation pension will have their incapacity entitlements reduced by 5 per cent of pre-injury earnings to offset the superannuation contributions that the employee would have been required to pay if he or she were still contributing to a superannuation scheme.

Comcare considers that the SRC Act's treatment of superannuation payments in the calculation of incapacity payments provides an appropriate disincentive for mature age workers in the Comcare scheme considering early retirement. However, due to the large-scale reforms of Australia's superannuation laws since 1988, there is currently a need to modernise the application of the offset provisions while continuing to support their policy rationale.

The intent of the superannuation provisions of the SRC Act was to prevent injured employees from receiving dual employer-funded benefits. However, since the Act was implemented in 1988 the superannuation laws have been reformed and employees who leave their employment are not always able to access their superannuation benefit—unless they are retired on invalidity or have reached their minimum preservation age.

As a result, the current superannuation offset provisions in the Act are out of step with the superannuation reforms. It is challenging for relevant authorities to apply and communicate the dual test of 'received' and 'retired' for employees who exit employment before their minimum superannuation preservation age. It is also challenging to obtain information about employer-funded superannuation amounts given the broad spectrum of superannuation schemes and retirement savings accounts that employees covered by the scheme can choose from.

Comcare has provided a submission to the SRC Act Review advising that it believes there is an urgent need to simplify the application of these provisions while continuing to support the concept that injured employees who exit employment should not be better off than those who are still employed.

One option is the removal of the notional deduction, by making the maximum combined post-retirement benefit payable 70 per cent of normal weekly earnings (NWE) (not 75 per cent minus 5 per cent). The same rule would apply to the increase in the compensation ceiling as the employee increases their hours of employment to a maximum of 95 per cent of NWE (not 100 per cent minus 5 per cent). In effect, this is the status quo.

An alternative option is to maintain the employer superannuation contributions for the benefit of incapacitated employees who are no longer employed and have not reached their superannuation preservation age (currently aged 55).

Comcare is awaiting the outcome of the current SRC Act Review in this area.