

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2008 No. 87**

Issued by the authority of the Minister for Employment and Workplace Relations

*Safety, Rehabilitation and Compensation Act 1988*

*Safety, Rehabilitation and Compensation Amendment Regulations 2008 (No. 1)*

Section 122 of the *Safety, Rehabilitation and Compensation Act 1988* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 107A of the Act provides that regulations may provide for the consequences of the suspension or revocation of a licence by the Safety, Rehabilitation and Compensation Commission (the Commission).

The Act establishes a workers' compensation and rehabilitation scheme for the Commonwealth public sector and certain private sector corporations (called 'eligible corporations') that compete with privatised or existing Commonwealth authorities. Part VIII of the Act enables Commonwealth authorities and eligible corporations to be licensed as self-insurers under the Act.

Under section 108D of the Act, as a condition of the grant of a licence, the Commission may require the Commonwealth authority or eligible corporation to obtain a bank or other guarantee to ensure that its workers' compensation and other liabilities under the Act will be met.

The purpose of the Regulations is to provide a statutory framework governing how Comcare may use money received after the calling-in of a guarantee where there is a licence suspension or revocation.

The Regulations provide that when a guarantee is called in by the Commission and there is a suspension or cancellation of a licence, the money is to be paid to Comcare. The Regulations also provide that Comcare will put into a separate bank account any money received under a guarantee and for the manner in which Comcare may deal with the money received.

Relevant government agencies, including the Department of Finance and Deregulation have been consulted in the making of these Regulations. Banks and licensees were consulted on the new form of guarantee. Because the amendments contained in these Regulations are minor and machinery and simply provide a transparent mechanism for dealing with funds if a guarantee is called in, other external stakeholders were not consulted about the Regulations.

On the advice of the Office of Regulation Review, a Regulation Impact Statement was not prepared for the Regulations because the amendments are minor and machinery in nature.

Details of the Regulations are set out in the [Attachment](#).

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

## ATTACHMENT

### Details of the *Safety, Rehabilitation and Compensation Amendment Regulations 2008 (No. 1)*

#### Regulation 1 – Name of Regulations

Regulation 1 names the Regulations the *Safety, Rehabilitation and Compensation Amendment Regulations 2008 (No. 1)*.

#### Regulation 2 – Commencement

Regulation 2 provides for commencement on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

#### Regulation 3 – Amendment of *Safety, Rehabilitation and Compensation Regulations 2002*

Regulation 3 provides that Schedule 1 amends the *Safety, Rehabilitation and Compensation Regulations 2002* (the Principal Regulations).

#### Schedule 1 – Amendments

Part 5 of the Principal Regulations provides for the consequences of suspension and revocation of a licence held by a Commonwealth authority and the consequences of revocation of a licence held by an eligible corporation. (The *Safety, Rehabilitation and Compensation Directions 2002* provide that the Commission may revoke, but not suspend, the licence of an eligible corporation.)

The Regulations amend Part 5 of the Principal Regulations by inserting new regulations that deal with the consequences of suspension and revocation of licences when a guarantee is called in by the Commission. The Commission may suspend or revoke a licence for reasons including, but not limited to, where the licensee is:

- insolvent;
- being wound-up;
- unable to make timely payments of workers' compensation benefits; or
- not in compliance with any conditions of the licence.

In some cases, the revocation of an eligible corporation's licence may be at the licensee's request and not associated with insolvency – such as when a licensee is subject to new ownership and chooses not to maintain a Commonwealth licence.

#### **Item [1]      Part 5, before regulation 13**

This item inserts Divisions 5.1 and 5.2 into Part 5 of the Principal Regulations.

#### **Division 5.1    Definitions for Part 5**

Regulation 12A contains definitions of 'guarantee' and 'licensee' for the purposes of Part 5:

- ‘guarantee’ refers to a guarantee for the due discharge of a licensee’s liability to pay workers’ compensation and other amounts under the Act given by a bank or other body and required by the Commission as a licence condition.
- ‘licensee’ includes a Commonwealth authority or an eligible corporation that was licensed under the Act immediately before its licence was suspended or revoked.

## **Division 5.2 Consequences of suspension or revocation of licence**

Regulation 12B of Division 5.2 provides an outline of the scope of that Division, which includes current regulations 13, 14 and 15. This Division deals with the consequences of suspension of a licence held by a Commonwealth authority and the consequences of revocation of a licence held by a Commonwealth authority or an eligible corporation.

The general consequences of licence suspension and revocation relating to workers’ compensation liabilities and claims management are found in current regulations 13, 14 and 15.

Where money is payable to Comcare under a guarantee, regulations 13A, 14A and 15A (as inserted by items [8], [14] and [16]) will set out additional consequences of suspension and revocation.

Regulation 14B (as inserted by item [14]) will deal with arrangements for a person to perform the employer functions of a Commonwealth authority. Regulation 15B (as inserted by item [16]) will deal with arrangements for a person to perform employer functions of an eligible corporation. The term ‘employer functions’ is defined in each of those Regulations.

Regulation 15C (as inserted by item [16]) relates to compensation for acquisition of property – an issue that may arise when surplus guarantee moneys are dealt with.

### **Item [2] Subregulation 13(1)**

Subregulation 13(1) is deleted in view of the insertion of a new overview provision in regulation 12B.

### **Item [3] Subregulation 13(2)**

To be consistent with existing subregulations 14(2) and 15(2), the term ‘an employee’ in existing subregulation 13(2) is replaced with ‘any of its employees’.

### **Item [4] Paragraph 13(2)(b)**

Paragraph 13(2)(b) of the Principal Regulations is amended to delete ‘, with the consent of the Commission and subject to any directions given by the Commission,’. Where the licence of a Commonwealth authority is suspended, the amendment removes the requirement for the Commission to direct how Comcare is to use funds to discharge the licensee’s liability for payments in respect of an employee’s injury, loss, damage or death. This amendment is consistent with the *Commonwealth Authorities and Companies Act 1997* (the CAC Act), which applies to Comcare.

**Item [5] Paragraph 13(2)(c)**

The effect of paragraph 13(2)(c) of the Principal Regulations is that where a Commonwealth authority's licence is suspended and Comcare discharges the authority's workers' compensation liabilities, the authority must repay the money to Comcare. It assumes that Comcare has paid the money from its own funds. Item [6] ensures that paragraph 13(2)(c) is not activated when a guarantee is called in following a licence suspension. In this situation, the requirements of regulation 13A will apply.

**Item [6] Paragraph 13(3)(b)**

The effect of paragraph 13(3)(b) of the Principal Regulations is that where a Commonwealth authority's licence has been suspended and Comcare manages the licensee's workers' compensation claims, the licensee must repay Comcare for its costs. It assumes that Comcare has paid the money from its own funds. Item [7] ensures that paragraph 13(3)(b) is not activated when a guarantee is called in a licence suspension. In this situation, the requirements of regulation 13A will apply.

**Item [7] Regulation 13, note**

This item corrects an error in the note under existing regulation 13 by replacing the words 'section 14' with 'section 15'.

**Item [8] After regulation 13**

Regulation 13A is inserted after current regulation 13.

**Regulation 13A Money payable under a guarantee — licence of Commonwealth authority suspended**

Regulation 13A deals with consequences of suspension of a licence held by a Commonwealth authority where the Commission has made a demand for payment of money under the guarantee relating to the Commonwealth authority. The money payable in response to the Commission's demand is referred to as 'guarantee money.'

When the guarantee is called in, the money will be paid to Comcare. Comcare will then be required to put the money into a separate bank account. Interest earned will form part of the guarantee money.

Under the Principal Regulations, if a Commonwealth authority's licence is suspended, the authority remains liable for its workers' compensation liabilities [subregulation 13(2)]. Those liabilities can be discharged by Comcare. However, the authority is prevented from managing claims. These must be managed by Comcare [subregulation 13(3)].

Regulation 13A enables Comcare to use the guarantee money to do any of the following:

- discharge a licensee's workers' compensation liabilities;
- meet costs incurred in managing workers' compensation claims;
- reimburse itself for discharging liabilities or managing claims where it has not used the guarantee money to do so.

If there is any money remaining after all the relevant payments are made and Comcare determines that there will unlikely be any further outgoings, Comcare will be required to deal with the remaining money in the way provided for in the guarantee. If the guarantee is silent on how the remaining money should be dealt with, Comcare will be required to pay the remaining money to the Commonwealth authority. If the Commonwealth authority no longer exists, Comcare will be required to pay the money in accordance with any legislation which provides for the distribution of the authority's assets. In any other case, Comcare will be required to pay the remaining money to the bank or other body that paid the money to Comcare.

**Item [9] Subregulation 14(1)**

Existing subregulation 14(1) is deleted in view of the insertion of a new overview provision in regulation 12B (as inserted by item [1]).

**Item [10] Paragraph 14(2)(c)**

The phrase ‘, with the consent of the Commission and subject to any directions given by the Commission,’ in paragraph 14(2)(c) of the Principal Regulations is deleted. This amendment removes the requirement for the Commission to direct how Comcare is to use funds to discharge the liability of the licensed Commonwealth authority. This amendment is consistent with the CAC Act, which applies to Comcare.

**Item [11] Paragraph 14(2)(d)**

The effect of paragraph 14(2)(d) of the Principal Regulations is that where a Commonwealth authority's licence has been revoked and Comcare discharges a workers' compensation liability of the authority, the authority must repay Comcare. It assumes that Comcare has paid the money from its own funds. Item [11] ensures that paragraph 14(2)(d) is not activated when a guarantee is called in following the revocation of a Commonwealth authority's licence. In this situation, the requirements of regulation 14A will apply.

**Item [12] Subparagraph 14(3)(c)(ii)**

This item makes a punctuation change in subparagraph 14(3)(c)(ii) to account for the insertion of paragraph 14(3)(d) (as inserted by item [13]).

**Item [13] After paragraph 14(3)(c)**

The original intention of the Act and Principal Regulations was that licensees pay Comcare for its costs in managing claims in respect of employee injury, loss, damage or death on behalf of licensees whose licences have been suspended or revoked. In its current form, regulation 14 does not give effect to this intention.

Therefore, item [13] inserts paragraph (d) to give effect to the original policy intention. It provides that a licensee must pay Comcare its costs in managing claims in respect of injury, loss or damage suffered by, or the death of, any employees that occurred prior to the revocation of the licensee's licence. Paragraph (d) is subject to regulation 14A (as inserted by item [14]) - to ensure that when a guarantee is called in the requirements of regulation 14A, rather than current regulation 14, will apply.

**Item [14] After regulation 14**

This item inserts new regulations 14A and 14B.

**14A Money payable under guarantee – licence of Commonwealth authority revoked**

Regulation 14A is inserted after regulation 14 of the Principal Regulations. It will deal with the consequences of revoking a Commonwealth authority’s licence where the Commission has made a demand for payment of money under the guarantee relating to the Commonwealth authority. The money payable in response to the Commission’s demand is referred to as ‘guarantee money’.

When the guarantee is called in, the money will be paid to Comcare. Comcare will be required to put the money received into a separate bank account. Interest earned will form part of the guarantee money.

Under the Principal Regulations, if a Commonwealth authority’s licence is revoked, the licensee remains liable for an employee’s injury, loss, damage or death where these occurred prior to the licence’s revocation. Comcare may discharge such liabilities [subregulation 14(2)]. However, the licensee must not manage workers’ compensation claims. These must be managed by Comcare [subregulation 14(3)].

Regulation 14A enables Comcare to use the guarantee money to do any of the following:

- discharge a licensee’s workers’ compensation liability relating to injury, loss, damage or death that occurred before the licence was revoked;
- meet costs incurred in managing workers’ compensation claims;
- reimburse itself for discharging liabilities or managing claims where it has not used the guarantee money to do so;
- pay the costs of an arrangement it has entered into with a person to perform the ‘employer functions’ of the Commonwealth authority under subregulation 14B(1).

Comcare will also be able to take from the guarantee money an amount equal to that assessed by an actuary as future liabilities and costs under subregulation 14A(6). The cost of obtaining an actuarial report will form part of claims management costs.

If there is any money remaining after all the relevant payments are made and Comcare determines that there will unlikely be any further outgoings, Comcare will be required to deal with the remaining money in the way provided for in the guarantee. If the guarantee is silent on how the remaining money should be dealt with, Comcare will be required to pay the remaining money to the Commonwealth authority. If the Commonwealth authority no longer exists, Comcare will be required to pay the money in accordance with any legislation that provides for the distribution of the authority’s assets. In any other case, Comcare will be required to pay the remaining money to the body that paid the money to Comcare.

**14B Performance of employer functions following revocation of licence – Commonwealth authorities**

If Comcare considers it appropriate, regulation 14B will enable it to make arrangements for the ‘employer functions’ of a Commonwealth authority whose licence has been revoked to be

performed by another person suitable and willing to enter into an arrangement to perform those functions

The ‘employer functions’ referred to in this regulation are:

- acting as the rehabilitation authority for the employee – for example, arranging rehabilitation assessments and programs for injured employees;
- acting as the relevant employer of an employee, within the meaning of subsection 40(2) of the Act – for example, providing suitable employment for an injured employee;
- acting for the licensee in making a request for reconsideration of a determination under paragraph 62(2)(c), or acting for the licensee to apply to the Administrative Appeals Tribunal for a review of a reviewable decision under paragraph 64(1)(c).

**Item [15] Subregulation 15(1)**

This item deletes subregulation 15(1) in view of the insertion of a new overview provision in subregulation 12B (as inserted by item [1]).

**Item [16] After regulation 15**

This item inserts new regulations 15A, 15B and 15C.

**15A Money payable under guarantee – eligible corporations**

Regulation 15A deals with consequences of the revocation of an eligible corporation’s licence where the Commission has made a demand for payment of money under the guarantee relating to the eligible corporation. Eligible corporations are certain private sector corporations that compete with privatised or existing Commonwealth authorities. The *Safety, Rehabilitation and Compensation Directions 2002* provide that the Commission may revoke, but not suspend, the licence of an eligible corporation.

The money payable in response to the Commission’s demand will be referred to as ‘guarantee money’. When the guarantee is called in, the money will be paid to Comcare. Comcare will be required to put the money received into a separate bank account. Interest earned will form part of the guarantee money.

Under the Principal Regulations, when an eligible corporation’s licence is revoked, the corporation continues to be responsible for discharging any liability relating to an employee’s injury, loss, damage or death which occurred before the revocation [see paragraph 15(2)(b)]. Furthermore, when an eligible corporation’s licence is revoked, the corporation continues to have responsibility for managing claims in respect of an employee’s injury, loss, damage or death that occurred before the revocation of the licence [see paragraph 15(3)(a)].

However, should the corporation be unable to discharge its liabilities to, or manage the claims of, affected employees regulation 15A enables Comcare to use guarantee money that has been called in to:

- discharge any workers’ compensation liability relating to injury, loss, damage or death that occurred before the licence was revoked; and

- meet claims management costs that are not paid directly to Comcare by the eligible corporation. [Claims may be managed by Comcare or Comcare may arrange for claims to be managed.]; and
- meet the costs of an arrangement for a person to fulfil ‘employer functions’ in relation to the eligible corporation under subregulation 15B(1).

Comcare will also be able to use the guarantee money to make future payments in accordance with an actuarial report. The cost of obtaining an actuarial report will form part of claims management costs.

If there is any money remaining after all the relevant payments are made and Comcare determines that there will unlikely be any further outgoings, Comcare will be required to deal with the remaining money in the way provided for in the guarantee. If the guarantee is silent on how the remaining money should be dealt with, Comcare will be required to pay the remaining money to the corporation. If the corporation no longer exists, Comcare will be required to pay the money in accordance with any legislation which provides for the distribution of the corporation’s assets. In any other case, Comcare will be required to pay the remaining money to the body that paid the money to Comcare.

#### **15B Performance of employer functions following revocation of licence – eligible corporations**

If Comcare considers it appropriate and has received enough money under a guarantee provided by the eligible corporation, Comcare will be able to make arrangements for the ‘employer functions’ of the eligible corporation to be performed by another person suitable and willing to enter into an arrangement to perform those functions.

The ‘employer functions’ referred to in this regulation are:

- acting as the rehabilitation authority for the employee – for example, arranging rehabilitation assessments and programs for injured employees;
- acting as the relevant employer, within the meaning of subsection 40(2) of the Act – for example, providing suitable employment for injured employees.

#### **15C Compensation for acquisition of property**

Subregulations 14A(7), 14A(8), 15A(6) and 15A(7) (as inserted by items [14] and [16]) detail how Comcare must deal with any surplus guarantee money. Regulation 15C (as inserted by item [16]) provides that if this results in an acquisition of property from a person on other than just terms, the Commonwealth will be required to pay reasonable compensation to the person. However, if agreement on compensation cannot be reached, then the person affected will be able to apply to a court to recover reasonable compensation. The purpose of this provision is to safeguard the Regulations from any possible invalidity resulting from the application of section 51(xxxi) of the Constitution, which prohibits the acquisition of property on unjust terms.

#### **Item [17] Schedule 3, Part 6, items 1 and 2**

This item deletes the phrase ‘obtain a bank guarantee’ in items 1 and 2 of Part 6, Schedule 3 of the Principal Regulations and replaces it with ‘arrange for a guarantee acceptable to the Commission to be provided’. There is a question about whether bank guarantees in their current form are ‘obtained’ by the licensee as required by paragraph 108D(1)(d) of the Act because of

the contractual context in which they are made. The proposed amendment puts the legal obligations of licensees beyond doubt given that under the Act the Commission has broad power to impose any conditions it sees fit on licensees.

**Item [18]      Schedule 3, Part 6, paragraph 2(a)**

This is a consequential amendment to item [17] above.

**Item [19]      Schedule 3, Part 6, paragraph 2(a)**

This is a consequential amendment to item [17] above.

**Item [20]      Schedule 3, Part 6, item 4**

This item amends Schedule 3, Part 6, item 4 of the Principal Regulations in the same way and for the same reasons as the amendments effected by item [17].