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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SAFETY, REHABILITATION AND COMPENSATION AND OTHER LEGISLATION  
AMENDMENT BILL 2006**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and  
Workplace Relations, the Honourable Kevin Andrews MP)

## **SAFETY, REHABILITATION AND COMPENSATION AND OTHER LEGISLATION AMENDMENT BILL 2006**

### **OUTLINE**

The Bill amends the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) to maintain the financial viability of the scheme – which has come under growing pressure from increasing numbers of accepted claims, longer average claim duration and higher claim costs, partly as a result of court interpretations of the legislation. The amendments will also improve the administration and provision of benefits.

The principal amendments will:

- amend the definition of ‘disease’ to strengthen the connection between the disease and the employee’s employment;
- amend the definition of ‘injury’ to exclude injuries arising from reasonable administrative action taken in a reasonable manner;
- remove claims for non work-related journeys and recess breaks where the employer has no control over the activities of the employee;
- amend the calculation of retirees’ incapacity benefits to take account of changes in interest rates and superannuation fund contributions;
- update measures for calculating benefits for employees, including the definitions of ‘normal weekly earnings’ and ‘superannuation scheme’;
- ensure that all potential earnings from suitable employment can be taken into account when determining incapacity payments;
- enable determining authorities to directly reimburse health care providers for the cost of their services to injured employees ; and
- increase the maximum funeral benefits payable.

The Bill also includes minor technical amendments to the SRC Act, including a substantial number of amendments which are consequential on the commencement of the *Legislative Instruments Act 2003* on 1 January 2005.

In addition, an amendment to the funeral benefit provisions of the *Military Compensation and Rehabilitation Act 2004* is proposed to maintain parity with benefits under the SRC Act.

## **FINANCIAL IMPACT STATEMENT**

It is estimated that the amendments to the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) will produce a reduced call on Comcare's premium pool of around \$20 million per annum. Reducing the call on the premium pool may have a beneficial effect on workers' compensation premiums under the Comcare scheme.

Of the total savings to Comcare's premium pool, the amendments to the definitions of 'disease' and 'injury' in the SRC Act are expected to produce savings of \$5 million per annum. Apart from savings to the premium pool, there will also be savings from these amendments of \$1.8 million per annum to self-insurers under the Commonwealth workers' compensation scheme.

The amendments to the treatment of journey claims and recess break claims are estimated to produce savings of \$15 million per annum to Comcare's premium pool. There will also be additional savings from these changes of \$5.4 million per annum to self-insurers under the scheme.

The net savings will be spread across all Commonwealth departments and agencies covered by Comcare, and self-insurers under the scheme.

## REGULATION IMPACT STATEMENT

### *Safety, Rehabilitation and Compensation Act 1988*

#### **Background**

The *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) establishes a scheme of rehabilitation and compensation for employees who are injured in the course of their employment.

It covers, in the premium paying component of the scheme, Commonwealth employees (except members of the Australian Defence Force who are covered by separate legislation) and Australian Capital Territory (ACT) public service employees. It also covers employees of certain private-sector corporations who self insure under the scheme.

ACT public service employees are covered by virtue of the ACT Public Service having been declared a Commonwealth authority for the purposes of the SRC Act with effect from 1 July 1994. Private sector corporations are able to apply to join the scheme if the Minister for Employment and Workplace Relations is satisfied that it would be desirable for the Act to apply to employees of a corporation that:

- is, but is about to cease to be, a Commonwealth authority; or
- was previously a Commonwealth authority; or
- is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority.

The total outstanding liabilities of the premium paying component of the scheme as at 30 June 2005 were \$0.949 billion covering approximately 178,000 employees. The claims incidence (resulting in 5 or more days incapacity) for this component of the scheme is around 15.8 per 1,000 (at an average claim cost of \$28,424 for the Commonwealth sector and \$30,175 for the ACT public sector). The self insured component of the scheme covers a further 73,748 employees with outstanding liability totalling \$0.343 billion.

In this Regulation Impact Statement, we examine proposals to address problems identified in the application of the SRC Act which relate to:

1. the definition of “disease” and “injury”; and
2. the availability of workers’ compensation for injuries sustained during employees’ travel to and from work and recess breaks.

#### **Definitions of “disease” and “injury”**

##### **The Problem**

###### Definition of “disease”

It was the original intention of the SRC Act that an employee’s eligibility for compensation payments for a disease suffered by the employee should require a close causal connection between the employee’s work and the contraction or aggravation of the disease. The causality test requires an employee’s employment to have contributed in a “material degree” to the contraction or aggravation of the disease. When referring to this provision in his second reading speech in 1988, the then Minister said that:

*It is intended that the test will require an employee to demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease. Accordingly, it will be necessary for an employee to show that there is a close connection between the disease and the employment in which he or she was engaged.*

In its 2004 report on *National Workers' Compensation and Occupational Health and Safety Frameworks* (Inquiry Report), the Productivity Commission commented that effective tests of work-relatedness were essential if workers' compensation schemes were to operate as intended—that is, to provide coverage only for truly work-related fatalities, injuries and illness.

If the criteria for compensability are too wide, there will be inappropriate cost-shifting to employers for medical conditions that are minimally work-related. However, criteria that are too narrow are equally undesirable in that they can involve significant cost-shifting to individual employees (and to taxpayer-funded health and other social services).

Since the enactment of the SRC Act in 1988, “material degree” has been interpreted in court and tribunal decisions so as to erode significantly the extent to which employment must have contributed to the contraction or aggravation of the disease for it to be compensable.

For example, in *Re Treloar and Australian Telecommunications Commission (1990)*, the Full Federal Court found that a causal connection between the injury and employment must be established on the probabilities and not left in the area of possibility or conjecture, but once the link was established, it did not matter whether the contribution was large or small.

In *Re Peters and Comcare (2004)*, the Administrative Appeals Tribunal found that marriage breakdown, family deaths and a history of abuse were “more significant” factors in the later development of the worker's condition but that the worker's continuing depression “was still contributed [to] in a material degree by employment-related issues”.

In the recent Full Federal Court decision, *Canute and Commonwealth of Australia [2005]FCA 299*, the judges discussed the meaning of material in terms that employment should be more than a mere contribution and the requirement to demonstrate a close connection between employment and the disease consistent with the intention of the SRC Act when introduced. These comments may reduce the erosion in the meaning, however they are yet to be tested at law.

#### Definition of “injury”

The SRC Act aims to prevent compensation claims being used to obstruct legitimate management action by excluding claims where an injury (usually a psychological injury) has arisen as a result of reasonable disciplinary action or a failure to obtain a promotion, transfer or benefit in connection with the employee's employment.

The term, “disciplinary action”, has been interpreted in a number of court and tribunal decisions very narrowly to mean formal disciplinary action taken under, for example, the *Public Service Act 1999* (or prior to this the *Public Service Act 1922*) or action taken pursuant to an award or certified agreement.

Consequently, investigations undertaken to determine: whether a probationary appointment should be annulled; formal disciplinary proceedings should be instituted; or management counselling provided to an employee, have been found not to constitute “disciplinary action”.

Claims for injuries purportedly arising in these circumstances have been allowed, which was not the intention of the Act.

In *Re Tan and Comcare (1997)*, the AAT held that a session described as a “counselling session” was not counselling but a preceding step, a “discussion, an investigation of complaints”, which did not attract the “disciplinary action” exclusion. In *Re Murray and Comcare (1998)*, the AAT held that “disciplinary action” did not include investigations undertaken prior to formal disciplinary action under section 61 of the *Public Service Act 1922*.

As a result of decisions such as these, employers under the SRC Act are exposed to liability for workers’ compensation in a much wider range of circumstances than was intended when the legislation was enacted. The narrow terms of the exclusion provision relating to “disciplinary action” is also inconsistent with a broader exclusion for ‘management actions taken reasonably’ which are a feature of all Australian jurisdictions, except the Northern Territory.

It is estimated that the financial impact on Comcare annually of these “disease” and “injury” claims which the legislation had not originally intended to be eligible for compensation is some 2.5% of total claims costs or \$5 million for 2004-05. Comcare’s annual premium pool totalled \$196.5 million in 2004-05. The financial impact on self-insurers is estimated to be a similar proportion annually.

## **Objectives**

The Government’s primary objective with the workers’ compensation scheme established under the SRC Act, is to minimise the human and financial cost of work-related injury and disease while at the same time providing appropriate compensation and support for employees injured or made ill through employment. In this context, the Government is seeking to strike a balance between the obligations of employers covered by the scheme to employees injured or made ill through work and the need to ensure that the costs of the scheme are maintained at a reasonable level.

It was the original intention of the legislation to ensure that there is a close connection to employment as the cause, aggravator or contributor of a worker’s disease or injury, before eligibility for workers’ compensation can be established.

A further objective, through the exclusionary provisions, was to ensure that the wide range of legitimate human resource management actions, when undertaken in a reasonable manner, do not give rise to eligibility for workers’ compensation.

Achieving these objectives would restore Parliament’s original intention regarding the operation of these provisions.

### **A. Definition of “disease”**

#### **Identification of Options**

The SRC Act has a weaker employment contribution test compared to most other Australian jurisdictions. In Victoria and Queensland, for example, employment must be “a significant contributing factor” for a disease to be compensable. In Western Australia, employment must be “a contributing factor and contribute to a significant degree”. In Tasmania and the Australian Capital Territory, employment must be “a substantial contributing factor”.

Court interpretations of the SRC Act's employment contribution test have further weakened its application. Options 2, 3 and 4 below seek to ensure there is a close connection between a person's employment and his or her contraction of a disease for the disease to be compensable under the Act.

*Option 1 – No change*

- The Act would continue to provide that, for a disease to be compensable, employment must have contributed in a "material degree" to the contraction or aggravation of the disease, with the current court and tribunal interpretations of "material degree" applying.

*Option 2 – Define the term "material degree"*

- The Act would continue to provide that for a disease to be compensable, employment must have contributed in a "material degree" to the contraction or aggravation of the disease.
- "Material degree" would be defined to ensure that employment would not be taken to have contributed in a material degree to the disease unless there was a close connection between the employee's employment and the ailment or aggravation concerned.

*Option 3 – Require a "significant contribution" by employment to the contraction of a disease*

- The definition of "disease" would be amended to provide that employment must have contributed in a "significant degree" to the contraction or aggravation of the disease and provide further elaboration as to what is meant by "significant degree".

*Option 4 – Require employment to be "the" significant contribution to the contraction of a disease*

- The definition of "disease" would be amended in the Act to provide that employment must be "**the**" significant contributing factor to the contraction or aggravation of a disease.

## **Impact Analysis**

The following analysis focuses on the impact of the above regulatory options on major stakeholders covered by the SRC Act, namely, licensed self-insurers, the premium payers (the Australian and ACT Governments), and employees of both categories of employer.

### **Option 1 – No change**

#### Cost to licensed self-insurers

- workers' compensation coverage would continue to apply in many cases where employment has had only a minimal impact on the contraction or aggravation of the disease.

#### Benefits to licensed self-insurers

- none readily identifiable.

#### Cost to employees

- uncertainty as to the extent of eligibility for workers' compensation.

#### Benefits to employees

- the scheme would continue to be very generous in its coverage, including in cases where work has had a minimal impact on the contraction or aggravation of the disease.

Cost to Government

- workers' compensation coverage would continue to apply even in cases where employment has had a minimal impact on the contraction or aggravation of the disease.

Benefits to Government

- none readily identifiable.

**Option 2 - Define the term "material degree"**

Cost to licensed self-insurers

- there is a risk that, even with a definition, retaining the term "material degree" might not be sufficient to completely counter the effect of existing case-law on interpretations of the term.

Benefits to licensed self-insurers

- would probably reduce the incidence of compensable claims compared to the present situation and provide scope for a reduction in workers' compensation costs; and
- could provide for greater certainty regarding eligibility.

Cost to employees

- workers' compensation coverage for disease claims would be more restrictive than at present.

Benefits to employees

- would provide for greater certainty regarding eligibility.

Cost to Government

- there is a risk that, even with a definition, retaining the term "material degree" might not be sufficient to completely counter the effect of existing case-law on interpretations of the term.

Benefits to Government

- would probably reduce the incidence of compensable claims and provide scope for reduced workers' compensation premiums; and
- could provide for greater certainty regarding eligibility.

**Option 3 - Require "a significant contribution"**

Cost to licensed self-insurers

- none readily identifiable.

Benefits to licensed self-insurers

- would reduce the incidence of compensable claims compared to the present situation and provide scope for a reduction in workers' compensation costs.

Cost to employees

- eligibility for workers' compensation for disease claims would be more restrictive than at present.

Benefits to employees

- there would still be eligibility for workers' compensation where work has made a significant contribution to the contraction or aggravation of an employee's disease.

Cost to Government

- none readily identifiable.



Benefits to Government

- would reduce the incidence of compensable claims compared to the present situation and provide scope for a reduction in workers' compensation premiums.

**Option 4 - Require employment to be “the” significant contribution**

Cost to licensed self-insurers

- none readily identifiable.

Benefits to licensed self-insurers

- would have a substantial impact on reducing the cost of payments for disease claims.

Cost to employees

- eligibility for workers' compensation for disease claims would be substantially restricted; and
- where there is more than one cause, it would be more difficult for employees to establish that the employment connection was indisputably “the” significant cause.

Benefits to employees

- none readily identifiable.

Cost to Government

- this option is more stringent than eligibility for workers' compensation under the State and Territory schemes (it would be similar to Tasmania's provisions) and could attract criticism that the Australian Government scheme is not adequately compensating employees who have contracted genuine work-related diseases.

Benefits to Government

- would have a substantial impact on reducing the cost of payments, particularly for psychological injury claims; and
- would significantly tighten the connection between the contraction or aggravation of the disease and employment.

**Recommended option**

Requiring employment to make a “significant contribution” to the contraction of a disease for the disease to be compensable (Option 3), is the preferred option.

Amending the SRC Act in accordance with Option 3 would ensure an effective test of work-relatedness, providing eligibility only for work-related diseases consistent with the intention of the SRC Act and consistent with eligibility in most other State schemes while at the same time minimising the scope for uncertainty and disputation.

This test is considered to provide a stronger causal connection between an employee's employment and the contraction or aggravation of a disease than Option 2 and is consistent with the Productivity Commission's recommendation in its Inquiry Report of a “significant contributing factor” as a minimum benchmark for defining work-related fatalities, injury and disease.

Defining the term “material degree” in the legislation and requiring that employment make a material contribution to the disease (Option 2) would also result in greater certainty than at present. However, there is a risk that this test would still allow for workers' compensation eligibility in cases where employment has made only a minor contribution to the illness. This

could result in an unreasonable degree of cost-shifting on to employers and the workers' compensation scheme.

The adoption of Option 4, requiring work to be “the” significant contributor to an employee's disease, would place an unreasonable onus of proof on claimants. In many situations, it would be difficult to quantify that employment made a more significant contribution than some other factor or factors, and differences of opinion between medical experts would be expected. This test would provide too much scope for increased disputation and litigation.

## **B. Definition of “injury”**

### **Identification of Options**

It is desirable that the SRC Act should prevent workers' compensation claims being used to obstruct legitimate administrative action by excluding claims where an injury has arisen as a result of reasonable administrative action undertaken in a reasonable manner. Under options 2 and 3, the exclusions would be more broadly and comprehensively elaborated and cover a wider range of legitimate administrative actions than at present.

#### *Option 1 – No change*

- The coverage of the exclusionary provisions in the definition of “injury” would remain as currently and narrowly determined by court and tribunal rulings.

#### *Option 2 – An exhaustive list of exclusions*

- The list would exclude a wider range of employer actions than court and tribunal interpretations of the current provision provide.
- Injuries arising from “reasonable administrative action” would be excluded and an exhaustive list would be provided of what constitutes “reasonable administrative action”.
- Under this approach, all actions listed in the exclusionary provisions would be excluded from workers' compensation eligibility but there would be no “catch-all” provision to cover actions not listed.

#### *Option 3 – A non-exhaustive list of exclusions*

- Injuries arising from reasonable administrative action would be excluded and a non-exhaustive list would be provided.
- This will allow for the exclusion from workers' compensation eligibility of injuries (usually psychological injuries) which result from reasonable administrative action even where the specific action is not explicitly covered in the list.

### **Impact Analysis**

The following analysis focuses on the impact of the above regulatory options on major stakeholders under the SRC Act, namely, licensed self-insurers, the Australian and ACT Governments, and employees of both categories of employer.

#### **Option 1 – No change**

Cost to licensed self-insurers

- workers' compensation eligibility will continue to frustrate legitimate administrative actions by management.

Benefits to licensed self-insurers

- none readily identifiable.

Cost to employees

- none readily identifiable.

Benefits to employees

- eligibility for workers' compensation will be available even where the administrative action taken was reasonable and appropriate.

Cost to Government

- continued capacity for workers' compensation eligibility to frustrate legitimate administrative actions.

Benefits to Government

- none readily identifiable.

**Option 2 – An exhaustive list of exclusionary provisions**

Cost to licensed self-insurers

- other administrative actions not included on list could still give rise to workers' compensation claims.

Benefits to licensed self-insurers

- would narrow workers' compensation eligibility and reduce costs; and
- reasonable administrative action could not be frustrated by workers' compensation claims in most cases.

Cost to employees

- would restrict eligibility for workers' compensation in a wider range of circumstances than currently.

Benefits to employees

- none readily identifiable.

Cost to Government

- other administrative actions not included on list could still give rise to workers' compensation claims.

Benefits to Government

- would narrow workers' compensation eligibility and reduce costs; and
- reasonable administrative action could not be frustrated by workers' compensation claims in most cases.

**Option 3 – A non-exhaustive list of exclusionary provisions**

Cost to licensed self-insurers

- would not have the clarity of an exhaustive list and could lead to some greater administrative complexity.

Benefits to licensed self-insurers

- would provide a more comprehensive regime of exclusionary provisions.

Cost to employees

- workers' compensation eligibility for injury claims would be more narrow than under Option 2; and
- would not have the clarity of an exhaustive list and could lead to some greater complexity as to coverage.

#### Benefits to employees

- none readily identifiable.

#### Cost to Government

- would not have the clarity of an exhaustive list and could lead to some greater administrative complexity.

#### Benefits to Government

- would provide a more comprehensive regime of exclusionary provisions.

### **Recommended option**

Option 3 is the preferred option.

The SRC Act should prevent workers' compensation claims being used to obstruct legitimate administrative action by excluding claims where an injury has arisen as a result of such action.

An exhaustive list, as under Option 2, would provide certainty about particular actions and decisions which constitute reasonable administrative action. A list would also provide for clarity of workers' compensation eligibility and thus minimise the scope for uncertainty and disputation.

In providing for a non-exhaustive list of exclusionary provisions, Option 3 would be more comprehensive in ensuring that injuries claimed to arise from reasonable administrative action are not compensable. This option would reduce the risk of future loopholes emerging in the exclusionary provisions.

On balance, the additional comprehensiveness of Option 3 compared to Option 2 makes this the preferred option.

### **Consultation**

There has been consultation with Comcare, self-insurers and affected unions at meetings of the Safety, Rehabilitation and Compensation Commission over the past three years.

The Government also commissioned the Productivity Commission in March 2003 to assess possible models for establishing national frameworks for occupational health and safety and workers' compensation arrangements. In preparing its report (finalised in March 2004), the Commission advertised in the national and metropolitan press for submissions; conducted public hearings; and sought comments on its interim report. The proposal regarding amendments to the definition of "disease" draws on the recommendations of the Productivity Commission.

Regarding the work-relatedness of diseases, employer groups argued in their submissions to the Productivity Commission that workers' compensation eligibility should be restricted to cases where employment is "the" major significant contributing factor. Union groups, on the other hand, argued that this would lead to rejection of many legitimate claims and would do nothing to improve occupational health and safety.

Discussions on the degree of work-relatedness required for a disease to be compensable have also taken place with the State and Territory governments through the Workplace Relations Ministers' Council.

## Workers' compensation coverage of journeys to and from work and recess breaks

### The Problem

#### Journeys to and from work

Section 6 of the SRC Act provides, among other things, that an injury to an employee is to be treated as having arisen out of, or in the course of, their employment if it is sustained while the employee was travelling between his or her place of residence and place of work.

Some of the other kinds of journey covered include while the employee:

- was travelling between the place where he or she normally resides and another place where he or she resides temporarily for the purposes of his or her employment;
- was travelling between one of his or her places of work and another of his or her places of work;
- was travelling between his or her place of work or place of residence and a place of education for the purpose of attending that place in accordance with a condition of his or her employment or at the request/direction of the employer or with the approval of the employer; or
- was travelling between his or her place of work or residence and any other place for the purpose of obtaining a medical certificate for the purposes of the SRC Act; receiving medical treatment for an injury; undergoing a rehabilitation program provided under the Act; receiving a payment of compensation under the Act; or undergoing a medical examination or rehabilitation assessment.

In relation to journeys between the place of residence and the place of work, the Productivity Commission Inquiry found that the cost of journey claims can be significant and influence the affordability of workers' compensation. It found that, while journeys to and from work are an inevitable part of meeting employment commitments, the mode and nature of the journey, and the location of the workers' residence relative to work, are not in most circumstances matters over which the employer exercises any control.

In these circumstances, the extension of workers' compensation coverage to "journey claims" does not fit well with the obligations imposed on employers by the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS Act) which provides that:

An employer must take all reasonably practicable steps to protect the health and safety **at work** of the employer's employees.

When an employee is undertaking a journey other than a purely work-related journey, for all practical purposes the employer has no control over the circumstances of the journey or the employee's behaviour. It is inappropriate that an employer could be liable for injuries sustained by an employee during these journeys notwithstanding that the employer fully complies with all occupational health and safety requirements in that employee's workplace.

Allowing workers' compensation coverage for journey claims is estimated to cost Comcare some 13.2% of total claims costs or \$25.9 million for 2004-05 claims. If journey claim coverage were to be removed, the estimated saving to the Commonwealth would be slightly less than this amount, because of a minor additional cost to Medicare and the private health insurance rebate. The impact of the current arrangements on self-insurers is of a similar magnitude.

### Recess breaks

The SRC Act provides that an injury sustained while an employee was at his or her place of work for the purposes of their employment, or “was temporarily absent from that place during an ordinary recess in that employment”, will be an injury “arising out of, or in the course of” that employment.

The effect of the provision is that workers’ compensation could be payable, for example, where an employee sustains an injury while shopping or playing sport during a lunch break. This is notwithstanding the fact that the employer has no control over the activities of the employee or the environment in which the employee engages in those activities.

The Productivity Commission Inquiry found that the employer’s ability to exert control over workplace recess breaks and social activities is a relevant consideration. It recommended that coverage for recess breaks and work-related events be restricted, on the basis of employer control, to those undertaken at workplaces and at employer-sanctioned events.

Allowing workers’ compensation coverage for injuries acquired during recess breaks is estimated to cost Comcare some 1.5% of total claims costs or \$2.9 million for 2004-05 claims. If recess break coverage were to be removed, the estimated saving would be slightly less than this amount, because of a small additional cost to Medicare and the private health insurance rebate. The impact of the current arrangements on self-insurers is estimated to be of a similar proportion.

### **Objectives**

As indicated previously in relation to proposals to amend the definitions of disease and injury, the Government’s primary objective with the workers’ compensation scheme established under the SRC Act is to minimise the human and financial cost of work-caused injury and disease while at the same time providing adequate compensation and support for incapacitated employees.

The objective is to limit employers’ exposure to liability for employees’ injuries sustained during journey and recess breaks referred to above, in circumstances where there is a lack of employer control.

This objective is consistent with the recommendations of the Productivity Commission.

### **Journeys to and from work**

#### **Identification of Options**

##### *Option 1 – No change*

- The SRC Act would continue to allow home to work journey claims and claims relating to certain other non-work journeys.

##### *Option 2 - Allow some limited workers’ compensation coverage of journeys*

- This would provide coverage for:
  - journeys from home or work to a place of study where an employee is undertaking an authorised course of study; and

- journeys from home or work to a place where medical services or rehabilitation are provided or compensation is received in the case of employees who have been injured in the course of their employment.
- There would be no workers' compensation coverage for travel between home and work unless the employee is undertaking actual duties of employment in the course of the journey.

*Option 3 - Exclude all journey claims except where the journey is undertaken as an integral part of the employee's duties*

- An employee would only be covered for workers' compensation purposes if the travel is an integral part of the employee's employment, that is, the employee is travelling for the purposes of performing their employment.
- "Travelling for the purposes of an employee's employment" would not include travel between an employee's home and usual place of employment or the other travel referred to in section 6 of the SRC Act.

### **Impact Analysis**

The following analysis focuses on the impact of the above regulatory options on major stakeholders under the SRC Act, namely, licensed self-insurers, the Australian and ACT Governments, and employees of each category of employer.

#### **Option 1 – No change**

Cost to licensed self-insurers

- self-insurers bear the workers' compensation costs for injuries which occur outside the workplace and which are out of the employer's control.

Benefits to licensed self-insurers

- none readily identifiable.

Cost to employees

- none readily identifiable.

Benefits to employees

- employees are fully covered for injuries sustained in the course of home to work journeys and certain other non-work journeys.

Cost to Government

- Government bears the workers' compensation costs for injuries which occur outside the workplace and which are out of its control.

Benefits to Government

- none readily identifiable.

#### **Option 2 - Allow some limited workers' compensation coverage of journeys**

Cost to licensed self-insurers

- some injuries which occur outside the workplace and outside the employer's control would remain compensable; and
- there could be scope for uncertainty and dispute between self-insurers and claimants regarding application of the exclusions.

Benefits to licensed self-insurers

- the incidence and cost of compensable claims and workers' compensation eligibility would be reduced; and
- compensable claims would be more closely aligned than they are at present with situations which are under the employer's control, with most private, non-work activity not being compensable.

Cost to employees

- workers' compensation eligibility for journey claims would be more restricted than at present.

Benefits to employees

- employees would continue to have workers' compensation eligibility for some non-work journeys.

Cost to Government

- some injuries which occur outside the workplace and are outside the Government's control as an employer would remain compensable; and
- there could be some scope for uncertainty and dispute between Comcare and claimants regarding application of the exclusion.

Benefits to Government

- the incidence and cost of compensable claims would be reduced which would provide scope for reduced workers' compensation premiums; and
- compensable claims would be more closely aligned than they are at present with situations which are under the employer's control, with most private, non-work activity not being compensable.

**Option 3 - Exclude all journey claims unless an integral part of employee's duties**

Cost to licensed self-insurers

- none readily identifiable.

Benefits to licensed self-insurers

- the incidence and cost of compensable claims and workers' compensation eligibility would be substantially reduced.

Cost to employees

- workers' compensation eligibility for journey claims which are not part of a worker's duties would be removed.

Benefits to employees

- none readily identifiable.

Cost to Government

- none readily identifiable.

Benefits to Government

- the incidence and cost of compensable claims would be reduced thus providing scope for reduced workers' compensation premiums.

**Recommended option**



The proposal to exclude all journey claims from workers' compensation coverage unless they are an integral part of an employee's duties (Option 3) is the preferred option.

As employers generally have no ability to control the risks associated with journeys in cases where these do not form an integral part of the employee's duties, they should not be exposed to liability for employees' injuries sustained during these journeys. It is important to note that these journeys are not regulated by occupational health and safety legislation. Furthermore, while such journeys are an inevitable part of meeting employment commitments, the mode and nature of the journey are not, in most circumstances, matters over which the employer can exercise any control.

Option 2, by contrast, would allow some workers' compensation coverage of journeys which do not comprise an integral part of an employee's duties and which are outside an employer's control. This option is not favoured for the above reasons.

## **Recess break claims**

### **Identification of Options**

#### *Option 1 – No change*

- Injuries sustained during an ordinary recess break will continue to be covered by workers' compensation, regardless of whether the recess break is undertaken on the employer's premises or away from the premises.

#### *Option 2 - Coverage for authorised recess breaks at the worker's place of employment and attendance at employer-sanctioned events but not for other recess breaks*

- This proposal provides workers' compensation eligibility for injuries incurred by an employee during an authorised break from work only while he or she remains in attendance at the employer's premises.
- It would also provide coverage for an employee's attendance at employer-sanctioned events (for example, a social activity approved or arranged by the employer or an event which the employer asks or directs the employee to attend).

#### *Option 3 - Coverage for recess break claims only if the activity which led to the injury was undertaken at employer-sanctioned events*

- This proposal would exclude workers' compensation coverage for injuries sustained by an employee during all recess breaks including those which the employee takes at the workplace.
- The only recess break injuries covered by workers' compensation would be those arising in the course of an employee's attendance at employer-sanctioned events (for example, a social activity approved or arranged by the employer or an event which the employer asks or directs employees to attend)

### **Impact Analysis**

The following analysis focuses on the impact of the above regulatory options on major stakeholders under the SRC Act, namely, licensed self-insurers, the Australian and ACT Governments, and employees of each category of employer.

### **Option 1 – No change**

#### Cost to licensed self-insurers

- workers' compensation eligibility would apply in the case of injuries sustained during recess breaks even where the employee's activities are outside the employer's control with subsequent impact and costs to the employer.

#### Benefits to licensed self-insurers

- none readily identifiable.

#### Cost to employees

- none readily identifiable.

#### Benefits to employees

- would continue to be fully covered by workers' compensation for injuries sustained during recess breaks.

#### Cost to Government

- workers' compensation eligibility would apply in the case of injuries sustained during recess breaks even where the employee's activities are outside the employer's control with subsequent impact on premium rates payable by the employer.

#### Benefits to Government

- none readily identifiable.

### **Option 2 – Coverage for authorised recess breaks at the employee's place of employment and attendance at employer-sanctioned events but not for other recess breaks**

#### Cost to licensed self-insurers

- none readily identifiable.

#### Benefits to licensed self-insurers

- the cost and incidence of compensable claims would be reduced; and
- workers' compensation coverage would be restricted to the employee's workplace or, for employer-sanctioned events, to the workplace or other venues. In both cases, the employer would have an element of control over the circumstances in which the recess break is taken or the event is conducted. These would also lead to a subsequent decrease in costs to the self-insurer.

#### Cost to employees

- workers' compensation eligibility for recess break injuries would be more restricted than at present.

#### Benefits to employees

- some recess breaks would remain compensable.

#### Cost to Government

- none readily identifiable.

#### Benefits to Government

- the cost and incidence of compensable claims would be reduced thus providing scope for reduced workers' compensation premiums; and
- workers' compensation eligibility would only apply to situations where the Government—as the employer—could exercise a degree of control.

### **Option 3 - Coverage for recess break claims only if the activity which led to the injury was undertaken at the request or direction of the employer**

Cost to licensed self-insurers

- none readily identifiable.

Benefits to licensed self-insurers

- the cost and incidence of compensable injuries and workers' compensation coverage would be reduced more than under Option 2; and
- workers' compensation eligibility would only apply to situations where the employer can exercise a degree of control over the employee.

Cost to employees

- workers' compensation eligibility for recess break claims would be restricted.

Benefits to employees

- employees would remain covered in circumstances where their activities are directed by their employer, including employer-sanctioned social and sporting events.

Cost to Government

- none readily identifiable.

Benefits to Government

- the cost and incidence of compensable claims would be reduced more than under Option 2; and
- workers' compensation eligibility would only apply to situations where the Government—as employer—can exercise a degree of control over the employee.

### **Recommended option**

The proposal to allow workers' compensation eligibility for injuries sustained during authorised recess breaks at the employee's place of employment and attendance at employer-sanctioned events but not for other recess breaks (Option 2) is the preferred option.

This option limits the employer's exposure to liability to circumstances where the employer has occupational health and safety obligations and an element of control—that is, over the workplace or the venue at which social or sporting events are conducted.

The preferred option has the advantages of ease of understanding and administrative simplicity for employers and employees, therefore minimising delays and scope for disputes as well as recognising the employer's obligation to provide a safe workplace at all times.

By contrast, Option 3 does not provide workers' compensation eligibility for injuries sustained during workplace recess breaks, and would not be consistent with the employer's obligations under the occupational health and safety legislation.

### **Consultation**

There has been consultation with Comcare, self-insurers and affected unions at meetings of the Safety, Rehabilitation and Compensation Commission over the past three years.

The Government also commissioned the Productivity Commission in March 2003 to assess possible models for establishing national frameworks for occupational health and safety and

workers' compensation arrangements. In preparing its report (finalised in March 2004), the Productivity Commission advertised in the national and metropolitan press for submissions; conducted public hearings and sought comments on its interim report.

The proposals regarding journeys to and from work and recess breaks draws on the recommendations of the Productivity Commission.

Employer groups who made submissions to the Productivity Commission argued that, as employers have no ability to control circumstances associated with journeys, these should not be covered by workers' compensation legislation. Unions, on the other hand, argued that journeys are simply a physical relocation of workers to their place of employment to undertake activities to the benefit of employers and so should be covered by workers' compensation.

With regard to recess break injuries, employer groups supported restricting coverage to recess breaks at the workplace and employer-sanctioned events, based on the lack of employer control elsewhere. Union groups considered that full coverage should be afforded to recess breaks and work-related events.

### **Implementation and review**

The SRC Act will require amendment for the proposed changes to the definitions of "disease" and "injury" and the journey claim and recess break provisions to be implemented. All provisions of the SRC Act are monitored by Comcare on an ongoing basis to ensure they are operating effectively and as intended under the legislation. Once implemented, the amendments will also be monitored to ensure that they operate as intended.

## **NOTES ON CLAUSES**

### **Clause 1 – Short title**

The enacted Bill will be known as the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2006*.

### **Clause 2 – Commencement**

Clause 2 specifies when the various provisions of the Act commence.

### **Clause 3 – Schedule(s)**

This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule. The Schedule contains amendments to the *Safety, Rehabilitation and Compensation Act 1988* and the *Military Rehabilitation and Compensation Act 2004*. Other items (eg transitional provisions) have effect according to their terms.

## SCHEDULE 1 – MAIN AMENDMENTS

### PART 1 - AMENDMENTS

#### ***Military Rehabilitation and Compensation Act 2004***

##### **Items 1 to 3 – Section 267**

These items amend section 267 of the *Military Rehabilitation and Compensation Act 2004* (the MRC Act) to increase the maximum funeral benefits payable.

Currently under section 267 of the MRC Act, compensation for the cost of a deceased person's funeral must not exceed \$ 5,117.23 (indexed in accordance with section 404).

Item 3 adds a new subsection 267(3). The new subsection increases the maximum lump sum amount of compensation for a funeral to \$9,000 (indexed in accordance with section 404). In addition, new paragraph 267(3)(b) enables the maximum amount of benefit to be increased by regulation should the indexation adjustments not keep pace with real costs. The regulation making power can only operate beneficially.

These amendments ensure parity with the increased funeral benefits payable under the SRC Act (see item 20).

##### **Item 4 – Paragraph 404(1)(m)**

This is a consequential amendment to the above items. Previously paragraph 404(1)(m) referred to section 267. This amendment now provides for the indexation provisions under section 404 to apply to the dollar amount in paragraph 267(3)(a).

#### ***Safety, Rehabilitation and Compensation Act 1988 (SRC Act)***

##### **Item 5 - Subsection 4(1) (definition of *disease*)**

Item 5 repeals the definition of *disease* and relocates the definition to new section 5B – see item 11.

##### **Item 6 - Subsection 4(1) (definition of *injury*)**

Item 6 repeals the definition of *injury* and relocates the definition to new section 5A – see item 11.

##### **Item 7 - Subsection 4(1)**

Item 7 inserts a definition of *retirement savings account*. Retirement savings accounts are to be included in the definition of *superannuation scheme* – see item 10.

##### **Item 8 - Subsection 4(1)**

Item 8 inserts a definition of *significant degree*. The meaning is given in subsection 5B(3) – see item 11.

**Item 9 - Subsection 4(1) (paragraph (a) of the definition of *suitable employment*)**

Item 9 amends the definition of *suitable employment* to allow consideration of a terminated employee's capacity to work outside Commonwealth employment (or employment by a licensed corporation) when calculating their weekly incapacity payments under section 19 of the SRC Act.

Under subsection 19(2) of the SRC Act, the amount of compensation payable to an incapacitated employee is reduced by the greater of either the amount the employee is able to earn in *suitable employment* or the amount the employee earns from any employment.

Currently *suitable employment* for a permanent employee (at date of injury) 'who did not subsequently terminate that employment', is defined as employment with the Commonwealth or the licensed corporation. It is appropriate that a permanent employee who remains employed by the Commonwealth or a licensed corporation should have *suitable employment* for them defined as *suitable employment* with the Commonwealth or the licensed corporation. However, where a permanent employee (at date of injury) is separated from their employment by management action (eg through invalidity retirement or some other method) the courts have held that *suitable employment* continues to mean suitable employment in the Commonwealth.

The impact of the current approach is that a permanent employee of the Commonwealth or licensed corporation on being separated by the employer from employment, and in receipt of weekly incapacity benefits, need make no effort to seek other employment but simply rely on the maximum compensation benefit.

The proposed amendment to the definition of *suitable employment* will:

- ensure that Comcare can take into account both actual and potential earnings when determining compensation amounts and that those amounts may be received from employment with the Commonwealth (or a licensed corporation) or any other type of employment; and
- facilitate the carrying out of the employer's duty under section 40 of the SRC Act of assisting an employee to find suitable employment including outside the APS.

**Item 10 - Subsection 4(1) (definition of *superannuation scheme*)**

Item 10 amends the definition of *superannuation scheme* to include *retirement savings account*.

Subsection 4(1) of the SRC Act defines *superannuation scheme* as any scheme under which the Commonwealth, Commonwealth authority or licensed corporation makes contributions on behalf of employees.

Where an employee is a member of a *superannuation scheme*, and the employee is subsequently retired and receives a superannuation benefit, Comcare may reduce the weekly compensation benefits as provided for by sections 20, 21 and 21A.

If the employee receives superannuation payments from a non-defined superannuation scheme, then those payments are not able to be taken into account.

The range of what is now thought of as superannuation funds has extended greatly over the last few years and in particular financial institutions have started to offer *retirement savings accounts* as an alternative to traditional superannuation.

The proposed amendment will extend the definition of *superannuation scheme* to include *retirement savings accounts*. The relevant retirement savings account has to be one to which the employer also made contributions, as it is only the employer's contributions that are taken into account for the purposes of sections 20, 21 and 21A.

### **Item 11 - Subsection 5**

Item 11 inserts new definitions of *injury* and *disease* replace definitions in subsection 4(1) – see items 5 and 6.

These amendments clarify the circumstances in which an employee is entitled to compensation for injury pursuant to the SRC Act.

#### New section 5A – Definition of *injury*

The new definition retains all the elements of the existing definition of *injury* but extends the exclusionary provisions.

The existing definition of *injury* excludes any disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment. The new definition makes it clear that the exclusions will extend to all reasonable management activities.

New subsection 5A(1) will provide that a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment is excluded from the definition of *injury*.

New subsection 5A(2) provides a non-exhaustive list of matters that may be taken to come within the term *reasonable administrative action*. These include:

- a reasonable appraisal of the employee's performance;
- a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;
- a reasonable suspension action in respect of the employee's employment;
- a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;
- a reasonable action done in respect to any of the above; and
- a reasonable action done in connection with an employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.



New section 5B – Definition of *disease*

The SRC Act currently defines *disease* to mean an ailment or aggravation that was ‘contributed to *in a material degree* by the employee’s employment by the Commonwealth or a licensed corporation’.

The initial legislative intent was to establish a test requiring a claimant to prove that his or her employment was ‘more than a mere contributing factor in the contraction of the disease’ (see the Second Reading speech to the *Commonwealth Employees’ Rehabilitation and Compensation Act 1988* – subsequently renamed as the SRC Act). The phrase ‘contributed to in a material degree’ was intended to ensure that the Commonwealth was not liable to pay compensation for diseases which have little, if any, connection with employment.

However, the courts have read down the expression ‘in a material degree’ to emphasise the causal connection between the employment and the condition complained of rather than the extent of the contribution. The purpose of the proposed amendment is to assist in reinstating the intended policy behind the Commonwealth workers’ compensation scheme by limiting access to compensation claims for diseases to which work has only made a very minor contribution.

New subsection 5B(1) defines *disease* to mean an ailment suffered by an employee, or an aggravation of such an ailment, that was contributed to, to a *significant degree*, by the employee’s employment by the Commonwealth or a licensee.

New subsection 5B(3) then defines *significant degree* to mean a degree that is substantially more than material.

This amendment has become necessary as the courts have read down the expression ‘in a material degree’. Section 4(1) of the SRC Act currently defines ‘disease’ as meaning any ailment suffered by an employee; or the aggravation of any such ailment that was contributed to in a material degree by the employee’s employment.

In the Second Reading speech to the [SRC] Bill in 1988, the then Minister said:

Under the existing Act an employee was required to establish only that his or her employment was a contributing factor in the contraction of the disease. This test does not adequately reflect the rights and obligations of the Commonwealth and its employees ... and frequently results in the Commonwealth being liable to pay compensation for diseases which have little, if any, connection with employment. This Bill seeks to remedy that situation by requiring an employee to show that his or her employment contributed in a material degree to the contraction of the disease. ... It is intended that the test will require an employee to demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease.

Notwithstanding the policy expressed in the Second Reading speech, the courts have read down the expression ‘in a material degree’.

In *Treloar v Australian Telecommunications Commission* (1990) (26 FCR 316), the Full Federal Court in discussing the use of the word ‘material’, though in relation to the earlier 1971 legislation, stated:

The use of the word ‘material’ in conjunction with the words ‘contributing factors’ in the legislation, where it has occurred in expositions of the section in other cases clearly is not

intended to add to the section any significance which is not already to be found in the words used by the legislature. It has served only to emphasise that the section is not brought into play unless it be established by evidence that features of the employment did in fact and in truth contribute to the condition complained of. The causal connection must be established on the probabilities and not left in the area of possibility or conjecture. Once the link is established, however, it matters not that the contribution be large or small (p 323).

In *Suters v Australian Postal Corporation* (1992) (28 ALD 320), Ryan J commented

Although it is true that *Treloar's* case was expressly limited to a consideration of the 1971 Act, in which the word 'material' did not appear, the case none the less contains a valuable exposition of the meaning of that word to which courts and tribunals are entitled to have regard when considering legislation containing it (p 331).

New subsection 5B(2) provides that in determining whether the *disease* was contributed to, to a *significant degree*, by the employee's employment, a number of factors may be taken into account. The factors include, but are not limited to:

- the duration of the employment;
- the nature of, and particular tasks involved in, the employment;
- any predisposition of the employee to the disease;
- any activities of the employee not related to his or her employment; and
- any other matters affecting the employee's health.

#### **Item 12- Paragraph 6(1)(b)**

#### **Item 13- Subsection 6(2)**

These items amend section 6 of the SRC Act which deals with the circumstances in which an injury to an employee may be treated as having arisen out of, or in course of, his or her employment. Paragraph 6(1)(b) currently provides that injuries incurred by an employee during temporary absences from the workplace during an ordinary recess or while travelling may be treated as having arisen out of, or in the course of, the employee's employment.

Item 12 repeals paragraph 6(1)(b) and substitutes new provisions which aim to clarify the circumstances in which an injury to an employee may be treated as having arisen out of, or in the course of, his or her employment.

#### *Recesses and absences from the workplace*

Currently, subparagraph 6(1)(b)(i) of the SRC Act provides that an injury sustained while the employee was at his or her place of work, for the purposes of that employment, or was temporarily absent from that place during an ordinary recess in that employment, will be an injury 'arising out of, or in the course of', that employment.

In its March 2004 report on *National Workers' Compensation and Occupational Health and Safety Frameworks*, the Productivity Commission recommended that coverage for recess breaks and work-related events should be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events. The amendments reflect this approach.

The amendments will provide that injuries incurred while an employee was temporarily absent from the workplace during an ordinary recess in employment will generally not be injuries arising out of, or in the course of, employment. For example, an employee who leaves his or her

workplace at lunch time to buy a sandwich will not be covered by the SRC Act while he or she is absent from the workplace.

However, the amendments do not affect:

- injuries incurred by an employee during an ordinary recess at the workplace – new paragraph 6(1)(b); and
- injuries incurred by an employee while the employee is temporarily absent from his or her workplace undertaking an activity associated with the employment or at the direction or request of the employer – new paragraph 6(1)(c).

In contrast to the example above, an employee who remains at the workplace at lunch time and eats their sandwich in the amenities room or purchases it in the staff canteen will be covered by the SRC Act during that break.

### *Journeys*

Section 6 currently provides that when an employee undertakes certain specified journeys he or she is deemed to be in the course of his or her employment. This covers not only journeys to and from work but also a number of other journeys, for example, journeys between work or residence and place of education.

In its March 2004 report on *National Workers' Compensation and Occupational Health and Safety Frameworks*, the Productivity Commission recommended that 'coverage for journeys to and from work not be provided, on the basis of lack of employer control, [and] availability of alternative cover in most instances'. The Government supported these recommendations in principle.

New paragraph 6(1)(d) will provide that the SRC Act will apply to injuries that occur while the employee was travelling, at the request or direction of the employer, for the purposes of the employment.

Paragraphs 6(1)(e) and (f) retain the previous provisions which applied coverage under the Act to:

- attendance at places of education where required, directed or with the approval of the employer
- obtaining a medical certificate or receiving medical treatment for any injury
- undergoing a medical examination, rehabilitation assessment as required under the Act
- undergoing a rehabilitation program
- receiving payment of compensation
- at a place to receive money due to him or her under the terms of his or her employment.

Item 13 inserts new subsections 6(1C) and (2).

New subsection 6(1C) makes clear that normal travel between an employee's residence and usual place of work is not taken at the direction or request of the employer.

New subsection 6(2) makes clear that travel for the purposes of paragraphs 6(1)(e) and (f) is not covered by the Act.

These amendments to section 6 address a concern that employers are being held liable for injuries for the activities of their employees that are beyond their control. The amendments also seek to align liability for workers' compensation with employer duties under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the OHS Act). Under the OHS Act an employer has a duty of care and must take all reasonably practicable steps to protect the health and safety of workers at the workplace. This duty of care does not apply once an employee leaves the workplace to undertake his or her own private pursuit, eg to go shopping at lunch time.

Workers' compensation will continue to be payable in respect of injuries arising from circumstances where an employer is able to take reasonably practicable steps to protect an employee, eg when the employee remains at the workplace during a recess or leaves the workplace for the purposes of his or her employment or at the employer's direction.

**Item 14 - Subsections 7(1), (2) and (3)**

This item amends section 7 as a consequence of the proposed amendment to the definition of *disease* – see item 11.

Section 7 deals with matters relating to diseases under the SRC Act and accordingly references in the section to 'in a material degree' are replaced with 'to a significant degree'.

**Item 15 - After subsection 8(9D)**

This item amends section 8 of the SRC Act by inserting new subsections 8(9E), (9F) and (9G).

Section 8 of the SRC Act makes reference to the calculation of an injured employee's normal weekly earnings (NWE). NWE is used as the basis for calculating an employee's weekly incapacity benefit under section 19 of the SRC Act.

Subsections 8(6), 8(7), 8(9) and 8(9A) deal with how a person's NWE is to be adjusted following general wage increases and the like where the person continues in employment. These provisions were drafted when wage increases predominantly either came through promotion and/or through general wage rises. These general wage rises would apply to a readily identifiable class and there was normally no difficulty in identifying the wage increase applicable to the employee, particularly if they remained in Commonwealth employment. However today wages are predominantly enterprise or individually based. As a result, subsections 8(6), 8(7), 8(9) and 8(9A) have become less relevant and more difficult to apply.

New subsections 8(9E), (9F) and (9G) provide for a current employee's NWE to be updated by reference to a prescribed index, where the NWE cannot otherwise be updated under the existing provisions of section 8.

The indexation date has been identified as 1 July following the date on which the Act receives the Royal Assent. The index is applicable over the one year ending on 31 December preceding each indexation date. Regulations may specify the manner in which the increase is calculated by reference to the prescribed index.

**Item 16 - Subsection 13(1) (definition of *relevant amount*)**

Section 13 of the SRC Act provides for the indexation of some forms of compensation payable under the Act, including amounts payable for funerals. Section 18 which deals with payment of compensation for funerals is being amended by items 19 and 20. This amendment is consequential to the amendments to section 18, and inserts a reference to a new paragraph 18(4)(a). The indexation provisions under section 13 are to apply to the new paragraph.

**Item 17 - Paragraph 16(4)(a)**

**Item 18 - Paragraph 16(4)(c)**

Comcare will be able to make direct payments to the providers of medical treatment.

Subsection 16(1) of the SRC Act provides that, in respect of a compensable injury, Comcare is liable to pay the cost of medical treatment, reasonably obtained. Subsection 16(4) then provides that the amount payable by Comcare under subsection 16(1) is payable to, or in accordance with the directions of, the employee. The majority of medical accounts, however, are lodged directly with Comcare by medical practitioners themselves or by employees in the expectation that they will be paid but without any direction by the employee to this effect.

These amendments deal with these situations, and will provide that:

- if the employee has paid the account, reimbursement of the cost of the medical treatment will be at the direction of the employee, which may be to the employee – amended paragraph 16(4)(a); and
- if the cost of the medical treatment has not been paid, then Comcare may make the payment direct to the person to whom the cost is payable, without needing to seek a direction from the employee – new paragraph 16(4)(c).

**Items 19 and 20 - Section 18**

These items amend section 18 of the SRC Act to increase the maximum funeral benefits payable.

Currently under section 18 of the SRC Act, compensation for the cost of a deceased person's funeral is limited to \$ 3,500 (indexed in accordance with section 13).

Item 20 adds a new subsection 18(4). The new subsection increases the maximum lump sum amount of compensation for a funeral to be set at \$9,000 (indexed in accordance with section 13). In addition, new paragraph 18(4)(b) enables the maximum amount of benefit to be increased by regulation should the indexation adjustments not keep pace with real costs. The regulation-making power can only operate beneficially.

Although section 13 of the SRC Act provides for annual adjustment of funeral benefits by the Consumer Price Index (CPI), these adjustments have not kept pace with actual increases in funeral costs. The proposed amendments would apply a new maximum funeral benefit of \$9000 subject to existing CPI adjustment arrangements. This new amount aligns with benefits payable in NSW while avoiding the open-ended funding provided by schemes in Queensland and Tasmania.

These amendments are also consistent with the increased funeral benefits payable under the MRC Act (see items 1-3).

**Item 21 - Subsection 20(1)**

**Item 23 – Subsection 21(1)**

**Item 25 – Subsection 21A(1)**

These items repeal the current subsections and substitute new subsections 20(1), 21(1) and 21A(1).

Sections 20, 21 and 21A currently ensure that where an employee is in receipt of weekly incapacity payments and is also in receipt of superannuation benefits, the weekly compensation payments may be reduced by taking into account the superannuation benefits. The subsections apply to an employee who, ‘being incapacitated for work ... retires voluntarily, or is compulsorily retired’.

In the Federal Court decision of *Lonergan v Comcare* [2005] FCA 377, Heerey J considered the meaning of the words ‘being incapacitated’ and found that the use of the present tense ‘being’ requires the incapacity for work to exist at the same point in time as the retirement.

The effect of this decision is that an employee who was incapacitated on the day before, or the day after their retirement (but not on the actual day of their retirement) will receive incapacity payments unaffected by any superannuation entitlement. On the other hand, an employee who happened to be incapacitated on the day of their retirement will receive a reduced level of incapacity payments on the basis of their superannuation entitlement.

The new subsections have been drafted to make clear that irrespective of the actual date of retirement, if the employee has an entitlement to weekly incapacity payments and also has a superannuation entitlement, then the weekly compensation payments are to be adjusted in accordance with the remainder of the relevant section.

**Item 22 - Subsection 20(3)**

**Item 24 – Subsection 21(3)**

**Item 26 – Subsection 21A(3)**

**Item 27 - Subsection 21A(4)**

These items repeal the relevant subsections and substitute new subsections 20(3), 20(4), 21(3), 21(4), 21(5), 21A(3) and 21A(4).

Subsection 20(3) sets out the formula to be used in calculating the *amount of compensation* payable to an employee who is retired and in receipt of a weekly superannuation benefit. Subsection 21(3) sets out the formula to be used in calculating the *amount of compensation* payable to an employee who is retired and received a lump sum superannuation benefit, while subsection 21A(3) sets out the formula to be used in calculating the *amount of compensation* payable to an employee who is retired, receives a superannuation pension and received a lump sum superannuation benefit.

The new formulas provide that the weekly *amount of compensation* payable in accordance with section 19 is reduced by the combined *superannuation amount* (which may include deemed interest on the superannuation lump sum) and 5% of the employee’s normal weekly earnings. *Superannuation amount* is defined in subsection 4(1) and an employee’s normal weekly earnings are calculated under section 8.

One substantive change that applies to all the formulas is that a set 5% of the employee's normal weekly earnings is to be taken into account in reducing the employee's compensation payments.

The policy intention of the SRC Act is for retired employees on incapacity benefits who are in receipt of superannuation amounts to receive 70% of their normal weekly earnings. When the SRC Act commenced, employees contributed a minimum of 5% of their normal weekly earnings (NWE) to the Commonwealth Superannuation Scheme. The reduction in retirees' incapacity benefits from 75% to 70% of NWE was based on the rationale that had the recipient not retired, he or she would have been required to continue making the 5% superannuation contribution. The 5% contribution was taken as the benchmark so all retired employees' weekly compensation payments were reduced by this amount, referred to as the 'notional superannuation contribution'.

The level of the notional superannuation deduction depends on the minimum amount the employee is required to contribute to their superannuation fund. Since the introduction of this provision in 1988, Commonwealth public servants and those covered by the SRC Act now belong to a range of superannuation schemes under which different minimum contributions may be made. The Public Sector Superannuation (PSS) scheme requires a minimum 2% employee contribution up to a maximum of 10%. Therefore, employee contributions under the PSS scheme may vary from 2% to 10% at the employee's discretion. Other employees covered by the Act may be members of funds which do not require a minimum contribution. Retired employees do not have any deduction made from their incapacity payments.

To restore the original policy intention of the Act, the new formulas set a standard compensation payment at 70% of NWE for all employees to whom sections 20, 21 and 21A apply.

Notwithstanding the change to the formulas, new subsection 20(4), 21(4) and 21A(4) have the effect of continuing to apply the notional superannuation contribution rate as the amount to be deducted from the compensation payable, for those employees who retired before the new formulas commenced. The new provisions will apply prospectively and not retrospectively.

The other substantive change to the formulas, which applies only to subsections 21(3) and 21(4) is that, under the new formulas the interest rate applying to lump sums will be that set under the new subsection 21(5). The Government has agreed that the current deemed interest rate of 10% is too high and the revised formulas combined with the new subsection 21(5) will allow the Minister to set the interest rate at a level that better reflects the rate that an employee could expect to earn if the lump sum were invested.

Under new subsection 21(5), the Minister for Employment and Workplace Relations would issue an instrument each year (to apply from 1 July) setting the deemed interest rate for the following 12 months. Currently it is anticipated that this would be based on the 10-year Government bond rate for the previous 12 months. This would allow the deeming rate to be adjusted to market interest rates as they fluctuate from time to time. This is a beneficial provision as it will allow the interest rates to be set at a lower rate than that currently contained in the Act.

#### **Item 28 - Subsection 28(4)**

The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* amended subsection 4(1) of the Act to insert a definition of 'licensee'. 'Licensee' means a Commonwealth authority or a corporation that is licensed, or that is taken to be licensed, under Part VIII.

This item replaces the separate references to ‘licensed authority’ and ‘licensed corporation’ with a single reference to ‘licensee’.

**Item 29 - Subsections 37(1) and (2)**

Subsections 37(1), (2) and (2A) are repealed and replaced.

These are technical amendments that correct an anomaly that arose out of an earlier amendment to section 37 of the SRC Act by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* (SRCOLA Act).

In removing a redundant reference to ‘an approved program provider’ the SRCOLA Act amendments had the unintended consequence of restricting the provision of all rehabilitation programs to approved providers. As originally enacted in 1988, subsections 37(1) and (2) enabled an employer to use a departmental officer (case manager) to develop and provide an internal rehabilitation program. If the case manager decided that an external rehabilitation provider was required, then that provider had to be one approved by Comcare.

In its current form – as amended by the SRCOLA Act – subsection 37(2) does not allow a case manager to develop and deliver an internal rehabilitation program.

The proposed new subsection 37(1) provides that a rehabilitation authority may make a determination that an injured employee should undertake a rehabilitation program.

New subsection 37(2) provides that, if the rehabilitation authority has made a determination under subsection 37(1), the rehabilitation authority may provide the rehabilitation program itself, or make arrangements with a Comcare approved rehabilitation provider to provide the program.

**Item 30 - Subsection 48(3)**

Subsection 48(3) of the SRC Act currently provides that where an employee recovers damages, and compensation has been paid to the employee, Comcare may recover the compensation paid or the amount of the damages whichever is the lesser. As currently drafted, the subsection refers to the compensation recoverable as being ‘any compensation under this Act [that] was paid to the employee in respect of the injury, loss or damage’.

The amendments to subsection 48(3) make clear that Comcare may recover all medical expenses paid directly to medical service providers under amended section 16 – see items 17 and 18.

**Item 31 - Paragraph 50(7)(a)**

Section 50 of the SRC Act provides for Comcare to take over or institute a damages action on behalf of an employee or dependant of a deceased employee.

Subsection 50(7) currently provides that if Comcare obtains any damages, then Comcare must deduct from the damages the amount of compensation paid to the employee or the dependant, including any costs incidental to the claim. The balance of the damages is then payable to the employee or the dependant.



The amendments to paragraph 50(7)(a) provide that Comcare may recover from any damages paid to the employee all medical expenses paid direct to medical service providers under amended section 16 – see items 17 and 18. This is a clarification of current policy and practice.

**Item 32 - Subsection 73A(2)**

The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* amended subsection 4(1) of the Act to insert a definition of ‘licensee’. ‘Licensee’ means a Commonwealth authority or a corporation that is licensed, or that is taken to be licensed, under Part VIII.

This item replaces the references to ‘licensed authority’ with a reference to ‘licensee’.

**Items 33 and 34 - Section 73A**

These items make minor technical changes to section 73A of the SRC Act.

The items repeal subsections 73A(2A), (6), (7) and (8) and re-enact the substantive provisions of these sections in the new subsection (6).

The amendments have arisen because:

- with the new definition of licensee, the separate references to licensed corporation and licensed authority in section 73A are unnecessary
- subsection 108M was repealed by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* and accordingly the reference in subsection 73A(8) is obsolete
- the current subsection 73A(7) is unnecessary. Comcare subsidiaries are currently covered by subsection 73A(8), and will be covered by the proposed new subsection 73(6).

**Item 35 - Paragraph 89B(a)**

This item repeals paragraph 89B(a) of the SRC Act and substitutes a new paragraph.

Section 89B sets out the functions of the Safety, Rehabilitation and Compensation Commission (the Commission). Paragraph 89B(a) provides that one of the Commission’s functions is to ensure that, as far as practicable, there is no inconsistency in administrative practices and procedures used by Comcare, a licensed authority and a licensed corporation in the performance of their respective functions. This provision reflects the functions of licensees under the previous Part VIIIA and Part VIIIB which were repealed by the SRCOLA Act and replaced by section 108E. The new paragraph 89B(a) is consistent with paragraph 108E(c).

**Item 36 - Paragraph 89S(2)(c)**

The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* amended subsection 4(1) of the Act to insert a definition of ‘licensee’. ‘Licensee’ means a Commonwealth authority or a corporation that is licensed, or that is taken to be licensed, under Part VIII.

This item replaces the separate references to ‘licensed authority’ and ‘licensed corporation’ with a single reference to ‘licensee’.

**Item 37 - At the end of Division 6 of Part VIII**

This item inserts a new section 108H which allows a licensed Commonwealth authority, through its principal officer, to delegate all or any of its powers or functions under the Act.

When the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* Act repealed Parts VIIIA and VIIB of the SRC Act, one of the sections which was repealed as part of that process was section 107T. This section provided for the delegation by the principal officer of a Commonwealth authority, all or any of the powers and functions of the licensed authority under the SRC Act to an officer or employee of that authority, the Commonwealth or any other Commonwealth authority.

The delegation power is still required and the new section 108H replicates the previous section 107T which was repealed in error.

**Item 38 - Section 121A**

The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* amended subsection 4(1) of the Act to insert a definition of ‘licensee’. ‘Licensee’ means a Commonwealth authority or a corporation that is licensed, or that is taken to be licensed, under Part VIII.

This item replaces the separate references to ‘licensed authority’ and ‘licensed corporation’ with a single reference to ‘licensee’.

**Item 39 - Section 122**

This item repeals the section and substitutes a new regulation making provision.

The existing regulation making power in the SRC Act only allows the Governor-General to make regulations in relation to matters *required or permitted* by the SRC Act. In this respect, it may be narrower than the standard Commonwealth regulation making power which also enables the making of regulations that are *necessary and convenient* for the purposes of carrying out or giving effect to the Act.

The new section 122 reflects the standard regulation making power contained in most Commonwealth legislation.

## **PART 2 – APPLICATION, SAVING AND TRANSITIONAL PROVISIONS**

### **Item 40 - Maximum amount of funeral benefit under section 267**

This item provides that the increased funeral benefits available under amendments to section 267 of the *Military Rehabilitation and Compensation Act 2004* apply in respect of deaths which occur on or after the day this Act received Royal Assent.

### **Item 41 - application of amendment of the definition of *disease* (section 5B)**

This item provides that the amendments to the definition of *disease* in section 5B of the SRC Act should apply in respect of ailments or aggravations suffered on or after the day this Act received Royal Assent.

This item also makes it clear that an employee will be deemed to have suffered an ailment or aggravation in accordance with subsection 7(4) of the SRC Act.

### **Item 42 Application of amendment of the definition of *injury* (section 5A)**

This item provides that the amendments to the definition of *injury* in section 5A of the SRC Act apply in respect of a disease, injury or aggravation sustained on or after the day this Act received Royal Assent.

### **Item 43 Application of amendment of definition of *suitable employment***

This item provides that amendments to the definition of *suitable employment* in section 4(1) of the SRC Act apply in respect of determinations of incapacity payments which are made in relation to periods of incapacity beginning on or after the day this Act received Royal Assent.

### **Item 44 - Application of amendments relating to when an injury arises out of or in the course of employment (section 6)**

This item provides that the amendments to section 6 of the SRC Act, which clarify when compensation will be payable for injuries occurring when an employee is on an ordinary recess break or travelling, apply in respect of injuries sustained on or after the day this Act received Royal Assent.

### **Item 45 - Maximum amount of funeral benefit under section 18**

This item provides that the increased funeral benefits available under amendments to section 18 of the SRC Act apply in respect of deaths which occur on or after the day this Act received Royal Assent.

### **Item 46 - Application of amendments of sections 20, 21 and 21A**

This item provides that amendments to subsections 20(1), 21(1) and 21A(1) of the SRC Act, which relate to eligibility for compensation for injuries resulting in incapacity, apply in respect of a retirement that takes place on or after the day this Act received Royal Assent.

This item also provides that the amendments to subsections 20(3), 21(3) and 21A(3), which alter the formulas used to calculate incapacity payments, should apply to determinations made in the period beginning from the date of commencement of these amended provisions.

**Item 47 - Transitional provisions for specifying a rate under subsection 21(5)**

Item 24 of these amendments insert a new subsection 21(5) which provides that the Minister may, by legislative instrument, specify a rate of weekly interest to be applied on a lump sum benefit paid under a superannuation scheme for the purposes of sections 21 and 21A of the SRC Act. This item provides that the Minister may specify a rate under subsection 21(5) that applies for the period beginning on the day after this Act received Royal Assent and ending on the next 30 June.

**Item 48 - Saving provision for regulations in force under section 122**

This item will preserve Regulations developed under section 122 of the SRC Act which were in force immediately before the day after this Act received Royal Assent.

## **SCHEDULE 2 – TECHNICAL AMENDMENTS RELATING TO LEGISLATIVE AMENDMENTS**

Schedule 2 of the Bill makes a number of technical amendments to the SRC Act as a consequence of the commencement of the *Legislative Instruments Act 2003* on 1 January 2005. Schedule 2 amends provisions in the SRC Act essentially to replace references to “instrument in writing”, “notice in writing”, “written declaration” and “written determination” with “legislative instrument”, with the latter being subject to the requirements of the *Legislative Instruments Act 2003*, rather than the *Acts Interpretation Act 1901*. The amendments do not in any way affect the operation of the provisions of the SRC Act.

### **Item 1 - Subsection 4(1) (paragraph (a) of the definition of *Commonwealth authority*)**

This item amends the subsection by omitting the reference to “notice in writing” and substituting a reference to “legislative instrument”.

This amendment is consequential on the commencement of the *Legislative Instruments Act 2003* on 1 January 2005.

### **Item 2 - Subsection 4(1) (at the end of paragraph (a) of the definition of *Commonwealth authority*)**

This item is a drafting amendment which inserts the word “or” at the end of paragraph (a) of the definition of Commonwealth authority.

### **Item 3 - Subsection 4(1)**

This item is similar to item 1 and amends the subsection by omitting the reference to “notice in writing” and substituting a reference to “legislative instrument”.

### **Item 4 - Subsection 4(1) (at the end of paragraph (b) of the definition of *Commonwealth authority*)**

This item is a drafting amendment which inserts the word “or” at the end of paragraph (b) of the definition of Commonwealth authority.

### **Item 5 - Subsection 4(1) (subparagraph (c)(iii) of the definition of *Commonwealth authority*)**

### **Item 6 - Subsection 4(1) (subparagraph (d)(ii) of the definition of *Commonwealth authority*)**

### **Item 7 - Subparagraphs 5(2)(c)(i) and (ii)**

Items 5, 6 and 7 are similar to item 1 and amend subsections 4(1), 5(2)(c)(i) and 5(2)(c)(ii) by omitting references to “notice in writing” and substituting references to “legislative instrument”.

### **Item 8 - Subsection 5(6)**

### **Item 9 - Subsection 5(6A)**

Items 8 and 9 are similar to item 1 and amend subsections 5(6) and 5(6A) by omitting references to “notice in writing” and substituting references to “legislative instrument (the *notice*)”.

**Item 10 - Subsection 5(12)**

This item is similar to item 1 and amends the subsection by omitting the reference to “make a written declaration” and substituting a reference to “by legislative instrument, declare”.

**Item 11 - After subsection 5(13)**

**Item 12 - At the end of section 5**

Items 11 and 12 amend section 5 by inserting new subsections 5(13A) and 5(16) to make clear that declarations made under subsections 5(13) and 5(15) are not legislative instruments. The Office of Legislative Drafting and Publishing has advised that declarations under subsections 5(13) and 5(15) are not instruments of a legislative character because they apply the law set out in the SRC Act to particular bodies and persons and do not determine, or alter the content of, the law. Unlike subsection 5(12) they are also not expressed to be disallowable instruments for the purposes of the *Acts Interpretation Act 1901*.

**Item 13 - Paragraph 7(1)(b)**

**Item 14 - Paragraph 7(1)(b)**

Items 13 and 14 are similar to item 1 and amend the paragraph by omitting the reference to “notice in writing” and “notice” and substituting references to “, by legislative instrument” and “the instrument”.

**Item 15 - Paragraph 16(6)(c) (definition of *specified rate per kilometre*)**

Items 15 is similar to item 1 and amends paragraph 16(6)(c) by omitting reference to “by notice” and substituting reference to “, by legislative instrument”.

**Item 16 - Subsection 26(3)**

This item is similar to item 1 and amends the subsection by omitting the reference to “notice in writing” and substituting a reference to “legislative instrument”.

**Item 17 - Subsection 28(3)**

**Item 18 - After subsection 28(3)**

**Item 19 - Subsections 28(7), (9) and (10)**

Items 17, 18 and 19 deal with the application of the *Legislative Instruments Act 2003* to the Comcare “Guide to the Assessment of the Degree of Permanent Impairment”.

Item 17 repeals subsection 28(3) and inserts a new subsection which provides that the Guide, or a variation or revocation of the Guide, must be approved by the Minister.

Item 18 inserts a new subsection 28(3A) which then makes clear that the Guide, or variation of revocation of the Guide, is a legislative instrument that is made on the day on which it is approved by the Minister. Notwithstanding that the legislative instrument is made on the day of Ministerial approval, the legislative instrument takes effect in accordance with section 12 of the *Legislative Instruments Act 2003*.

Item 19 is a consequential amendment to the above items. It repeals subsections 28(7), 28(9) and 28(10) because, as the approved guide is held to be a legislative instrument under the *Legislative Instruments Act 2003*, these subsections are no longer necessary.

**Item 20 - Subsection 30(4)**

**Item 21 - Subsection 34D(1)**

**Item 22 - Subsection 34D(3)**

Items 20 and 21 are similar to item 1 and amend subsections 30(4) and 34D(1) by omitting references to “notice in writing” and “instruments in writing” and substituting references to “legislative instrument”.

Item 22 is a consequential amendment to item 21. It repeals subsection 34D(3), because, as the instrument is a legislative instrument under the *Legislative Instruments Act 2003*, there is no longer a requirement to publish the criteria determined under 34D(1) in the *Gazette*.

**Item 23 - Subsection 34E(1)**

**Item 24 - Subsection 34E(3)**

Item 23 is similar to item 1 and amends the subsection by omitting the reference to “notice in writing” and substituting a reference to “legislative instrument”.

Item 24 is a consequential amendment to item 23. It repeals subsection 34E(3), because, as the instrument is a legislative instrument under the *Legislative Instruments Act 2003*, there is no longer a requirement to publish the criteria determined under 34D(1) in the *Gazette*.

**Item 25 - Subsection 34S(1)**

This item is a drafting amendment which amends the subsection by omitting the number “(1)” as a consequence of the repeal of subsection 34S(2) at item 27.

**Item 26 - Subsection 34S(1)**

**Item 27 - Subsection 34S(2)**

Item 26 is similar to item 1 and amends the subsection by omitting the reference to “instrument in writing” and substituting a reference to “legislative instrument”.

Item 27 is a consequential amendment to item 26. It repeals the subsection because, as the instrument is a legislative instrument under the *Legislative Instruments Act 2003*, it is no longer necessary to specify that the instrument is a disallowable instrument for the purposes of the *Acts Interpretation Act 1901*.

**Item 28 - Subsection 57(6)**

This item is similar to item 1 and amends the subsection by omitting the reference to “notice in writing” and substituting a reference to “legislative instrument”.

**Item 29 - Section 97P**

This item is similar to item 1 and amends the subsection by omitting the reference to “notice in the *Gazette*” and substituting a reference to “legislative instrument”.

**Item 30 - Section 100**

This item is similar to item 1 and amends the subsection by omitting the reference to “notice in writing” and substituting a reference to “legislative instrument”.

**Item 31 - At the end of subsection 101(1)**

This is a consequential amendment which amends the subsection by moving the note previously located in subsection 101(2) to the end of this subsection.

**Item 32 - Subsection 101(2)**

This item amends the subsection by making it clear that section 42 of the *Legislative Instruments Act 2003*, which provides for certain legislative instruments to be disallowable, applies to directions given by the Minister to the Commission under section 89D, relating to licences. This item also repeals the note at the end of the subsection as the note has now been incorporated as part of the new subsection 101(1).

**Item 33 - Subsection 114D(3)**

**Item 34 - Subsection 114D(4)**

Item 33 is similar to item 1 and amends the subsection by omitting the reference to “written determination given to the Chief Executive Officer” and substituting a reference to “legislative instrument”.

Item 34 is a consequential amendment to item 33. It repeals subsection 114D(4), as item 33 makes the determination a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

In accordance with the original policy under the SRC Act which required the Minister to give a copy of a determination to each House of Parliament after the making of the determination, this subsection makes it clear that section 42 of the *Legislative Instruments Act 2003* does not apply to this subsection.

**Item 35 - Subsection 119(7) (definition of *specified law*)**

This item is similar to item 1 and amends the subsection by omitting the reference to “notice in writing” and substituting a reference to “legislative instrument”.

**Item 36 - Section 121**

This item repeals section 121 because, as other amendments define instruments as legislative instruments under the *Legislative Instruments Act 2003*, this provision is otiose.

**Item 37 - Subsection 150(1)**



**Item 38 - Subsection 150(2)**

**Item 39 - Subsection 150(4)**

Item 37 is similar to item 1 and amends the subsection by omitting the reference to “prepare and issue to the Chair of the MRCC written” and substituting a reference to “, by legislative instrument, make”.

Items 38 and 39 are consequential amendment to item 37. Previously subsection 150(2) referred to the Commission’s ability to “issue” guidelines, and subsection 150(4) referred to instruments which have been “issued”. The amendment at item 38 provides for the Commission’s ability to “make” guidelines, and the amendment at item 39 refers to instruments which have been “made under”, to ensure that wording is consistent with the amended subsection 150(1).

**Item 40 - Subsection 150(5)**

This item repeals subsection 150(5) because, as the instruments are held to be legislative instruments under the *Legislative Instruments Act 2003*, it is not necessary to provide that these instrument are disallowable for the purposes of the *Acts Interpretation Act 1901*.