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The Secretary  
Standing Committee on Employment and Workplace Relations  
House of Representatives  
Parliament of Australia,  
Parliament House, Canberra, ACT

Dear Sir,

The Superannuated Commonwealth Officers Association (SCOA) welcomes this opportunity to make a submission to the Committee and its inquiry into workers compensation schemes. This submission picks up issues relevant to point 2 (b) of the Committee's Terms of Reference which relate in part to the obligations of employers.

SCOA has been involved with workers compensation casework, including representing individuals. SCOA is a not for profit national association of 80 years standing. It represents the superannuation and retirement income interests of a constituency that covers retired Commonwealth employees and their families. Current Commonwealth employees are also eligible to seek SCOA membership and its support networks in each State and the ACT.

The Association has several dedicated people in its ACT Branch, who have built up experience in dealing with workers compensation cases (since before the 1988 SRC legislation) involving Commonwealth employing departments and compensation administration. The ACT Branch has prepared this submission in consultation with SCOA's Federal Office.

It is from our collective experience that we would like to comment on the following:

- a) Issues relevant to efficient operation of workers compensation arrangements at the Commonwealth level.
- b) Appropriate application of relevant legislation and impact on employer obligations and client rights.
- c) The desirability of regular compliance auditing activity by the Australian National Audit Office regarding compensation administration.

As an Association, we have an interest in ensuring that the overall policy framework governing workers compensation is right and operating effectively.

Our submission also draws the Committee's attention to a specific case- that of some 100 NSW firefighters transferred from the NSW Fire Brigade to the Commonwealth in 1976 and then subsequently in 1989, to the ACT Government. A basis of the transfer was that workers compensation, superannuation and related rights applying in NSW at the time of transfer were to be maintained by the new employing body. We understand from the cases that have come to our attention that that has not been the position over time.

We have identified the key issues in our submission relevant to this situation and included further detail in Attachment A. We note that this situation has been the subject of discussions between the Firefighters Association and the ACT Government and the Commonwealth over an extended period.

The NSW firefighters situation is one that we believe warrants attention by your Committee under its terms of reference. It is illustrative of the compensation complexities/potential irregularities that may arise over time where employees are transferred between jurisdictions. We also note that the issues raised with respect to the ex-NSW Firefighters case may have application to other categories of transfers that occurred between NSW and the Commonwealth within the same period.

Specific comments on issues noted at a), b) and c) above are outlined below.

**a) Operational efficiency issues**

Commonwealth workers compensation legislation, namely the Safety, Rehabilitation and Compensation Act, 1988 and supporting provisions are complex for both compensation recipients and administrators. SCOA has noted and applauds COMCARE's consistent efforts to improve compensation administration over a period of years. The Association has had periodic discussions with COMCARE, initiated by COMCARE's CEO, in the interests of achieving efficient processes and also of resolving individual cases brought to the attention of SCOA. I am pleased to say that these regular meetings between SCOA and COMCARE staff have provided an excellent opportunity for SCOA to raise issues and have policy decisions explained in a co-operative environment.

SCOA's range of cases has included:

- a) people who have been overpaid with resulting repayment and tax issues creating hardship for individuals;
- b) people who have been underpaid often because their salary and classification details were not kept up to date and supplied by agencies to COMCARE; or
- c) people whose payments have been stopped or reduced by COMCARE and reinstated once information has been followed through, updated and clarified.

This caseload has indicated that weaknesses in information and recording capacity of agencies have contributed to many of the problems and we acknowledge that there has been a genuine effort by COMCARE to address some of those problems and the administrative errors that have arisen.

Our experience has also highlighted the importance of COMCARE staff communicating effectively at the individual case level. The positive effect of good communication cannot be overstated. To prevent irregularities, it is important that recipients receive advice that adequately spells out the bases for:

- amounts comprising payment to a client, or
- claims for review of asserted overpayments (which could have accumulated over a number of years).

This ensures that compensation recipients are able to check the accuracy of advice. Lack of proper information culminates in recipient bewilderment and stress leading often to drawn out processes that can result in involvement with the Administrative Appeals Tribunal. Additional bewilderment and stress often impacts adversely on people who are trying to recover from an illness or injury suffered in the workplace. The Association is of the view that efficient communication and information exchange between administrators and compensation recipients are important elements in the Government's approach of managing a compensation system whose aim is to encourage workers to return to work as soon as possible.

Cases of underpayments have primarily resulted, it is understood, from the failure of former or current employing agencies correctly keeping COMCARE informed of increases to the normal weekly earnings brought about by classification and salary adjustments in respect of the recipient's employment level at the time of the compensatory circumstance. Two of the more significant examples in SCOA's files have involved underpayments from 1991 to 2002 of \$104,010 and another of \$68,354 from 1985 to 1998. There have been other cases involving many thousands of dollars.

SCOA acknowledges that there has been a change to the Safety, Rehabilitation and Compensation ( SRC) Act, 1988 that will ensure in the future that COMCARE clients will not need to rely on their employer notifying COMCARE of salary increases for their salary classification because an annual wage cost index adjustment will be applied.

Correct Levels of Compensation: It is important, nonetheless that a proper base be established for COMCARE clients to ensure proper application of the amended legislation regarding the wage cost indexation arrangements. SCOA understands that this is being addressed by COMCARE's revising clients' records and SCOA looks forward to advice regarding progress with this exercise.

It is SCOA's view that COMCARE and the relevant employing authorities should, as a matter of urgency review all cases- particularly those that commenced after the introduction of enterprise and workplace agreements throughout the public sector. Such a review should include persons who have since died to assess whether there are any outstanding monies that may become due to their estates.

In addition, pre 1988 cases should also be reviewed to ensure that they also are recorded on the current computer based monitoring system. We have had cases in this regard where administrative records have been lost "in the mists of time".

Tax issues and interest foregone: Tax issues are an inevitable consequence for individuals where overpayment or underpayment occurs because of administrative error. People who have been overpaid face a lump sum tax liability that they may only be able to repay over a lengthy period of time. A person who receives a settlement because of underpayments over a period of years may be saddled with a higher tax burden than if the correct compensation payment had been received on an annual basis.

Moreover, no interest is paid to individuals affected by underpayments. Where individuals have been underpaid, there has been a progressive loss of purchasing power over the period to which underpayments relate. The Government has enjoyed the benefit of the interest these underpayments have earned and it is only fair that underpaid COMCARE clients are compensated with an appropriate interest payment.

It is suggested that the Australian Taxation Office and COMCARE be asked to examine and address tax and interest issues in relation to underpayments and overpayments.

It is also important that the changes arising out of the amended SRC Act strengthen some of the bases of efficient compensation administration such as ensuring that:

- a) COMCARE communicate with and provide clear information and guidance at the individual case level;
- b) Staff in Commonwealth departments be appropriately trained to ensure provision of adequate and timely advice to clients and COMCARE;
  - there is scope for considerable improvement in some agencies in this area.
- c) Agencies and COMCARE hold valid information in their systems that can be accessed, analysed, verified and properly updated in terms of:
  - The initial salary and classification and the initial compensatory condition;
  - Management of each case by COMCARE including appropriate medical records and advice.

## **b) Appropriate application of relevant legislation and impact on employer obligations and client rights**

SCOA has also represented compensation recipients where difficulties have arisen as a result of questions as to which compensation legislation should be applied to their employment circumstances.

One of SCOA's current cases, a former medically retired police officer with the Northern Territory police force, illustrates some of the issues that can arise for employer obligations and client rights, especially where compensation administrators have not clearly established the legislative basis for payment of compensation.

It would appear from a decision made by the Administrative Appeals Tribunal (AAT)- *Anrade and Department of Health and Community Services (NT) 1990*<sup>1,2</sup>- that the relevant legislation under which compensation should be provided for former employees in the Northern Territory is the Compensation (Commonwealth Government Employees) Act 1971. The AAT decision of 16 January 1990 holds that, even though the 1971 Act was repealed by the Commonwealth Employees' Rehabilitation and Compensation Act 1988, the definitions of 'Commonwealth and 'Commonwealth Authority' in the 1988 Act did not include the Northern Territory. Moreover, by virtue of s 129 of the 1988 Act and s 8 of the Act Interpretation Act 1901 (the AIA), the AAT 1990 decision holds that the rights of Northern Territory employees were preserved and that the applicable Act should be the 1971 Act.

The retired police officer is being compensated under the provisions of the Safety, Rehabilitation and Compensation Act, 1988 which it would appear, does not apply to former Northern Territory employees by virtue of s 124A. Before any issues can be addressed regarding the recipient's entitlements, the appropriate legislative provision needs to be clarified. This case is not an isolated one in respect of the Northern Territory.

What this example illustrates is that individual employers are obligated to determine the correct legislative processes that apply when compensation provisions are enacted- it is important for compensation administrators as it goes to their authority to make payments and they should not be in breach of relevant statutory obligations. It is important for individual recipients as it goes to their level of rights and entitlements and to their financial security.

### **Need for Regular ANAO Compliance Auditing**

Best practice administration of workers compensation requires minimisation of the types of issues noted above. SCOA believes that this would best be achieved if the Australian National Audit Office were to have regard to such issues when conducting its normal auditing function with COMCARE and Commonwealth agencies.

### **NSW Firefighters Transferred in 1976 To The Commonwealth**

The case described below illustrates the issues that can arise from the application of compensation provisions to employees transferred between jurisdictions where entitlements agreed at the time of transfer become progressively eroded by administrative application without apparent Ministerial or legislative justification.

**History:** There were some 100 firefighters transferred from the NSW Fire Brigade to the ACT Fire Brigade in January 1976. This transfer followed about two years of negotiations.

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<sup>1</sup> Reference Administrative Appeals Tribunal, Deputy President R K Todd, 16 January 1990, No D88/10): ALD p.99,100

<sup>2</sup> The Act was cited as the Commonwealth Employees Rehabilitation and Compensation Act 1988, until its short title was changed on 24 December 1992 to the Safety, Rehabilitation and Compensation Act, 1988.

A key condition of the transfer was that the minimum terms of employment were to be those that applied to the NSW Fire Brigade at the time of transfer. These conditions included provisions relating to workers' compensation, superannuation, age retirement, long service leave and revisionary and other provisions concerning payment to widows.

There is considerable evidence to indicate that the Commonwealth agreed to abide by the transfer conditions. In this regard, extracts of statements by Minister Hodgman in 1981 and from the Fire Brigade Award (Act No 1 of 1982) directed to compensation matters and other references to superannuation are enclosed by way of examples at Attachment A.

There is considerable precedent concerning the established practice of preserving rights and conditions on transfer between jurisdictions, for example:

- The Australian Workers Compensation Act 1980;
- Various High Court decisions which have held that the law that was in force in the State at the time of transfer is the relevant law to be taken into account;
- Inclusion of specific clauses in Awards;
- The Acts Interpretation Act 1901; and
- The Public Service Act, 1999.

However, there appears to have been a history of unwillingness on the part of successive administrations to face up to and implement the originally agreed conditions of transfer for the ex-NSW firefighters. This could have been because of inadequate instructions to implementing Commonwealth agencies at the time of transfer in 1976 and subsequently, in 1989 at the time the functions were transferred from the Commonwealth to the ACT Government.

The relevant issues are discussed under the following headings.

*Compensation:* COMCARE in a letter dated 15.7.96 indicated that it acknowledged the transfer conditions for ex-NSW Firefighters but were nevertheless paying compensation on the basis of the 1988 SRC legislation and expected any additional monies due to be assessed and paid by the employing agency. There is no evidence from the cases that SCOA is aware of that other agencies actually assessed and paid any further entitlements and associated payments due under the original transfer conditions.

It is understood that at the time of 1976 transfer, workers compensation provisions in NSW provided for assessment of claims for injured employees according to a 'table of maims'. The maximum weekly compensation payable was limited only by the proviso that it should not exceed the amount that the claimant would have earned in exercising his duties. There was also an entitlement to a lump sum for the injury and an additional lump sum if the injury subsequently caused the claimant's death. In addition, the following State provisions were to apply at the time of transfer:

- Workers compensation payments were separate for all other payments;
- There was no limit of 70% of Normal Weekly Earnings (as applies under the SRC 1988 legislation);

- There was no 5% deduction for superannuation payments (as required by SRC legislation);
- There were no deeming rates on lump sum (as applied under the SRC 1988 legislation);
- The probability of the firefighters being promoted to a higher rank or grade was taken account of and the workers compensation payment increased accordingly;
- If a firefighter later died of the injury his dependent received the lump sum payment for death;
- After a period of time, which varied according to circumstances, the firefighter could accept a lump sum payment based on an actuarial formula-in lieu of weekly payment;
- Late underpayments were subject to interest and paid to the recipient (which is not the case under the SRC Act of 1988).

The SRC legislation applied by COMCARE provided for a compensation payment of 75% of weekly earnings with a provision to pay an amount for 'non-economic loss' for injury. This was further reduced by a 5% notional superannuation deduction which did not go to the benefit of an employees superannuation fund.

It would appear that some 30- ex-NSW firefighters were adversely affected in workers compensation claims through the application of the SRC 1988 legislation to their circumstances.

Age Retirement, Superannuation and Other Provisions: The maximum age for retirement of NSW Firefighters under the NSW provisions at the time of transfer to the Commonwealth (1976) was 60 years. The maximum age, in the Commonwealth superannuation scheme at that time was 65 years. *Extract from Department of Treasury letter at Attachment A refers.*

The transfer provisions allowed for transferees to join the Commonwealth scheme, and, if they wished, pay their NSW accumulated contributions to the Commonwealth at that time. Recognition for years of service in NSW as also accepted. That recognition also applied, to superannuation, compensation, long service leave etc.

A problem has arisen from the difference in maximum retirement age. The Commonwealth Scheme assesses superannuation entitlements on the basis of a 65 years benchmark. It reduces payments for earlier retirement on the basis of the age at retirement and years of service. This means, for example, a 5% reduction in superannuation payment for persons retired at 60 years after 20 to 39 years of service- that is a reduction from 51.5% to 46.5 % of the previous 3 years average of annual salary.

Concern has been expressed by Firefighter transferees over what is the continued use of the 65 years maximum instead of the 60 years of age retirement they were required to meet as a maximum for full entitlements. The transferees believed that this problem was sorted in discussions with the then Treasurer-Mr Frank Crean. It is believed that that Treasurer agreed to an adjustment to the normal CSS provision in relation to the maximum retirement age for the transferees-specifying 60 years instead of 65 years. It is understood that evidence of this variation can be separately produced.

Widow Reversionary Benefits- NSW Scheme: Concern has also been expressed that widows of NSW Firefighter retirees have not been paid under the NSW conditions at the time of

transfer. For information of the Committee, benefits payable on the death of a married fund member are set out at Attachment B.

The situation with respect to the ex- NSW Firefighters could have been avoided with due administrative care and a proper recognition of employer obligations and responsibilities. We recognise that a case by case approach to determine any outstanding payments to individuals may not be practical given the passage of time.

It is proposed however, that a small committee of officials drawn from appropriate organisations should examine a sample of individual cases where information is available through records./archives. In this regard, SCOA could arrange for names to be provided of some 15 to 20 people that could be examined as part of such a study. The further action that might result from that exercise including the practicality of applying a standard Act of Grace Payment could be considered.

Firefighters have been called upon to provide a dedicated service to our communities and our institutions should repay that dedication by ensuring that they and their dependants are treated with fairness and equity.

Yours sincerely



Ewan Hazell  
President  
SCOA (ACT Branch)  
13 February 2003.