



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE
RELATIONS AND EDUCATION

**Reference: Safety, Rehabilitation and Compensation and Other Legislation
Amendment Bill 2007**

THURSDAY, 8 FEBRUARY 2007

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:
<http://parlinfoweb.aph.gov.au>

SENATE
EMPLOYMENT, WORKPLACE RELATIONS AND
EDUCATION LEGISLATION COMMITTEE

Thursday, 8 February 2007

Members: Senator Troeth (*Chair*), Senator Marshall (*Deputy Chair*), Senators Barnett, George Campbell, Fifield, Lightfoot, McEwen and Stott Despoja

Participating members: Senators Allison, Bartlett, Bernardi, Boswell, Brandis, Bob Brown, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Forshaw, Hogg, Humphries, Hutchins, Johnston, Joyce, Ludwig, Lundy, McLucas, Ian Macdonald, Mason, McGauran, Milne, Moore, Murray, Nash, Nettle, O'Brien, Patterson, Payne, Polley, Robert Ray, Sherry, Siewert, Stephens, Sterle, Trood, Watson, Webber, Wong and Wortley

Senators in attendance: Senator Troeth (*Chair*), Senator Marshall (*Deputy Chair*), Senators Barnett, George Campbell, Fifield and Trood

Terms of reference for the inquiry:

Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006.

WITNESSES

BENNETT, Ms Barbara, Chief Executive Officer, Comcare 2

**BUNDY, Ms Elizabeth Anne, Senior Government Lawyer, Department of
Employment and Workplace Relations 16**

KIBBLE, Mr Steve, General Manager, Research and Policy Branch, Comcare..... 2

**O’SHEA, Mr Alex, Director, Safety, Rehabilitation and Compensation Policy Section,
Comcare..... 2**

**WASLIN, Mr Tony, Group Manager, Department of Employment and Workplace
Relations 16**

Committee met at 4.30 pm

CHAIR (Senator Troeth)—I declare open this public hearing. The committee agreed yesterday that some loose ends not dealt with in Melbourne last week should be dealt with today. The first is a technical matter concerning item 17 of the Workplace Relations Legislation Amendment (Welfare to Work and Vocational Rehabilitation Services) Bill 2006. The second relates to concerns with Comcare and certain provisions of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006 regarding the deeming rate and calculations of injured employees' benefits under the scheme. There may be other matters also arising from answers to questions placed on notice in Melbourne.

Before the committee starts taking evidence, I advise that all witnesses appearing before the committee are protected by parliamentary privilege with respect to their evidence. Any act by any person that operates to the disadvantage of a witness following their providing evidence will be treated as a breach of privilege. Witnesses may request that part or all of their evidence be heard in private. However, I would also remind witnesses that giving false or misleading evidence to the committee may constitute a contempt of the Senate. I welcome to this public hearing any observers that may be present.

[4.33 pm]

BENNETT, Ms Barbara, Chief Executive Officer, Comcare

KIBBLE, Mr Steve, General Manager, Research and Policy Branch, Comcare

O'SHEA, Mr Alex, Director, Safety, Rehabilitation and Compensation Policy Section, Comcare

CHAIR—I understand that Senator Trood has some questions, so I will ask him to proceed.

Senator TROOD—Thank you for returning to appear before us. I know that you have been giving evidence to the committee. I was not present at the last hearing. I apologise for not being able to make it to ask some of these questions. It may cover some ground that you feel that you have already traversed with the committee. So, if you will forgive me, there are some things I want to clarify about this bill and its implications and background.

Part of it goes to this problem of the deeming rate, which seems to me has been a rather longstanding issue for the various people whom you might regard as your clients, as it were. Perhaps this question is appropriate for you, Ms Bennett, but I would be grateful for clarification from any one of you. I suppose the simple way to put it is: why has it taken such a long while for this deeming rate question to be addressed by Comcare?

Ms Bennett—Firstly, just as a point of clarification: Comcare's legislation is run under the portfolio of the Minister for Employment and Workplace Relations, so it is actually the DEWR portfolio that brings forward legislative change. I would just put it clearly that that is their responsibility. This proposal has been around and debated for some time. My understanding is that it was really about the government's ability to put in a package of changes that they wanted, and it was obviously about parliamentary timetables and the ability to obtain support to get the changes through.

Senator TROOD—So your evidence is that you are an agency and the policy department is DEWR and, essentially, you just do as the department tells you?

Ms Bennett—As the government decides to do at the time.

Senator TROOD—I understand that line of inquiry. However, the high level of this deeming rate—10 per cent—has been a problem for 10 years or so.

Ms Bennett—It was set in 1988. In the mid-90s, as other financial indicators such as bond rates and interest rates changed, it moved out of step and it probably has been too high since the late 90s.

Mr O'Shea—For a couple of years it was actually low, when we had that big period of inflation, and cash rates or Treasury bond rates—

Ms Bennett—Were higher than the deemed rate.

Mr O'Shea—were higher than the 10 per cent.

Senator TROOD—Indeed, that is true, Mr O'Shea, and it was an unhappy time for lots of people, unless you were a self-funded retiree, of course.

Ms Bennett—The other part of this amendment is that now, by regulation, that will be reviewed annually and the deemed rate now will be locked into the Commonwealth bond rate. So long periods where potentially it can be out of step will be resolved by these amendments.

Senator TROOD—So you are telling us that there will be put in place an arrangement that will preclude this particular situation arising again. Is that right?

Ms Bennett—On 1 July every year, it will be reviewed by the minister and a new rate will be set. It is linked, isn't it, in the legislation to the bond rate?

Mr Kibble—Yes. The department, in its submission to the inquiry, advise that this rate will be based on the 10-year government bond rate, which is currently around 5.6 per cent, and it will be set each year by the minister by legislative instrument effective 1 July.

Senator TROOD—It is encouraging that a measure of flexibility will be introduced into the legislation. Clearly, that has been lacking in the past. Indeed, I am grateful that there has been some progress in addressing what, it seems to me, has been an injustice to quite a few people. However, I am a bit troubled by the fact that the level at which you are striking this rate in relation to the bond rate is quite different to the level of deeming rates in relation to other agencies—for example, DVA and Centrelink agencies. What is the explanation for that?

Ms Bennett—Firstly, as I said, this is DEWR's piece of legislation.

Senator TROOD—I am sorry, but can I just interrupt? Are you telling me that we would be better off if we asked questions of DEWR in relation to these matters?

Ms Bennett—In the development of the policy rationale in its purest answer, I think they could probably provide a more detailed answer and do it quickly. However, perhaps I could explain my understanding and background.

Senator TROOD—That would be helpful.

Ms Bennett—Other increases in rates, particularly those set in benefits provided by Centrelink, are set at a different rate. Our increases keep pace with CPI in a number of other areas, so this is more consistent with how we determine general increases in benefits paid out to injured workers under the Comcare arrangements. Arrangements for other forms of government benefit have more complex formulas. That probably then explains a lower deeming rate at that point in time. But, as I said, in setting that government policy, Comcare administers the legislation that is developed and determined by the government, and then we do as the government decides on the passage of that legislation.

Senator TROOD—Have you not had any input into this legislation? As the administering agency, have your views on the legislation not been sought?

Ms Bennett—Yes, our views were sought in a number of areas of change: administrative practicality, treatment of classes of Comcare claimants and what the impact would be.

Mr Kibble—Going back to the technicalities of the proposed amendments, the bill does not actually set what the deeming rate will be based upon. In its submission to the committee, DEWR has indicated that it will be based on the 10-year bond rate, but it has not yet been determined by the minister. It will be, as I mentioned, a legislative instrument.

Ms Bennett—That instrument is subject to the scrutiny of the parliament as well. At this stage the minister in the explanatory memorandum and DEWR in its submission to this committee have indicated that that is the base that they would use, and all legislative instruments are subject to being disallowed.

Senator MARSHALL—Yes, but that puts us in a position where we either take it or we stick with 10 per cent, doesn't it?

Ms Bennett—Yes.

Mr Kibble—All we were pointing out is that the bill in front of the Senate at the moment does not actually define—

Senator MARSHALL—No; that is right. That was the point.

Senator TROOD—Senator Marshall is obviously right in that respect. I am always delighted when the parliament has an opportunity to scrutinise some of the activities and the instruments that come before it. Mr Kibble, are you saying that this might not actually be the figure—that it might not be the bond rate? Is this a serious proposition you are putting to us? Is it just a theoretical observation that the minister could make a different decision, or are you saying that he just has not gone through the process of making this submission?

Ms Bennett—No. The department's submission to the committee obviously reflects their understanding of the minister's approach. Mr O'Shea has just pointed out to me that the other amendments in 15(9F) make changes in the increase that are consistent with that approach of where the deeming rate is. So it brings a consistent approach to the increase of benefits paid to claimants as well as this aspect, which is a deduction; it is based on a sane approach and information that is available.

Senator GEORGE CAMPBELL—Does that reflect the approach of the current minister or of the previous minister?

Ms Bennett—I think you would have to ask DEWR. I have not been informed that there is any difference between Minister Andrews's approach on this deeming rate and Minister Hockey's.

Senator GEORGE CAMPBELL—DEWR are not coming, are they, Madam Chair?

CHAIR—Not to this hearing but, if you wish to explore this issue further, I expect that we could do it at estimates next week.

Senator GEORGE CAMPBELL—I just want to ask Ms Bennett to check with DEWR and advise us whether or not that is the case.

Ms Bennett—I have just been advised that, in discussions up to this morning when we met with DEWR on a number of other issues, there has been no change between the change of ministers in the position of this deeming rate.

Senator TROOD—I think my colleagues are exploring the possibility that you, understandably, are the agency and they are the policy department and, if we wish to gain deeper insight into the rationale of the policy, it would be profitable perhaps to have some discussions, Madam Chair, with the department as well.

Ms Bennett—Some of the questions that we were asked in the Melbourne hearings related to individual cases. Examples were given and, in my view, the committee was looking at whether people were better off or worse off because of these changes. We have done a number of analyses of a number of scenarios. It is our view that either people will experience little change or they will be better off. In fact, I am able to provide to the committee the example given by the Law Society for the scenario ‘Darrell’. We were asked to provide that as quickly as possible and I can table it now. Gross, Darrell will be \$206.97 better off through that changed deeming rate. I can provide that to the committee.

CHAIR—Thank you.

Ms Bennett—I also had discussions with the Law Society this morning confirming that Darrell was better off through the deeming rate. Mr Redpath also accepted that Darrell would be better off under this new rate on the basis of those figures. This change is an improvement in that sample of scenarios that we provided to you earlier. In the case provided by them, those claimants being cited as examples are better off because of this changed deeming rate or they have a direct and quite significant benefit.

Senator MARSHALL—That probably brings us to one of the broader issues. It is obvious that, if you nearly halve the deeming rate, people under these circumstances are going to be substantially better off. The mere fact that you are doing it acknowledges that the deeming rate has been inappropriate for a long time. So the recipient of the payments has been disadvantaged for a period of time because of the high deeming rate and the Commonwealth has been advantaged by that. Is that a fair assessment—one person’s disadvantage is the Commonwealth’s advantage, because ultimately that is where the money is coming from?

Ms Bennett—I just reiterate what Mr O’Shea said. There were a number of years where it was to their advantage as well. There were a number of years where that deeming rate of 10 per cent was much lower, taking into account the rest of the community. So in part you are right, but it has not always been a disadvantaged rate since it was established.

Senator MARSHALL—You have anticipated where I am going, and, of course, I anticipated that response too. But the individual was never in a position where they determined what the deeming rate should or should not be. In fact, when people have asked for an adjustment to the deeming rate, it has fallen on deaf ears for a long, long time. So it ought not fall on the recipient to take any responsibility for inappropriate deeming rates either way. If the deeming rate was inappropriate in terms of the Commonwealth being disadvantaged to the advantage of the recipient, the Commonwealth should have moved to address that then; and, when the reverse was true, again the Commonwealth should have moved to address that then.

So my question is: given that it is only the Commonwealth that has the power to address this issue, and it has failed to do so, however we average it—if we want to pursue this, I guess I could ask you to average it out over the period of the deeming rate—the recipients have been at quite a significant disadvantage over a long period of time. I have had figures quoted to me of \$180,000 worth. For people who have been permanently incapacitated and who rely on these benefits, that is a hell of a lot of money. In fact, it is a hell of a lot of money for anyone. You have acknowledged that the deeming rate was inappropriate, so I ask: is any

consideration being given to addressing the backdating of the deeming rate application for recipients who rely on this money for their day-to-day income?

Ms Bennett—No. The bill will take effect from the day it is passed.

Senator MARSHALL—I understand what the bill says. My question is: was consideration given or will there be consideration given?

Ms Bennett—We have not been asked or given any indication that this part of the legislation will be backdated.

Senator TROOD—And that is unlikely?

Ms Bennett—I cannot comment on what the government might do. I am just saying that, on the information available to me and how we have been engaged in this, I have seen no indication that backdating would be done.

Senator TROOD—I am much reassured to know that the legislation we are proposing to pass will improve the lot of some Australian citizens. It would distress me greatly if I thought that the legislation we were passing would disadvantage them. Obviously you have done some sums in relation to some of these people. What percentage of the people who are in this category are, in your view, likely to benefit from the legislation?

Ms Bennett—In the scenarios and samples that we did—obviously you extrapolate in making a scenario as in the case of Darrell and the one that we provided earlier—as I have said, to the best of our knowledge, it would remain relatively the same or be an improvement. Obviously, in reducing something from 10 per cent to 5.6 per cent, we did not find a scenario that fitted our experience in which someone would receive less money.

Senator TROOD—Senator Marshall says that, when you reduce the deeming rate by the degrees you do, it would be astonishing, frankly.

Ms Bennett—So that answers the question.

Senator TROOD—You have done some calculations. It seems to me that one of the logical outcomes of the position is that all of the people involved will be advantaged by the legislation.

Ms Bennett—To the best of our knowledge, nobody will be worse off because of these changes.

Senator TROOD—But the particular cases you have cited are those where people most clearly will be better off.

Ms Bennett—Some of these cases were not just cases that we cited; they were provided as scenarios from other parties, which we were asked to comment on for the committee. You can see from the sample that we gave that the relationship between superannuation, what someone has contributed to it and how it relates to benefits depends on an individual's circumstances and their superannuation arrangements. So for everybody those figures will have to be reworked out. So I can say to you that, to the very best of our knowledge, we do not believe that anybody will be worse off under these changes to the deeming rate. We have not been able to find a scenario that disadvantages an individual.

Senator TROOD—Is Emery's case one of those that you looked at?

Ms Bennett—Mr Emery has been in regular contact with us. In fact, I think he probably would have provided information to the committee as well. But he has provided figures to us and we have advised him on what the outcome of the changes will be. I would not normally talk about individual's circumstances, but he has put them on the record and provided a submission. So is it appropriate that I—

CHAIR—Yes.

Ms Bennett—Yes, he will be better off under these arrangements.

Senator TROOD—You did speak about him in the hearings.

Ms Bennett—With the same preface that he had made public submissions.

CHAIR—So it is on the public record.

Senator TROOD—You say that he will be better off under these arrangements—I think this is your evidence. He writes to you regularly. Is that the case?

Ms Bennett—Certainly the agency has had regular correspondence with Mr Emery, yes.

Senator TROOD—But you also say that you have met with him. Is that a reference to you personally meeting with him?

Ms Bennett—That is Comcare. We meet regularly with claimants who, after a series of correspondence or something, may feel that they would like a personal explanation of their arrangements. Yes, an officer of Comcare has met with Mr Emery on other occasions and talked through his arrangements.

Senator TROOD—So, when you said 'and I have met with him,' did you mean you personally?

Ms Bennett—Did I say that in *Hansard*?

Senator TROOD—That is the record I have.

Ms Bennett—No, sorry. I meant—

CHAIR—In a generic sense.

Ms Bennett—that generically we have met. That sounds a bit royal, doesn't it, but I meant 'we, the organisation'.

Senator TROOD—So it is the organisation that has met with him on occasions. I have a couple of questions about this problem between gross and net amounts, which seems to me to be equally a cause of some anxiety for some of the recipients of these pensions.

Senator MARSHALL—Senator, would you mind if I ask one more question on the previous topic before we move on?

Senator TROOD—Please do.

Senator MARSHALL—My view is that the Commonwealth was really obligated to adjust these figures to reflect the economic circumstances at the time. We will not look to point fingers, but, on balance, if these sorts of figures are correct, we are talking about an enormous amount of money. I am not surprised that people have pursued you very regularly, because, if I thought someone owed me \$180,000, I would be pursuing them fairly regularly.

I will probably ask you during estimates, Ms Bennett, how much it would cost if the 10-year bond rate had been applied over the last 10 years; and, if the Commonwealth were of a mind to make some kind of back payment to cover the change to the deeming rate to reflect the deeming rates that may have been applied more appropriately over those 10 years, how much that might cost the Commonwealth.

Ms Bennett—We would have to take that on notice, obviously, and just see how much information we can get.

Senator MARSHALL—Yes. I am just forewarning you that I will ask you that at estimates to enable you to have some information there. But I understand that it may take some time and you may need to take it on notice there.

Ms Bennett—Obviously, one of the issues is that our agency probably does not keep the 10-year Treasury bond rate as a piece of information internally. I will have to seek Treasury's advice about what it has been between 1996 and now. We will have to see what we can do and then try to draw the issue that you are raising about how that translates.

Senator MARSHALL—Would it be possible that, as a result of this deeming rate, someone would have been disadvantaged by around \$180,000 over the last 10-year period? I will not hold you to your answer, but I am trying to get a feel of whether the claims that have been made are inflated or whether that could well be the case.

Ms Bennett—The 10-year bond rate has not been at six per cent since 1996 and it has gone up and down around that. Superannuation, as you know, is very complicated and it would depend on someone's circumstances. It would depend on when they took the superannuation. It would depend under which scheme they are—whether they are in the pre-1988 arrangements. It would depend on the level of compensation they were receiving and how their superannuation interacted. There is no simple answer to that question. It is a complex formula to apply and then the individual's figures would have to be looked at in order to see whether someone had been disadvantaged over that period of time for that amount.

Senator MARSHALL—Perhaps I need to be a little more specific. In Mr Emery's case—and Mr Emery has not actually provided this figure to me—someone who has done an analysis of his case has advised me that their view is that, since May 1994, Mr Emery would have been disadvantaged in excess of \$180,000 under this portion of the formula. Just so I get the figure of the disadvantage to the recipients—

Ms Bennett—Would Mr Emery agree to our doing the scenario on him?

Senator MARSHALL—I suppose it would be proper for us to get his agreement.

Senator TROOD—I am not sure, but probably it would be a courtesy to ask him whether he has any objection.

Senator MARSHALL—Are you in a position to do that, Senator Trood?

Senator TROOD—Maybe. I can certainly inquire, if that is appropriate, Chair.

CHAIR—Thank you.

Ms Bennett—If you could confirm that with us—

Senator TROOD—We will let you know.

Mr O'Shea—Just on rough figuring, we have worked it out at a 5.56 deeming rate. Interest rates are pretty low now, so it is a bigger amount. It is \$120 a week. With there being 52 weeks in a year, it is \$6,000-something a year. So \$180,000 would seem a bit overinflated.

Senator MARSHALL—That is what I am trying to get a feel for.

Ms Bennett—And, as I said, the deeming rate was higher and it has come down at a very low time. If Mr Emery agrees, we can look at his case specifically and see what it is. If we can get the information about the bond rates from Treasury in a timely manner, we can provide that as quickly as possible. But, on a thumbnail sketch, Mr O'Shea is suggesting that, if it has been as low as this for the last 10 years, it would be much nearer to \$60,000 than to \$180,000.

Senator MARSHALL—Of course, if compensation were to be considered, there would have to be the good and the bad over that period. But what is is what is.

Senator TROOD—Senator Marshall raised that question, and perhaps I can ask you one more question along these lines. Do you think a reason or a principle is at stake here that would justify the proposition that the recipients of Centrelink benefits and DVA benefits should be at a different deeming rate than those who receive benefits from your department?

Ms Bennett—I am not certain about the DVA arrangements. The military compensation arrangements are very complex and entwined with a lot of other benefits and treatments that exist, so I cannot comment on which bit is compensation and which bit becomes something else. I can reiterate that, as I pointed out earlier, Centrelink does not increase benefits on the same formula as we do; they would have their own approach. Under the amendments, we are increasing benefits under the same arrangements that determined the deeming rates so that there is consistency in what goes up and what the costs are. That formula will now work. I think you would have to canvass with Centrelink why it determines a particular increase for benefit recipients at that rate. I am not across that arrangement.

Senator TROOD—That is an appropriate answer. However, I must say that I think it is difficult for people who are recipients of these benefits, particularly those who have been disadvantaged, as Senator Marshall has mentioned. For example, as I understand it, the DVA Centrelink rates now are currently three per cent up to \$62,000 and five per cent on balances, which are way below the bond rates that you are talking about. So it is very difficult for people outside saying, 'Well, these are Commonwealth agencies and we are getting benefits from the Commonwealth and this rate'—and with a great deal more flexibility, I have to say.

Ms Bennett—Centrelink recipients do not receive 75 per cent of—

Senator TROOD—No, we are talking about—

Ms Bennett—Centrelink might be able to explain that it is about how much will be going in and how much will be going out. As I said, I really cannot explain why. All I can say is that I suspect that government agencies in doing those things look at the circumstances of the individuals who are affected by those decisions. As I said, we have improved the way the increases will go while at the same time we have improved this arrangement about the deeming. It brings a consistency that we think will be beneficial to Comcare claimants.

Senator TROOD—Did you give any thought to the possibility that you might make adjustments twice a year?

Ms Bennett—No. As I said earlier, for some time, when the legislation came into place, the 10 per cent was a low rate. We were talking about Mr Emery—if you look at what happened to his benefits or those of others in those circumstances from the late eighties until the mid-nineties, that 10 per cent being there was not bad. It has been as the interest rates have changed that this has been thrown up more starkly. It was not as obviously apparent when it was 9.3 per cent whether it would go up or go down. It is about the balance and at which point it would occur. There was some debate about it, there were briefings and letters were received, and I think then it came onto the radar.

Senator TROOD—We might pursue that with DEWR, if we have an opportunity to do so later on. Perhaps I can return to my earlier question about the issue of gross and net amounts. Perhaps you could just run me through the policy that underscores that particular proposition.

Mr O'Shea—I attempted to explain this on 31 January. I explained it in terms of sections 20, 21 and 21A in the legislation. That is where the formulas for payment of retired people in receipt of superannuation benefits are dealt with in the SRC Act. A good starting point is section 20, which basically says that, if a retired person is in receipt of a superannuation weekly pension amount, you get the amount of compensation that they would otherwise get after 45 weeks, which is 75 per cent, and subtract off it the addition of their weekly pension amount plus that their superannuation contribution amount; so you would subtract off that.

Section 21, which deals with a lump sum amount, is an attempt to deal with that same sort of construct but, I guess, in a different way because you are dealing with a lump sum. In section 20, you subtract off from the gross compensation amount that would otherwise be payable—that is the 75 per cent—two other gross amounts: the gross weekly compensation benefit plus the gross five per cent contribution that a person would make. Effectively, that delivers to the person a combined benefit of 70 per cent of their normal weekly earnings. Again we are talking about gross.

If in one of those formulae you say, 'Instead of deeming on a gross amount received, we'll deem on a net amount received,' you have instantly thrown things out of balance and a person who elects to receive a lump sum will receive an advantage over a person who receives a weekly benefit. In section 21A, the person has a mix of lump sum and a weekly benefit. The more of a lump sum they get, the better off they will be compared to a person who receives a pension.

The whole construct of the SRC Act is that it is a weekly benefit scheme. It is a scheme to encourage people to receive a weekly benefit so that it will encourage them to get back to work and stop their weekly benefit. Once a person takes a lump sum out of their super scheme, it is harder for them to get back to work, because they have sort of done their lot with the scheme.

Senator TROOD—I agree with you. It is a desirable policy objective, as it is with most superannuation arrangements, to encourage people to take weekly or at least periodic benefits rather than taking their lump sum and then blowing it on something that might be completely unrelated to their future health or subsistence. But, to me, there seems to be an anomaly here.

Section 21 refers to lump sum benefits received by an employee. It does not refer to gross or net amounts; it refers to lump sum benefits. Please help me. I am struggling with the idea that an employee is receiving a benefit, when you deem it gross and that employee does not get it, with you taking a chunk off the top.

Mr O'Shea—In the very same formula, the AC amount—the amount of compensation that they receive—is also gross. And the amount of superannuation contribution that gets deducted off it is also gross; it is a five per cent gross amount. So, if you treat one as net and the others as gross, it does not make sense.

Ms Bennett—Just to explain, we also have situations where recipients, while on compensation for an injury that occurred to them in the course of their public sector employment, receive their superannuation and compensation for their injury and are also in other forms of work. That commonality or common approach between various sources of incomes places that on a footing where the obligations of taxation and other arrangements translate more clearly.

Senator TROOD—I agree with that.

Ms Bennett—I do not think it is a unique government approach to look at gross versus net in making formulas. My understanding is that the Comcare legislation is quite consistent with how this is treated in a range of other similar types of arrangements of superannuation—in the treatment of final payments that might come with terminations and those other sorts of arrangements that people in the community receive.

Senator TROOD—If you are arguing the case for consistency, why wouldn't you argue the case for consistency in relation to deeming rates?

Senator MARSHALL—Which does seem a serious problem.

Ms Bennett—Obviously the committee can make an observation about that. I cannot defend or argue for the difference between the deeming arrangements of Centrelink and those of Comcare.

Senator TROOD—But you are taking refuge in consistency.

Senator MARSHALL—If the objective of the act is to deliver 75 per cent of—

Ms Bennett—Normal weekly earnings.

Senator MARSHALL—normal weekly earnings, with the deeming rate and the deduction of the five per cent people have not been meeting that threshold.

Mr O'Shea—No, I would like to correct you. The object of the act is for retired people to deliver 70 per cent. I maintain that that has always been the object of the act. For people who are still in employment, the statutory rate after 45 weeks is 75 per cent. But, since 1988 until fairly recently, those people have had their employer deduct from them a compulsory super contribution. So their take-home gross is effectively 70 per cent.

Senator MARSHALL—But this is the problem. Put to one side whether it is 70 or 75. With the deeming rate, they fall well below the 70 per cent even.

Ms Bennett—They are making a contribution to their superannuation arrangements for when their compensation ceases at the end of 65.

Senator MARSHALL—Maybe I am coming back to the deeming rate, unfortunately. However, let us accept, as you say, that the objective of the act is to deliver 70 per cent. Even though the act says 75 per cent, you say that in real terms it is 70 per cent.

Mr O'Shea—Yes, whatever.

Senator MARSHALL—You apply the deeming rate strictly in the sense of the deduction—and I can understand why you do that: to meet the objective that you say is inherent in the act—but the deeming rate has been misapplied all this time, which has delivered an outcome well below even 70 per cent.

Mr O'Shea—I think we have established that it has. But, when the deeming rate is adjusted to 5.56 per cent, when we deem a person on their gross lump sum, they will get not just basically the same but the same as a person who would be getting a weekly pension would get, which is 70 per cent. Through a combination of their superannuation and comp—

Senator MARSHALL—I am probably ploughing the soil for the argument about some compensation or retrospectivity in terms of the deeming rate. If the whole purpose of the Comcare act was to deliver 75 per cent less five per cent super, if we accept your position, that is what the outcome should have been and that is what we should ensure that people should have received. You were also responsible for the deeming rate. It seems logical to me that we ought to be making this retrospective and applying it properly. We are going to fix it for the future, and we all appreciate that and look forward to that, but there has been a long period of time where people have been significantly disadvantaged.

Mr Kibble—Perhaps I can come back to 'receive the gross versus net', just to add to Mr O'Shea's answer. It all turns around in legal terms on the meaning of the word 'received' in the legislation, noting that the bill itself does not make any change in the gross versus net issue. While there have been many tribunal and court cases involving the ASIC Act in a whole range of areas, there has never been a case that we are aware of where a claimant has disputed our interpretation. Apart from Mr Emery in administrative terms, we are not aware of any other case or settled law where they have challenged our approach to the word 'received'. We have been applying that administrative approach—

Ms Bennett—Pre-1988.

Mr Kibble—pre-1988.

Senator MARSHALL—That is nice information, but if it turns on that—

Mr Kibble—It means that it has stood since pre-1988. People have contested our interpretation across a whole range of issues and provisions in the SRC Act; on this one they have not.

Senator MARSHALL—It has not been contested.

Mr Kibble—No.

Senator TROOD—There could be all sorts of reasons for that, of course.

Ms Bennett—I think the legal advice that we, and probably claimants, have received is that it is done right.

Senator TROOD—I just read the act and it says ‘received’. Received means received. If you do not receive it, then it is difficult to see how you have received it—if that makes sense.

Mr Kibble—It does.

Ms Bennett—But receipt of workers compensation does not change other obligations that people have about superannuation and taxation and those sorts of things.

Senator TROOD—Ms Bennett, in answer to a previous question, you alluded to the fact that part of this legislation relates to people who are continuing in work and that the arrangements under the scheme relate to the benefits or the pay they might receive in relation to that work. Clearly, I agree with you completely: we do not want to put people in a position where they are double dipping or taking unnecessary advantage of the entitlements.

Ms Bennett—Or financially discouraged from working.

Senator TROOD—Indeed. But there seems to me a lack of subtlety here in relation to the legislation, particularly with regard to those people who have no likelihood of ever being able to work again—who are being paid out by some lump sum or on a weekly basis and have no prospects of being able to go back to work. There seems to be a class of people for whom the legislation works to their considerable disadvantage because they are unlikely to be able to go back to work.

Ms Bennett—Okay.

Senator MARSHALL—Can I clarify some of the super deduction issues too? Which funds is the five per cent notional deduction for people who are out of the workforce being paid into?

Mr O’Shea—When a person is at work, if they get 75 per cent, their employer is deducting five per cent and paying it into their super scheme.

Ms Bennett—That will depend on what the fund was of the person at the time they commenced it. For some public servants, that might be the CSS arrangements; for some it might be the PSS arrangements. With the ‘Darrell’ example, part of his would be the CSS and part would be the Telstra super fund. For people in those situations, depending on what arrangements are nominated by the person at the time, the employer will place it in that fund.

Mr O’Shea—But, according to sections 20, 21 and 21A, it is not a deduction; it is just an arithmetic formula to deliver the outcome of the legislative intent of paying 70 per cent to retired employees. Comcare is not taking an amount of money off someone and banking it somewhere.

Ms Bennett—We do not take the money.

Senator MARSHALL—I cannot find it now, but I thought I had recorded in some of the notes I have that you said the five per cent notional superannuation deduction is now accruing a benefit.

Ms Bennett—There may have been a bit of confusion in the question too. Comcare does not take this and put it in one of our accounts. It is really important—

Mr O’Shea—It is an arithmetic adjustment to deliver—

Senator MARSHALL—As long as I am clear on that. Thank you.

Senator TROOD—Is this for particular recipients or for all recipients?

Mr O'Shea—For recipients on 20, 21 and 21A benefits—that is, retired people in receipt of compensation and superannuation. Section 20 is a pension, 21 is a lump sum and 21A is a pension and a lump sum combined benefit.

Senator TROOD—So you are talking about a notional figure.

Mr O'Shea—It is in there because the AC part in those three sections refers back to section 19, which starts at 75 per cent. I do not want to overly complicate this matter. May I should not.

Ms Bennett—Just don't! We can put it in writing.

Mr O'Shea—It affirms the legislative intent to pay 70 per cent. I just draw that to your attention.

Senator TROOD—I haven't looked at your website, but I understand that you confirm that it talks about a 75 per cent benefit. It might be like with my website—I do not often look at it. Do Comcare employees look much at their website? Is that what the representation is?

Mr O'Shea—Yes. The HWCA comparison of schemes would mention that the floor benefit we pay is 75 per cent.

Senator TROOD—So it is 75 per cent, but the formulas seem to produce something less than that on occasions.

Mr O'Shea—I guess we are not talking about retired employees in receipt of compensation and superannuation in that instance; we are referring to people who work.

Senator TROOD—Sorry, you are referring to people—

Ms Bennett—Some people are on 75 per cent for many years before they reach retirement age.

Senator TROOD—Ms Bennett, are you saying they are the people who are still at work until they reach retirement age?

Ms Bennett—They are of working age—

Mr O'Shea—They have not retired yet.

Ms Bennett—But obviously they are not at work if they are receiving that proportion of compensation.

Senator TROOD—Mr Acting Chair, the remainder of my questions are probably best directed to DEWR at some later stage.

ACTING CHAIR (Senator Marshall)—This is a complex issue, so I thank the officers for their patience. We still may have some follow-up questions and we will have an opportunity during estimates next week to ask some of those. Senators Barnett or Fifield, do you have any questions?

Senator BARNETT—No, thank you.

Senator FIFIELD—No.

Ms Bennett—Apart from providing an answer to the Darrell scenario and amending the *Hansard* records where I said I met with Mr Emery rather than that Comcare had met with him, can I also amend the record at page 33 on 31 January where I explain that we had taken \$6 million in recovered third-party damages? For the last financial year, which is at the bottom of page 33, I somehow added two financial years. It was \$3.9 million for the last financial year and \$3 million to date this financial year rather than \$6 million.

ACTING CHAIR—We do not actually amend the *Hansard*, but we are happy for you to correct the record.

Ms Bennett—Can I make another observation about evidence that was given, if you are happy to receive it?

ACTING CHAIR—Yes.

Ms Bennett—I draw attention to the evidence provided by Mr Marles and Ms Sherrington in talking about the Comcare arrangement and explaining compensation paid in the context of ‘journey to work’. In our reading of that evidence, they gave the impression that somehow Comcare had a scheme whereby employers did not pay for injury but the scheme did—as if the scheme was some separate entity. I just wanted to assure the committee that the premium rate paid by agencies contributing to Comcare is determined very specifically by year-on-year workers compensation costs that result from the injuries incurred by that employer. There is a much more direct relationship paid by employers than was suggested by Mr Marles, which I have already let him know too.

ACTING CHAIR—Ms Bennett, if you are disputing the impression that other witnesses have left on the committee, I would prefer that you write formally to the committee and just outline that. We will make sure that is attached to the record. Is there anything else?

Ms Bennett—No, thank you.

ACTING CHAIR—Thank you.

Ms Bennett—We will you let me know if Mr Emery agrees to his case being the sample for the deeming rates since 1988 to 1996.

[5.25 pm]

BUNDY, Ms Elizabeth Anne, Senior Government Lawyer, Department of Employment and Workplace Relations

WASLIN, Mr Tony, Group Manager, Department of Employment and Workplace Relations

Senator MARSHALL—The explanatory memorandum accompanying the bill states that the guidelines will still be subject to disallowance under the Legislative Instruments Act. The position put in the memorandum appears to be that, under the existing provision, the guidelines are both subject to disallowance and subject to the amendment procedure, that the bill will temporarily suspend the amendment procedure only and that the ability of either house to disallow the guidelines will continue during the temporary suspension.

An alternative interpretation is that the amendment procedure set out in the existing provisions supersedes the normal disallowance procedure and that the temporary suspension of the amendment procedure would not give rise to a temporary disallowance process. The result would be that the guidelines would not be subject to either amendment or disallowance during the period of suspension.

I would seek confirmation from departmental officials that the government has received clear legal advice that the interpretation contained in the explanatory memorandum is correct. I would also ask that the advice be made available to members of the committee. I would be asking whether you could give a firm undertaking, though maybe you cannot on behalf of the minister, that it adopts and will adhere to the interpretation contained in the explanatory memorandum—that is, that the guidelines are subject to disallowance and will remain subject to disallowance during the period of suspension provided in the bill.

Mr Waslin—That is quite an interpretation of the legislation and it might be best if my colleague address the committee in that regard.

Ms Bundy—It is certainly the position that the interpretation in the explanatory memorandum is correct. During the drafting of the bill, we received advice from the Office of Parliamentary Counsel that the Legislative Instruments Act would apply—and we are certainly of that view. Concerning the provision device, it is the department's view that generally we do not disclose documents that are subject to privilege.

Senator MARSHALL—Thank you for that advice; that probably resolves the issue for me. Are you aware or able to advise me whether the government will give that firm undertaking? Normally, when these undertakings are given, they are given in the second or third reading speech. Can you advise me on that, or would you pass that request through your departmental head to the minister?

Ms Bundy—I certainly understand that that would be the position as set out in the explanatory memorandum. We cannot give that assurance, but we certainly will pass that on.

Senator MARSHALL—Thank you.

CHAIR—Thank you very much for appearing.

Committee adjourned at 5.28 pm