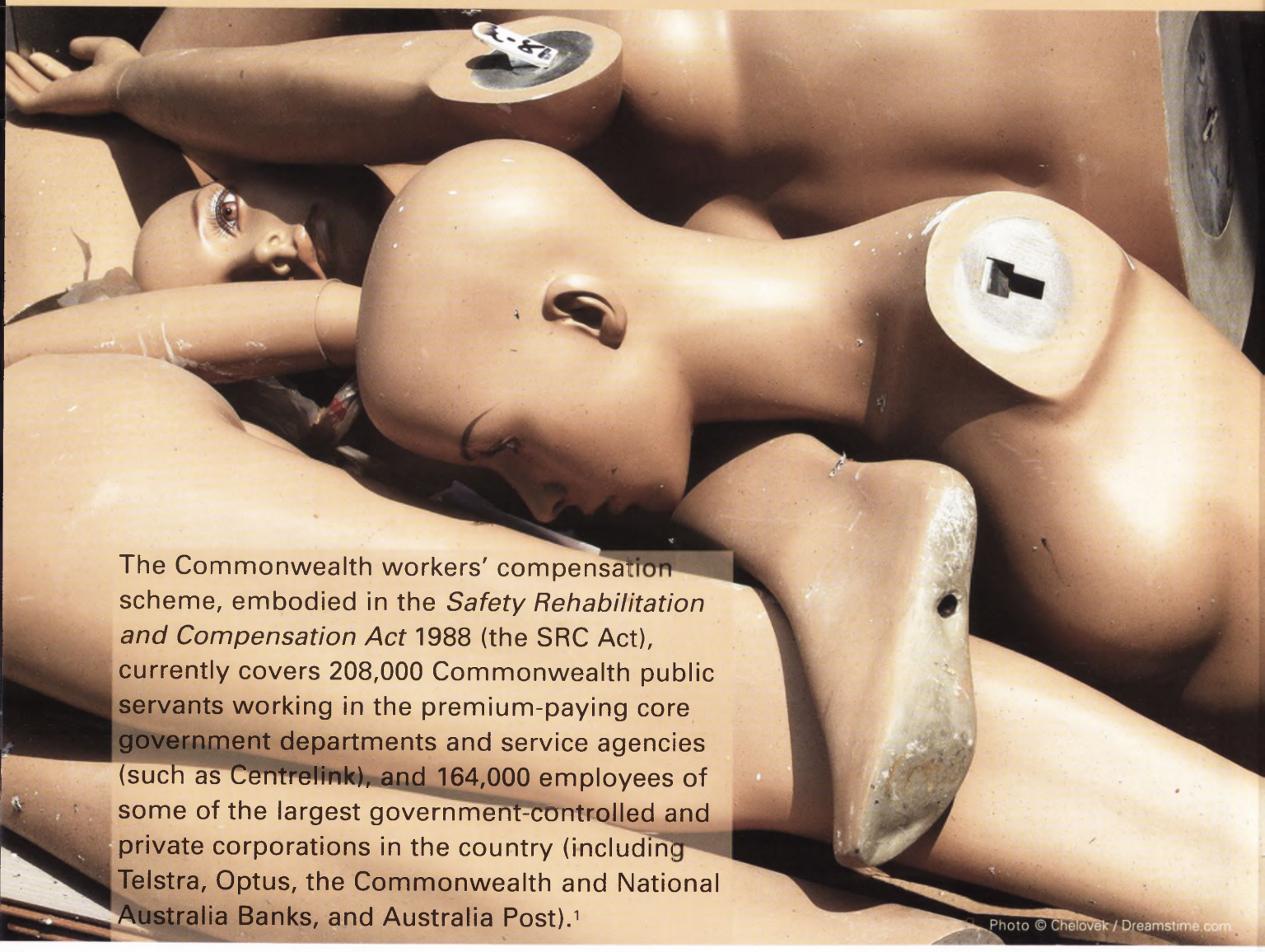
By Leo Grey

Permanent impairment under Commonwealth Compensation Law

How *Canute* made the tide recede



The Commonwealth workers' compensation scheme, embodied in the *Safety Rehabilitation and Compensation Act* 1988 (the SRC Act), currently covers 208,000 Commonwealth public servants working in the premium-paying core government departments and service agencies (such as Centrelink), and 164,000 employees of some of the largest government-controlled and private corporations in the country (including Telstra, Optus, the Commonwealth and National Australia Banks, and Australia Post).[1]

This article looks at significant changes that have occurred in permanent impairment compensation under the SRC Act since the beginning of 2006, and how they have combined to create significant legal complexities to the detriment of injured workers.

THE STAGE IS SET

The keystone entitlement provision in s14(1) of the SRC Act provides that 'Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment'. The reference to 'Comcare' must also be read as a reference to a licensed self-insurer, where applicable.

Until April 2007, 'injury' was simply defined in s4 along with a number of other terms requiring definition, as 'a disease suffered by an employee' or 'an injury (other than a disease) suffered by an employee, being a physical or mental injury arising out of, or in the course of, the employee's employment', or an aggravation of such an injury. The legislative changes that came into force on 13 April 2007[2] inserted new sections into the SRC Act defining 'injury' and 'disease': ss5A and 5B. Those definitions made other changes that have resulted in a

significant restriction of entitlement to compensation, but the central role played by s14, and the place of 'injury' in that section, remained unchanged by the 2007 amendments.

Once the entitlement to compensation is established under s14, permanent impairment compensation may be awarded under s24, provided that the impairment is 'likely to continue indefinitely', and the degree of impairment is (in general) not less than 10 per cent when assessed under the *Guide to the Assessment of the Degree of Permanent Impairment* ('the Comcare Guide'). Sub-section 25(4) also provides that where Comcare makes a 'final assessment' of the degree of permanent impairment of an employee (other than for hearing loss), no further permanent impairment compensation is to be paid unless the subsequent increase in impairment is 10 per cent or more.

Against that background, two long-running processes came to fruition in the last five years to reshape the law of permanent impairment under the SRC Act.

The first process was the revision of the Comcare Guide. The Federal Court had frequently criticised the drafting of the Guide following its introduction in 1989,[3] and the process of revising the Guide travelled a tortuous path from the late 1990s until the second edition was released in 2005, with effect from 1 March 2006.

The second process started with a simple permanent impairment claim lodged by a civilian employee of the Department of Defence, Mr Ken Canute, in 2002.

ENTER KEN CANUTE, STAGE LEFT

Mr Canute suffered a compensable back injury in the course of his employment. He was awarded compensation for a 12 per cent whole person impairment arising from physical restrictions in his spine and right leg. After that, he developed depression. A claim for a psychiatric impairment was made in 2002. Comcare denied that claim on the basis that any increase in whole person impairment did not amount to 10 per cent or more, as allegedly required by both s24(7) and s25(4). This determination was affirmed on internal review.

Mr Canute appealed to the AAT. His argument was that his psychological impairment was 10 per cent, and that it arose from a separate 'injury' and should not be combined with the back injury impairment. The AAT found[4] that Mr Canute did suffer from a 10 per cent permanent impairment, but that it should be combined with the 12 per cent permanent impairment arising from the back injury under Table 14.1 of the then first edition of the Guide, to produce a combined value of 21 per cent. The AAT then applied s25(4) of the SRC Act to conclude that the increase in compensation was less than 10 per cent. Mr Canute therefore failed.

Mr Canute appealed to the Federal Court. Hill J found that the AAT had failed to consider whether the adjustment disorder was itself an 'injury',[5] because the AAT thought it relevant that the psychological injury had come about as a result of the physical injury arising from the one incident. Hill J said that it did not matter whether the two injuries were caused by single event, as the SRC Act was concerned with *injuries*, not *incidents*. The matter was sent back to the AAT.

Comcare appealed to the Full Federal Court (French, Gyles and Stone JJ). The majority of the Full Court (French and Stone JJ) considered that the word 'impairment' as used in the SRC Act encompassed some 'injuries' consequential upon the initial injury, and that these should be treated as aspects of the impairment created by the initial injury.[6] The majority further considered that when an 'injury', which is an element of 'impairment' from the initial injury, occurs after a final determination of permanent impairment has been made, it will be caught by the provisions of s25(4). According to the majority, the AAT did err, but the error was that the AAT had failed to address whether the mental condition was an 'impairment'. Nonetheless, the result of a correct approach would have been the same, because the psychological 'injury' was an 'impairment' resulting from the back 'injury', *and* it was caught by s25(4). Accordingly, Mr Canute failed (again).

Gyles J dissented from the decision of the majority. He considered that the judgment of Hill J was correct, and agreed with Mr Canute that compensation for the second condition would not be affected by s25(4) of the SRC Act if it answered the description of an 'injury' with a relevant connection to employment.

Mr Canute was then granted special leave to appeal to the High Court. Five judges of the High Court restored the decision made by Hill J.[7] The Court made the following statement about the concept of 'injury', which it regarded as central to the scheme of the SRC Act (226 CLR 535 at 540):

> 'At this juncture, three things may be observed about the concept of "an injury". First, the Act does not oblige Comcare to pay compensation in respect of an employee's impairment; it is liable to pay compensation in respect of "the injury". Secondly, the term "injury" is not used in the Act in the sense of "workplace accident". The definition of "injury" is expressed in terms of the resultant effect of an incident or ailment upon the employee's body. Thirdly, the term "injury" is not used in a global sense to describe the general condition of the employee following an incident. The Act refers disjunctively to "disease" or "physical or mental" injuries and, at least to that extent, it assumes that an employee may sustain more than one "injury". The use in s24(1) of the indefinite article in the expression "an injury" reinforces that conclusion.'

On the s25(4) issue, the Court said (at 548):

> 'In referring to increases in the degree of impairment, s25(4) does not include a separate "injury" resulting in a separate permanent impairment which must be individually assessed. Since the adjustment disorder had nothing to do with the impairments previously assessed by Comcare >>

> resulting from the back injury, s25(4) was inapplicable. If this construction is open, why should the Court regard s24 and s25(4) as repugnant in the circumstances of this case, as Comcare would have it? The approach of Gyles J is not only plausible, but preferable. It gives effect to the terms of s24, and produces a separate assessment in respect of each injury.'

Since that decision, *Canute* has been seized on as a justification for increasingly narrow characterisations of 'injury'. Accordingly, it is important to be clear about the true *ratio* of *Canute*. It concerned the question of whether *for the purposes of the SRC Act* a secondary psychological condition was a stand-alone 'injury', separate from the back condition that had triggered it. In purely *medical* terms, that issue was not in dispute between the parties. Even the Full Federal Court had accepted that the psychological condition was a separate 'injury'[8] but thought it was also an 'impairment' arising from the earlier back injury, and hence caught by s25(4). It was on that latter point that the High Court disagreed with the Full Court.

An important question that the High Court was not asked to determine in *Canute* was how the boundary between one 'injury' and another should be determined. The difference between the physical injury on the one hand, and the mental injury on the other, was always plain in Mr Canute's case. The decision also concerned the first edition of the Comcare Guide. It was discussed in argument in the High Court whether the construction proposed by Mr Canute would be more or less advantageous for workers than a construction which permitted combination of whole person impairments. Under the first edition, there was no obvious advantage or disadvantage. As later became evident, that was not true of the second edition.

ENTER SALIM DIB AND OTHERS, STAGE RIGHT

Mr Salim Dib was a Commonwealth employee who suffered a blow to the spine in a compensable motor vehicle collision in 2003. He suffered aggravation of previously asymptomatic degenerative changes in his spine. These resulted in accepted permanent impairments assessed under the second edition of the Guide (as his claim for impairment compensation was made after February 2006). Mr Dib was found to have impairments of the cervical spine (under Table 9.15) and lumbar spine (under Table 9.17), arising from the one accident, each amounting to 8 per cent of the whole person. Comcare determined that these two impairments were the result of separate 'injuries', allegedly applying the decision in *Canute*. As each impairment was less than 10 per cent, Comcare determined that Mr Dib was entitled to nothing.

Mr Dib appealed to the AAT. His case was that he had suffered a single injury to the spine (being organically a single bodily structure) giving rise to two impairments.[9] The AAT decided that there were *two* injuries,[10] accepting expert evidence relied on by Comcare that the cervical spine and the lumbar spine were 'functionally different regions', and rejecting expert evidence to the contrary relied upon by Mr Dib. Accordingly, Mr Dib failed.

The outcome in *Dib* was particularly poignant because Tables 9.15 (cervical spine) and 9.17 (lumbar spine) of the second edition of the Comcare Guide under which Mr Dib had received his two 8 per cent impairment assessments provided no level at which a 10 per cent impairment could be found, despite s24 setting that as the statutory threshold. In short, the second edition of the Guide imposed an 18 per cent threshold for the cervical spine and a 13 per cent threshold for the lumbar spine as the minimum impairment for which a worker could be compensated. This was not the case under the first edition.

This problem with the second edition was recently considered by Buchanan J in *Broadhurst v Comcare*,[11] dealing with Table 9.17. His Honour agreed that it was a difficulty that the Guide did not provide the material necessary to assign (or not assign) a 10 per cent value for impairment. However, rather than invalidate Table 9.17, Buchanan J considered that it should be treated as simply not applicable in the circumstances, in which case resort could legitimately be had to the American Medical Association Tables.[12] Accordingly, Buchanan J sent the case back to the AAT for consideration of that alternative.

The decision in *Dib* brought into sharp relief the question of how one injury is to be differentiated from another. If the question were simply to be decided by pointing to the fact that two different bones had been fractured in a single incident, and therefore there were two injuries, the argument could quite logically be taken to absurdity. For example, the question of injury to the spine might be treated a number of separate 'injuries' to adjacent vertebra, in which case a blow to the lumbar spine that caused damage to each of the five lumbar vertebrae might produce five different 'injuries'. It is plain that such a simple characterisation cannot be correct. But where one incident produces damage in adjacent, similar parts of the body, how is the boundary between one 'injury' and another to be determined?

An attempt to deal with this problem as an issue of principle was put forward in the AAT in 2010 in the matter of *Re McDonald & Comcare*[13] (Deputy President Handley). That case involved a worker who fell on the stairs of a railway station on her way home from work in August 2005, as a result of which she fractured her right elbow and right clavicle. Impairments were found in both the shoulder and the elbow. The matter was complicated by a factual dispute about which set of whole person impairment assessments should be accepted, but the central argument was whether the worker had suffered one injury or two. It was argued on behalf of Ms McDonald that the proper test is one that divides the body into 'functional units'. This followed what appears to have been the rationale in *Dib*. Ms McDonald contended that the right upper limb was a single functional unit that had suffered a single injury, giving rise to two impairments. However, Deputy President Handley found that there were two injuries, one to the right clavicle and one to the right elbow.

The Deputy President regarded himself as bound by *Canute* in reaching that decision, for reasons that are not clear. Unfortunately, the question of principle – namely, whether the right upper limb should be treated as a single functional unit for the purposes of the SRC Act – was not discussed, and remains to be properly analysed on another occasion.

However, in principle, it is submitted that the 'functional unit' test must be correct. For example, the hand can be treated as a functional unit on its own, or it can be treated as part of a larger functional unit, the arm. Whether an 'injury' is treated as one to the hand, or one to the arm, may depend upon how widespread the damage is, and whether the Comcare Guide is capable of enabling overall assessment of the larger functional unit (which, in the case of the arm, it is). This is plainly an area for further consideration and refinement in the legislation and the Comcare Guide.

THE OTHER SIDE OF *CANUTE* – THE DECISION IN *FELLOWES*

The High Court decision in *Canute* has not led to uniformly negative results for injured workers. Some redress was provided by the decision in *Fellowes v Military Rehabilitation and Compensation Commission*,[14] where the High Court affirmed *Canute*. That case involved Table 9.5 in the First Edition of the Comcare Guide, which deals with general lower limb function, assessed by reference to certain functional descriptors. For example, where the evidence showed that the injured worker could 'rise to a standing position and walk but has difficulty with grades and steps', then that descriptor corresponded to a 10 per cent whole person impairment. Until the decision in *Fellowes*, Federal Court authority[15] held that if, for example, an injury to one leg produced a 10 per cent permanent impairment, according to the descriptor set out above, and a permanent injury to the other leg then occurred which left the worker in a position where he or she could still 'rise to a standing position and walk but has difficulty with grades and steps', then no further permanent impairment compensation was payable, even if the second injury would have caused the same degree of impairment on its own.

The High Court rejected this approach, following the logic of *Canute*. The result of treating the two injuries as separate was that each had to be assessed independently of the other.

While the decision in *Fellowes* amounted to a small victory for workers to whom the first edition of the Comcare Guide applied, its value was much less under the second edition of the Guide, due to the restrictions placed by the Guide itself on the use of Table 9.7 (the successor to the old Table 9.5). However, some of these restrictions may be inconsistent with the SRC Act, as interpreted in *Canute* and *Fellowes*.

CONCLUSION

The decision in *Canute*, and its subsequent affirmation in *Fellowes*, has created a range of difficult issues requiring consideration at a policy level, both in terms of the legislation itself, and the phrasing of the Comcare Guide. The second edition of the Guide was prepared and adopted before the reasoning of the High Court in *Canute* became known. Accordingly, there is a disconnect between the legislation (as interpreted by the High Court) and the Comcare Guide, which has not been corrected despite the elapse of over five years since the introduction of the second edition. ■

Notes: **1** Information published on the website of the *Safety Rehabilitation and Compensation Commission*, October 2010: http://www.srcc.gov.au/scheme_statistics. **2** See the *Safety Rehabilitation and Compensation and Other Legislation Amendment Act* 2007 (No 54 of 2007). **3** See, for example, *Whittaker v Comcare* (1998) 86 FCR 532 at 538. **4** *Re Canute & Comcare* [2004] AATA 627. **5** *Canute v Comcare* (2005) 40 AAR 327 (FC). **6** *Comcare v Canute* (2005) 148 FCR 232 (FFC). **7** *Canute v Comcare* (2006) 226 CLR 535 (HC). **8** (2005) 148 FCR 232 at 234. **9** *Comcare v Roser* (2003) 127 FCR 155 at 167 (para [37]) **10** *Re Dib & Comcare* [2008] AATA 739. **11** *Broadhurst v Comcare* [2010] FCA 1034. **12** *Ibid*, at [58]-[64]. **13** *Re McDonald & Comcare* [2010] AATA 635. **14** *Fellowes v Military Rehabilitation and Compensation Commission* (2009) 240 CLR 28. **15** See *Comcare v Van Grinsven* (2002) 117 FCR 169.

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