



## **Express law** *fast track information for clients*

6 October 2006

### **Canute and Comcare**

Every 'injury' as defined by section 4 of the *Safety, Rehabilitation and Compensation Act 1988* (the Act) which results in an 'impairment' must be the subject of a separate assessment pursuant to section 24. Subsection 25(4) and the Combined Values Chart in the Guide to the Assessment of the Degree of Permanent Impairment (the Guide) do not apply to separate injuries which result from the same event or incident.

#### ***Canute v Comcare [2006] HCA 47***

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***Canute v Comcare [2006] HCA 47, 28 September 2006, S154/2006***

The appellant received compensation under section 24 of the Act in respect of a 12% whole person impairment resulting from 'L5/S1 spondylolisthesis'. He later submitted a second claim for compensation under section 24 of the Act in respect of 'adjustment disorder with depression'.

Comcare denied liability to pay compensation in respect of the second claim on the basis that the appellant did not meet the threshold increase in the degree of whole person impairment imposed by subsection 25(4) of the Act. Comcare's decision was affirmed on reconsideration, and by the Administrative Appeals Tribunal. The matter then went on appeal to the Federal Court<sup>1</sup> and the Full Court of the Federal Court.<sup>2</sup>

#### ***The Act does not distinguish between primary and secondary injuries***

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The decision to deny liability in respect of the appellant's second claim for compensation under section 24 of the Act was based upon a construction of the Act which considered conditions arising as a consequence of an 'injury' as contributing to the degree of whole person impairment resulting from the primary injury. However, the consequential or secondary injury was not recognised and assessed as a separate injury. The High Court<sup>3</sup> rejected this approach:

... there is no foundation in the Act for any such distinction between "an injury" and a consequential or secondary injury. Neither of these qualifiers finds any expression in the Act. The act speaks exclusively in terms of "an injury".

The High Court<sup>4</sup> continued:

The Act only adopts the "whole person impairment" approach with respect to permanent impairments resulting from each "injury". That "whole person" approach cannot properly be used to deny the applicability of s 24 to something which corresponds to the legislative definition of an

“injury”. The statutory criterion of an “injury” is antecedent to the concept of “whole person” impairment, not the other way around.

## ***Implications***

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The High Court’s decision in *Canute* requires a fundamental change in the manner of determining the amount of compensation payable in respect of claims under section 24 of the Act.

When a claim is made, a separate assessment will be required in respect of each condition which satisfies the definition of ‘injury’.

The Combined Values Chart will only be relevant where an ‘injury’ results in multiple impairments. For example, as in the case of the appellant’s first claim for compensation under section 24, L5/S1 spondylolisthesis may result in an impairment to the back and to the lower limbs.

The operation of subsection 25(4) will be limited to circumstances in which the degree of impairment resulting from an ‘injury’ increases.

Depending upon their individual circumstances, this decision may be detrimental, or beneficial, to employees claiming compensation under the Act.

The decision will be detrimental to employees who suffer multiple injuries that result in minor degrees of impairment. The percentage impairment resulting from each injury must satisfy the minimum threshold imposed by subsection 24(7) (10% whole person impairment for impairments other than hearing loss) or subsection 24(7A) (5% whole person impairment for hearing loss).

The decision has the potential to be slightly beneficial to employees who suffer multiple injuries each of which result in an impairment that satisfies the minimum thresholds. For example, an employee who sustains one injury resulting in a 10% whole person impairment, and a second injury resulting in a 15% whole person impairment will now receive an amount of compensation equal to the full 25%. (Under the construction of the Act applied prior to this decision, the impairments had been combined, so the employee would have received compensation for a 24% whole person impairment.)

*Text of the decision is available at:*

[http://www.austlii.edu.au/au/cases/cth/high\\_ct/2006/47.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2006/47.html)

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## **Notes**

<sup>1</sup> (2005) 40 AAR 327

<sup>2</sup> (2005) 148 FCR 323

<sup>3</sup> [2006] HCA 47 at [34]

<sup>4</sup> [2006] HCA 47 at [37]

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