SAFETY, REHABILITATION AND COMPENSATION

(NOTIONAL INTEREST) DETERMINATION 2022

EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance

under subsection 90C(3) of the *Safety, Rehabilitation and Compensation Act 1988*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) establishes the Commonwealth workers' compensation and rehabilitation scheme for employees of the Commonwealth, Commonwealth authorities and licensed corporations.

Section 90C of the SRC Act outlines the manner in which Comcare is to meet its liabilities and other expenses under the Act, including the circumstances in which Comcare must make payments from 'Comcare-retained funds'.

Subsection 90C(2) of the SRC Act provides that, if there is insufficient money in Comcare-retained funds to make a particular payment under subsection 90C(1), the Commonwealth is to make funds available to Comcare as is necessary to enable Comcare to make that payment.

Subsection 90C(3) states that such payment will not be made by the Commonwealth to Comcare under subsection 90C(2) if it would exceed the amount worked out using the formula: premiums received + notional interest – previous payments.

For the purposes of this formula, 'notional interest' is defined to mean the interest at such rates as are from time to time determined by the Finance Minister that would have accrued, on or after 1 July 1989 and before the relevant payment is made, in respect of the premiums received if such interest had been payable to the previous Commission and to Comcare.

Pursuant to subsection 90C(3), the Finance Minister determines in this instrument the 'notional interest' to be applied in the following periods:

- 1 July 1989 to 30 June 2000;
- 1 July 2000 to 19 June 2002;
- 20 June 2002 to 31 October 2018; and
- from 1 November 2018 onwards.

This instrument applies the same notional interest rate for the period 1 July 2000 to 19 June 2002, and the period 20 June 2002 to 31 October 2018 as specified in the preceding *Safety, Rehabilitation and Compensation (Notional Interest) Determination 2003*. Prior to 30 June 2000 the notional interest rate was determined to be zero per cent.

The change to the notional interest rate from 1 November 2018 to the Bloomberg AusBond Treasury 5+ Year Index will enable closer duration matching of Comcare premium scheme assets and liabilities, creating greater stability in Comcare's funding ratio and reducing the risk of premiums being significantly impacted by interest rates.

The instrument has retrospective application but operates on the same terms as previous determinations made under subsection 90C(3) of the SRC Act were understood to operate.

Subsection 12(1A) of the *Legislation Act 2003* provides that a legislative instrument may provide that the instrument commences before it is registered. However, subsection 12(2) of that Act provides that the retrospective commencement of an instrument is to have no effect if it would disadvantage the rights of a person or impose liabilities on a person in respect of anything done or omitted to be done prior to the registration of the instrument.

While the instrument commences on the day after it is registered on the Federal Register of Legislation, it has retrospective application with notional interest rates determined for periods dating back to 1 July 1989. This will not disadvantage any person other than the Commonwealth. The effect of the instrument is to apply a notional interest rate to funds to be made available to Comcare, a Commonwealth authority, to meet its liabilities and other expenses. This impacts the Commonwealth only.

Under section 90C of the SRC Act, Comcare pays the future cost of claims from cash reserves. A new determination of the notional interest rate applicable to these funds will only impact the notional value of Comcare funds held in the Consolidated Revenue Fund (CRF), but will have no impact on underlying cash balances.

Specifying the notional interest rates for prior periods confirms the applicable rates over previous periods.

The instrument is a disallowable legislative instrument for the purposes of section 42 of the *Legislation Act 2003*.

CONSULTATION

Comcare and the Attorney-General's Department were consulted in relation to this instrument. Consultation beyond Commonwealth entities was not necessary, as the instrument only impacts the Commonwealth in respect of notional amounts held in the CRF. The instrument does not impact how Comcare performs its functions or works with claimants.

REGULATION OF IMPACT STATEMENT

Regulation Impact Statement is not required (OBPR21-01241).

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

NOTES ON SECTIONS

Section 1 – Name

Section 1 provides that the title of the instrument is the *Safety, Rehabilitation and Compensation (Notional Interest) Determination 2022*.

Section 2 – Commencement

Section 2 provides that the entirety of the instrument commences on the day after it is registered.

Section 3 – Authority

Section 3 provides that the instrument is made under subsection 90C(3) of the *Safety, Rehabilitation and Compensation Act 1988.*

Section 4 – Definitions

Section 4 provides the definitions of terms used in the instrument.

Section 5 – Rates of notional interest for period from 1 July 1989 to 30 June 2000

Section 5 provides that for subsection 90C(3) of the Act, the rate of notional interest for a day occurring during the period from 1 July 1989 to 30 June 2000 (inclusive) is zero.

Section 6 – Rates of notional interest for period from 1 July 2000 to 19 June 2002

Section 6 provides that for subsection 90C(3) of the Act, the rate of notional interest for a day occurring during the period from 20 June 2002 to 31 October 2018 (inclusive) is the 6-month Treasury Note Yields rate fixed for the day by the Reserve Bank.

Section 7 – Rates of notional interest for period from 20 June 2002 to 31 October 2018

Section 7 provides that for subsection 90C(3) of the Act, the rate of notional interest for a day occurring during the period from 20 June 2002 to 31 October 2018 is the 6 month Overnight indexed swaps rate fixed for the day by the Reserve Bank.

Section 8 – Rates of notional interest for 1 November 2018 onwards

Section 8 provides that for subsection 90C(3) of the Act, the rate of notional interest for a day occurring after 31 October 2018 is the rate of return on the day on the Bloomberg AusBond Treasury 5+ Year Index (BATY5:IND) constructed by Bloomberg L.P.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Safety, Rehabilitation and Compensation (Notional Interest) Determination 2022

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) establishes the Commonwealth workers' compensation and rehabilitation scheme for employees of the Commonwealth, Commonwealth authorities and licensed corporations.

Section 90C of the SRC Act outlines the manner in which Comcare is to meet its liabilities and other expenses under the Act, including the circumstances in which Comcare must make payments from 'Comcare-retained funds'.

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Subsection 90C(3) states that such payment will not be made by the Commonwealth to Comcare under subsection 90C(2) if it would exceed the amount worked out using the formula: premiums received + notional interest – previous payments.

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Subsection 12(1A) of the *Legislation Act 2003* provides that a legislative instrument may provide that the instrument commences before it is registered. However, subsection 12(2) of that Act provides that the retrospective commencement of an instrument is to have no effect if it would disadvantage the rights of a person or impose liabilities on a person in respect of anything done or omitted to be done prior to the registration of the instrument.

While the instrument commences on the day after it is registered on the Federal Register of Legislation, it has retrospective application with notional interest rates determined for periods dating back to 1 July 1989. This will not disadvantage any person other than the Commonwealth. The effect of the instrument is to apply a notional interest rate to funds to be made available to Comcare, a Commonwealth authority, to meet its liabilities and other expenses. This impacts the Commonwealth only.

Under section 90C of the SRC Act, Comcare pays the future cost of claims from cash reserves. A new determination of the notional interest rate applicable to these funds will only impact the notional value of Comcare funds held in the Consolidated Revenue Fund (CRF), but will have no impact on underlying cash balances.

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The instrument is a disallowable legislative instrument for the purposes of section 42 of the *Legislation Act 2003*.

Human rights implications

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* provides for the right of everyone to social security, including social insurance. General Comment 19 by the Committee on Economic, Social and Cultural Rights elaborates on Article 9, stating that the 'States parties should ensure the protection of workers who are injured in the course of employment or other productive work'.[1]

Workers' compensation, such as that provided through Comcare, is analogous to social insurance in that it provides payment of wages and medical costs to employees for injuries occurring as a result of their employment.

This instrument does not raise any human rights issues because it determines the extent of the Commonwealth's liability to pay money to Comcare in circumstances in which there is insufficient money in Comcare-retained funds to make a relevant payment under the SRC Act. The change to the proposed rate will provide greater stability of the scheme by mirroring the return on the CRF to the fluctuations in the value of the scheme's liabilities, thus reducing volatility in Comcare's premiums for Commonwealth employers. The greater stability will increase the protection of workers' right to social security (including social insurance).

Where the Commonwealth's liability to pay money to Comcare through this mechanism is exceeded, there are other methods available in the *Safety, Rehabilitation and Compensation Act 1988* which would enable the payment of money to Comcare as appropriated by the Parliament to ensure that a workers' right to social security (including social insurance) is not affected.

[1] Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art. 9)*, U.N. Doc E/C.12/GC/19 (2008), [17].

Conclusion

This legislative instrument is compatible with human rights because it does not raise any human rights issues.

Senator the Hon Simon Birmingham

Minister for Finance