

Recoveries Against Third Party Wrongdoers

Objectives, Targets & Performance Indicators

Objective	Target	Performance Indicator
SAPS agencies have an implemented procedure regarding recoveries against third party wrongdoers	All SAPS agencies	Implemented policy/ procedure

Purpose

The purpose of the guideline is to ensure SAPS agencies have an implemented procedure in accordance with Division 10 – Section 66 of the Return to Work Act 2014 (RTW Act) regarding recoveries against third party wrongdoers.

Context

<p>(5) If—</p> <p>(a) compensation is paid or payable under this Act in respect of a work injury;</p> <p>(b) a right of action exists against a person other than the employer for damages in respect of the injury,</p> <p>the person by whom the compensation is paid or payable is entitled to recover from that other person the amount of the compensation in accordance with subsection (7).</p>	Section 66(5)
<p>(6) If—</p> <p>(a) a work injury arises out of the use of a motor vehicle; and</p> <p>(b) the employer was or ought to have been insured against liability for the injury under the law of compulsory third-party motor vehicle insurance; and</p> <p>(c) compensation is paid or payable by the Corporation or a self-insured employer under this Act in respect of the injury,</p> <p>the Corporation or a self-insured employer (as the case requires) is entitled to recover the amount of the compensation in accordance with subsection (7).</p>	Section 66 (6)
<p>(7) If—</p> <p>(a) compensation is paid or payable to a person (the <i>injured party</i>) under this Act; and</p> <p>(b) the injured party has received, or is entitled to, damages from another person (the <i>wrongdoer</i>) pursuant to rights arising from the same trauma as gave rise to the rights to compensation under this Act; and</p> <p>(c) the person by whom the compensation is paid or payable under this Act (the <i>claimant</i>) is entitled to recover the amount of the compensation by virtue of subsection (5) or (6),</p> <p>then the following provisions apply:</p> <p>(d) the claimant is entitled to recover the amount of compensation paid or payable under this Act from the wrongdoer or the injured party but subject to the following qualifications:</p> <p>(i) no amount may be recovered from the wrongdoer in excess of the wrongdoer's unsatisfied liability to the injured party; and</p>	Section 66(7)

- (ii) the claimant must exhaust its rights against the wrongdoer before recovering against the injured party; and
 - (iii) no amount may be recovered from the injured party in excess of the amount of the damages received by the injured party;
- (e) the claimant must, on giving notice to a wrongdoer of an entitlement to recover compensation under this section, have a first charge, to the extent of the entitlement, on damages payable by the wrongdoer to the injured party;
- (f) any amount recovered by the claimant against a wrongdoer under this subsection will be taken to be an amount paid in or towards satisfaction of the wrongdoer's liability to the injured party;
- (g) an action for the recovery of compensation under this subsection—
- (i) may be heard and determined in proceedings brought in the District Court of South Australia; and
 - (ii) must be commenced within 3 years after the date of the trauma referred to in paragraph (b);
- (h) the injured party and the claimant may enter into an agreement (a **deed of release**) under which the parties agree that after the claimant has recovered from the injured party or the wrongdoer the full amount of compensation paid by the claimant to the injured party—
- (i) the injured party is then entitled to retain the balance of any damages paid or payable to him or her by the wrongdoer; and
 - (ii) any liability by the claimant to the injured party under this Act in respect of the work injury (including a liability to provide recovery/return to work services or to provide compensation under Division 4) is discharged; and
 - (iii) the employer from whose employment the injury arose has no further obligation under this Act to provide suitable employment to the injured party;
- (i) a deed of release cannot be entered into unless the injured party has received—
- (i) competent professional advice; and
 - (ii) competent financial advice,
- about the consequences of entering into the deed of release;
- (j) if the claimant notifies the injured party that it is willing to enter into a deed of release, the claimant is liable to indemnify the injured party for reasonable costs of obtaining the advice required under paragraph (i) up to a limit prescribed by regulation.

(8) This section is intended to apply in relation to any action that arises out of the occurrence of a work injury—

- (a) irrespective of where the injury occurred; and
- (b) —
 - (i) irrespective of whether the action is brought before a court of this State or before a court of some other state, territory or country; and
 - (ii) notwithstanding that the court before which the action is brought would not (but for this subsection) apply, or take into account, South Australian law.

Section 66 (8)

<p>(9) If—</p> <p>(a) an action is brought in respect of a work injury in a court that is not a court of the State; and</p> <p>(b) despite subsection (8),</p> <p>the court awards an amount against an employer that is in excess of the amount (if any) that would have been awarded in a similar action before a court of the State; and</p> <p>(c) the Corporation is liable to pay the amount awarded by virtue of insurance provided under this Act,</p> <p>the Corporation is entitled to recover the excess from the person to whom the amount is awarded.</p>	<p>Section 66 (9)</p>
<p>(11) In this section—</p> <p>damages includes any form of compensation payable apart from this Act in respect of a work injury;</p> <p>employer includes—</p> <p>(a) any person who is vicariously liable for the acts of an employer;</p> <p>(b) any person for whose acts an employer is vicariously liable;</p> <p>the law of compulsory third-party motor vehicle insurance means—</p> <p>(a) Part 4 of the <i>Motor Vehicles Act 1959</i> (including a policy of insurance under that Part); or</p> <p>(b) the law of another State or a Territory of the Commonwealth that corresponds to Part 4 of the <i>Motor Vehicles Act 1959</i> (including a policy of insurance under such a law).</p>	<p>Section 66 (11)</p>

Overview

Where a worker suffers injury as a result of the actions of a third party that results in an entitlement to compensation pursuant to the RTW Act and if the worker is entitled to claim damages from that third party (the wrongdoer) the Agency will seek recovery of the costs paid and payable from the workers compensation claim from the wrongdoer.

Categories of costs that are recoverable are:

- Medical and related expenses
- Weekly payments
- Lump sum payments

Expenses that are not recoverable are:

- Return to work costs (rehabilitation)
- Legal costs.
- Claims investigation costs

To exercise the statutory right of recovery for an injury to a worker notice of intention to seek recovery should be provided to the wrongdoer within two (2) months of the injury.

The notice must include details of the payments paid in respect of which recovery is sought.

The notice must also include an estimate of future possible payments of income maintenance, medical costs and lump sum to be made.

Regular updates of compensation paid must also be provided to the parties involved.

The agency is entitled to seek recovery even if the worker decides not to pursue a claim for damages against the wrongdoer.

However, if a worker pursues damages against the wrongdoer, the agency will exercise its right to seek recovery of any compensation paid from any award of damages made to the worker. The worker should be advised of the Agency's intention to seek the recovery and be provided with copies of the recovery notices issued.

Procedure

The identification of potential recovery actions, initial notification and finalising actions to recover amounts from the wrongdoer or their insurer is the responsibility of the Agency.

Recovery in the cases of motor vehicle accidents

Often, a worker will be injured as a result of negligence of another driver in a work related motor vehicle accident.

In such a case, the recovery action is taken against the Motor Accident Commission insurer. The notice of recovery is therefore to be sent to the insurer.

In accordance with an agreement between the State and the Accident Commission (the MAC agreement), it is not necessary for proceedings to be issued in the District Court. It is however necessary for the Agency to provide updates of payments made to the insurer. If no agreement can be reached on recovery, the matter will proceed to arbitration

Recoveries in non motor vehicle accident cases or motor vehicle accident cases which do not involve the Motor Accident Commission (ie interstate insurers)

To exercise the statutory right of recovery against other insurers or persons (wrongdoer), proceedings must be issued in the District Court by the agency within three (3) years of the injury against the wrongdoer or their insurer. Those proceedings will be issued on behalf of the agency by the Crown Solicitors Office or a solicitor appointed to act on behalf of the Agency.

In such cases, legal advice must be sought no later than two years from the date of injury, to enable adequate time for advice to be provided and the necessary pre action Court procedures undertaken.

When recovery should not be pursued

Recovery cannot be pursued if the worker has no entitlement to damages from the alleged wrongdoer (that is, there is no wrongdoing on the part of the alleged wrongdoer or the worker cannot pursue the claim against the wrongdoer)

However, the agency may choose to not seek recovery of compensation paid under the Return to Work Act 2014 from the wrongdoer if:

- The value of the recovery is negligible and outweighs the costs to the Agency in pursuing the recovery action
- Liability is denied by the wrongdoer or insurer and the likelihood of succeeding in recovery are poor or the costs prohibitive.
- The agency has a commercial relationship with that third party that may be negatively impacted upon by any action to seek recovery of compensation paid; or
- There is an indemnity to the third party that would preclude recovery of compensation paid.

In any of the above cases, the agency should seek legal advice before deciding not to pursue recovery.

Procedure when a recovery amount is agreed in cases not involving District Court proceedings

In cases where an agreement has been reached with the Motor Accident Commission, the form of agreement to accept recovery is attached as Attachment 1.

In cases where the agreed amount includes an amount for future payments, the agency may receive a request from the worker or their representative for payment of any unused amount.

It is considered that the worker has no entitlement to be paid the unused portion of the recovery amount because the money has been recovered by the agency and it is the Agency's money and not the worker's money.

However, the agency can agree to pay the unused portion to the worker either by:-

1. a redemption agreement under sections 53 and 54 of the RTW Act whereby the worker is paid the unused portion of income maintenance and medical costs ; or
2. a deed of release under section 66(h) of the RTW Act whereby the worker retains the monies. A deed of release is conditional upon the worker agreeing that any liability under the Act for the injury, including a liability to provide recovery/reuter to work services or to provide compensation as a seriously injured worker is discharged."

A form of a deed of release is attached-Attachment 2.

Your Reference:
Our Reference:

DISCHARGE

1. Subject to clause 2 hereof, the Motor Accident Commission (“MAC”) will pay and the State of South Australia in right of the Department will accept the sum of \$ ***** .** in full and final satisfaction of the entitlement of the State of South Australia in right of the Department pursuant to section 54 of the Workers Rehabilitation and Compensation Act 1986 (“WRCA”) and/or section 66 of the Return to Work Act 2014 (“RTWA”) to recover from the MAC the amounts of compensation paid or payable by it to ***name***** (“the worker”) as a result of injuries sustained by the worker in the motor vehicle accident details of which are set out in the Schedule below.

2. In the event that the worker shall subsequently make a claim against MAC and recover, whether by judgment, settlement or otherwise, damages in a sum in addition to the amount referred to in clause 1 hereof (“the excess damages”) the release given by the State of South Australia in right of the Department to MAC in clause 1 does not extend to prevent or in any way bar the State of South Australia in right of the Department from giving notice of, and enforcing, a first charge pursuant to section 54(7) of the WRCA and/or 66(7) of the RTWA on the excess damages.

SCHEDULE

DATE OF ACCIDENT: *

PLACE OF ACCIDENT: *

MAC INSURED: *

WORKER: *

DATED the ** of ** 2016

.....
Duly authorised officer of the
NAME OF AGENCY

.....
Duly authorised officer of the
Motor Accident Commission

RETURN TO WORK ACT 2014 - SECTION 66 (7)(h) DEED OF RELEASE

IN THE MATTER OF SECTION 66(7) OF THE RETURN TO WORK ACT 2014

- and -

IN THE MATTER OF AN AGREEMENT BETWEEN:

“Worker”

- and -

THE STATE OF SOUTH AUSTRALIA IN RIGHT OF (DEPARTMENT)

“The State”

WHEREAS:

- A. The worker was at all material times employed by the State as a (occupation with (Department)
- B. On or about [insert date of injury} the worker suffered a work injury (the injury) out of his employment with the (Department) particulars of which are as follows –
 -
- C. The State has paid compensation to the worker in respect of the injury referred to in recital B under the Workers Rehabilitation and Compensation Act 1986 (the WRCA) and/or the Return to Work Act 2014 (the RTWA).
- D. The worker has received or has an entitlement to damages from another person (the wrongdoer) pursuant to rights arising from the same trauma which caused the work injury referred to in recital A and gave rise to the rights to the compensation referred to in recital B.
- E. Subject to the conditions set out in the RTWA the State is entitled under section 66(7) of the RTWA to recover the amount of compensation paid or payable under the WRCA and/or RTWA from the wrongdoer or the worker (subject to the qualifications contained in section 66(7)(d) of the RTWA).
- F. The parties wish to enter into a deed of release (this Deed) pursuant to section 66(7)(h) of the RTWA.

AND IT IS HEREBY COVENANTED AGREED AND ACKNOWLEDGED by the parties that -

1. The State has recovered the full amount of compensation paid by the State to the worker and it has received or will receive the full amount of \$ xx.
2. The State and the worker agree that after the State has recovered the full amount of compensation paid referred to in clause 1 the worker is entitled to receive or retain the balance of damages paid or payable to the worker by the wrongdoer and that the State has no title or interest in such balance of damages.
3. The worker hereby releases the State its agents and assigns and agrees to hold them harmless against any past present or future action, suit, claim, or demand made by the worker or on behalf of the worker in respect of any liability whatsoever by the Corporation to the worker under the RTWA arising out of the injury referred to in recital A, and without limiting the general nature of the release including all income maintenance, lump sum compensation, expenses for medical treatment and the like, recovery and return to work services and all other obligations under the RTWA consistent with section 66(7)(h)(ii) of the RTWA.
4. The State in its capacity as the employer of the worker has no further obligation to provide suitable employment to the worker consistent with section 66(7)(h)(iii) of the RTWA from and after the execution of this Deed and the receipt by the State of the full amount of the compensation.
5. IN CONSIDERATION of this Deed the worker HEREBY INDEMINIFIES the State and its agents, servants, officers, successors insurers and assigns and agree to hold them harmless against any past, present or future actions, suits, causes of actions, proceedings, claims or demands made by any person or entity for payment, repayment or reimbursement of all or any damages, costs, expenses or benefits of any type arising out of or in any way connected with the injury.
6. The worker warrants that in compliance with section 66(7)(i)(i) of the RTWA the worker has received competent professional advice about the consequences of entering into this Deed as appears from Annexure "A".
7. The worker warrants that in compliance with section 66(7)(i)(ii) of the RTWA the worker has received competent financial advice about the consequences of entering into this Deed as appears from Annexure "B".
8. This Deed is governed by the laws of South Australia.
9. This Deed may be executed in any number of counterparts with all executed counterparts together constituting one document.
- 10 This Deed does not become binding on the parties until it has been signed by all parties.
11. A party may sign and deliver this Deed by sending to the other party or their representative an email of an original signed copy of the Deed in PDF or equivalent form.

DATED the _____ day of _____ 201 .

EXECUTED as a Deed

SIGNED SEALED AND DELIVERED by the worker)
).....
).....) Date and time
signed by worker

in the presence of:

).....

SIGNED FOR AND ON BEHALF OF THE STATE OF SOUTH AUSTRALIA

.....in the).....
presence)
of

.....

ANNEXURE "A"
PROFESSIONAL ADVICE

SUBJECT: Release of liability under section 66(7)(h) of the Return to Work Act, 2014

I, (the worker), have received competent professional advice about the consequences of entering into a deed of release (this Deed) under section 66(7)(h) of the Act from as required by section 66(7)(i)(i) of the Act.

Although not limited to, I have received advice on the following:

- That on signing this Deed and receipt of the balance of damages I have no further entitlement to payment of any income maintenance, lump sum compensation, expenses for medical treatment and the like, recovery or return to work services and all other obligations under the RTWA consistent with section 66(7)(h)(ii) of the RTWA in relation to the injury described in recital A.
- That on signing this Deed and receipt of the balance of damages I may not be able to claim medical benefits from Medicare nor my health fund for treatment regarding my injury described in recital A.
- The application of section 49(3) of the Act and that on signing this Deed and receipt of the balance of damages, I acknowledge that in the event of another claim I may be taken to be receiving weekly payments of \$0.00 for the purpose of section 49(1) of the Act.
- Taxation implications of signing this Deed and receipt of the balance of damages, if any. In particular, I have been advised that I may seek a private ruling in accordance with the Income Tax Assessment Act 1997.
- Centrelink implications in relation to receipt of the balance of damages. (Information available from the South Australian Centrelink Compensation Recovery Team on 8402 8088).
- Housing SA implications in relation to receipt of the balance of damages, if any. (Information available from Housing SA's Benefit Review Branch on 1300 728 600).

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Worker's Name

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Adviser's Name

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Worker's Address

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Adviser's Company name and address

.....
Worker's Signature

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Adviser's Signature

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Date and time signed by worker

.....
Date and time signed by adviser

ANNEXURE "B"
FINANCIAL ADVICE

SUBJECT: Release of liability under section 66(7)(h) of the Return to Work Act, 2014

I, (the worker), have received competent financial advice about the consequences of entering into a deed of release under section 66(7)(h) of the Act fromas required by section 66(7)(i)(ii) of the Act.

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Worker's Name

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Adviser's Name

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Worker's Address

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Adviser's Company name and address

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Worker's Signature

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Adviser's Signature

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Date and time signed by worker

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Date and time signed by adviser