COMCARE REVIEW

Submission of

AUSTRALIAN COUNCIL OF TRADE UNIONS

29 FEBRUARY 2008
Executive Summary

This submission is made by the Australian Council of Trade Unions (ACTU).

Reference is made to submissions by ACTU affiliate unions that are an adjunct to this submission.

The ACTU welcomes this opportunity to comment on the Comcare scheme for workers compensation and occupational health and safety arrangements and the suitability of Comcare self-insurance.

In addressing the Terms of Reference for this Review, our submission has two parts. In the first part of our submission we respond to the questions posed in the Terms of Reference. Additionally, as an addendum to our submission, we detail matters we consider need the immediate attention of Government to provide relief to workers from Comcare’s inadequate OHS protections and workers compensation entitlements.

The culture of the Comcare self-insurance regime is secretive and consultation between self-insurers and their workers is not encouraged or facilitated by the regulator.

Comcare is currently under resourced to effectively ensure compliance and enforcement of its Occupational Health and Safety jurisdiction. The culture minimises payments to workers through claim rejection and a willingness to allow disputes to progress to lengthy and costly dispute settlement processes.

It is the position of the ACTU that no further corporations are declared eligible to apply for self-insurance and that no applications from those already declared eligible are considered by the Safety Rehabilitation and Compensation Commission, until such time that:

- it can be guaranteed that there will be no loss of rights and conditions for employees involved;
- a comprehensive review of the scheme is undertaken, including an examination of the SRCC powers and functions to ensure their utmost effectiveness, and the scope and application of licence conditions;
- entry criteria are substantially tightened;
- all jurisdictions and other stakeholders have had an opportunity to review and consider national implications;
- the value of self-insurance to a workers compensation system is fully determined;
- employees, through their representative organisations, are meaningfully consulted and fully consent to any transfer; and,

a process of public review, including public tribunal hearings is established.

This submission concludes that:

- The question is not whether Comcare can be fashioned into a scheme that has the legal capacity to regulate self insurers but whether Comcare should be used as a de facto national scheme? The answer is no.
- The review cannot “ensure that Comcare is a suitable OHS and workers’ compensation system for self insurers and their employees”¹. To ensure requires certainty, and for the reasons outlined in our submission, there are many uncertainties.
- The Comcare OHS system has a consultative, compliance and enforcement philosophy that is vastly different to the position advocated by unions and is vastly different to State systems.
- Comcare has a cumbersome dispute settling process, significantly inferior lump sum payments and very limited access to common law review.

¹ Terms of Reference for Comcare Review, 23rd Jan 2008.
• The Occupational Health and Safety Act 1991 be reinstated and that it include union right of entry provisions.

• Comcare does not have adequate numbers of investigators operating in all States and Territories.

• Workers employed by Comcare self insurers are more frequently injured than workers' employed by scheme contributing employers and more frequently injured than the Australian average.

• Comcare self-insurers when compared to scheme contributing employers, accept less claims for compensation, have more appeals against self-insurer decisions lodged with the Administrative Appeal Tribunal (AAT), pay less compensation to injured workers and spend more money on legal, administration and regulatory matters.

• While the Commonwealth does not maintain an adequate workforce of safety investigators to service all States/Territories it has also failed to agree to a new Memorandum of Understanding with the key eastern seaboard states where MOU’s have expired.

• The experience of unions is that our members have not been involved in meaningful discussion or consultation regarding their employers intended move to the Comcare system.

• There are several workplace health and safety arrangements that require ‘consultation’ with employees, but “continuing consultation on OHS matters” is not a requirement under the Act. Rather it is an item which may be included in a Health and Safety Management Arrangement.

• There are no mechanisms established by Comcare, the SRCC or the Department of Education, Employment and Workplace Relations (DEEWR) that allows workers or their union direct consultation with the regulator on operational policy matters relating to compensation, rehabilitation and return to work or on matters affecting the OHS of workers. Further there are no special forums on these matters with regard to self-insurance.

• Those who may be entitled to claim entitlements to workers' compensation, rehabilitation and return to work under the SRC Act in certain circumstances is determined by the State/Territory legislation. It would seem an impossible task for the Comcare and the SRCC predict future workers' compensation liabilities when ultimately scheme swappers need to provide workers' compensation coverage for some workers' which may be determined such by State and Territory laws as they exist from time to time.

• There is general agreement among actuaries that State/Territory premiums will rise as a result of employers leaving those systems.

• It would be reckless to continue the policy of allowing companies to scheme swap when it is known that this strategy results in increased business costs for employers outside Comcare.

• Some lawyers are advising their employer clients to move to Comcare to:
  ➢ reduce the administrative costs of maintaining separate workers compensation and OHS arrangements;
  ➢ reduce business costs by deny workers compensation benefits; and,
  ➢ avoid state enacted OHS obligations and penalties.

• There is a commitment by all State/Territory schemes and the Federal Government to the development of common approaches to administering premium, compensation, safety issues, and self insurance arrangements.
The ACTU recommends:

a) That the provisions of the:
   - Occupational Health and Safety (Commonwealth Employment) Amendment Act 2006;
   - OHS and SRC Legislation Amendment Act 2006; and,
   - Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act 2004,
   are rescinded from the Occupational Health and Safety Act 1991.

b) That the provisions of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007 relating to the definition of disease, the definition of injury, coverage for journey and recess claims, the definition of suitable employment and notional superannuation contributions are rescinded from the Safety Rehabilitation and Compensation Act 1988.

c) That a substantive independent and overall review of the Comcare system is undertaken as a matter of priority to ensure that workers’ in the scheme are provided adequate OHS protections and workers compensation rights and entitlements.

d) That the regulator of Federal OHS and workers' compensation legislation effectively enforce that legislation. This includes a requirement for the regulator to consult and provide information, support and advice to all workplace parties.

e) That the regulator ensures that workplace representatives are supported and protected and actively brings prosecutions for legislative breaches in a timely, appropriate and forthright manner.

f) That the inspectorate of workplace health and safety and compensation and rehabilitation is adequately resourced, pro-active and capable of fulfilling an enforcement role as well as an advisory role.

g) That the regulator actively monitors self-insurers and ensures transparency and fairness of their workers' compensation and return to work systems.

h) That as a matter of utmost urgency the a Memorandum of Understanding (MOU) for Comcare to use other jurisdiction’s safety inspectors is re-established between Comcare and those jurisdictions with expired MOU’s.

i) That the SRC Act 1988 and the scheme operation be strengthened to improve the schemes effectiveness, efficiency and fairness in return to work and rehabilitation outcomes for employees, including:
   - addressing problems in the operation of the Administrative Appeals Tribunal as outlined;
   - setting strict timelines for compensation and appeal decisions;
   - consideration to the establishment of a special section within the Office of the Ombudsman to handle complaints about Comcare practices;
   - reviewing the use and role of case managers; and,
   - clear, transparent and accessible information on benefits, client services for injured employees and their families.
j) That workers' are fully informed and engaged in meaningful consultation, in ways appropriate for the workforce about their employers' intention to apply for, seek an extension to or significantly vary a Comcare self-insurance license.

k) That a Comcare self-insurance license will only be granted, extended or significantly varied if a majority of affected workers' agree.


m) That the ACTU is represented at all Comcare, SRCC and DEEWR forums regarding OHS and workers compensation/rehabilitation and that Comcare, SRCC and will be provided with the necessary assistance to allow its full participation.

n) That as a matter of urgency protocols are established between Comcare and the State/Territory jurisdictions regarding actions to be taken if a Comcare self-insurance license is revoked.

o) That the implementation of the OHS and workers' compensation harmonisation arrangements is completed as soon as practicable.

   The preamble to the Charter includes the following:

   This Charter of Rights sets out the rights and responsibilities of all workplace parties in the provision of
decent and fair health, safety, compensation and rehabilitation systems and practices in Australia.

   Regardless of jurisdiction, changes to occupational health and safety, compensation and rehabilitation
law must not result in a diminution of the rights and entitlements of any worker.

   Workers must not be adversely affected by any employer moving between jurisdictions in relation to
their OHS and workers compensation entitlements. Any proposed move between jurisdictions will only
occur following genuine consultation and agreement with workers and their representatives and a
process of public review, including public tribunal hearings.

2. Hence our Charter establishes our view of the minimum set of standards that systems should be based
on regardless of the scheme workers find themselves subject to,

3. Vital to the development of Occupational Health and Safety (OHS) and workers compensation laws is a
recognition by the social partners of the need for joint consultative practices as described by the United
Kingdom Parliament, Robens Committee Report\(^2\).

4. This authoritative Report, which influenced OHS and workers compensation legislative trends in
Australia, detailed that:

   ‘. . . employees must be able to participate fully in the making and monitoring of arrangements for
safety and health at work. There should be a statutory duty on every employer to consult with his
employees or their representatives at the workplace on measures for promoting safety and health at
work, and to provide arrangements for the participation of employees in the development of such
measures.’

5. Based on this principle and with reference to International Labor Organisation Conventions (ILO) on
such matters, it is ACTU Policy that all occupational health and safety, compensation and rehabilitation
laws should be developed in a tripartite manner.

6. The expansion of the Comcare scheme over recent years has been a retrograde step in workers OHS
protections and injured workers compensation and rehabilitation rights and entitlements.

7. This expansion of Comcare has occurred at the detriment of workers and without their consultation or
approval and was eloquently summarised by Callinan J. of the High Court of Australia, thus:

   ‘The "choice" is the choice of the employer alone. It is one thing to say that anyone should be free to
choose his or her insurer, or whether to self-insure. It is an entirely different, and, I am disposed to
think, unconstitutional thing to say, that in consequence of that choice, employees not party to the
choice, who may have been wronged and injured by their employers, should become disentitled to
seek remedies and damages in the ways, of the kinds, and subject to the limitation periods, for which
State laws otherwise applicable to them and their employers provide.’\(^3\)

8. The ACTU has an in-principle opposition to self-insurance. We cannot support the concept that a
group of employers can be allowed to opt out of contributing to the premium pool of workers
compensation systems at either an individual state or national level.

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\(^3\) Attorney-General (Vic) v Andrews [2007] HCA 9, at 176
9. If self-insurance is to be a feature of a scheme it should only be available in very limited circumstances and must involve a high level of ongoing oversight and monitoring by scheme regulators. Self-insurance in this scenario should be viewed as a privilege not a right.

10. Employers wishing to become or remain self-insurers must earn that privilege by bringing to workers compensation systems a superior performance in all areas of injury prevention, claims management and occupational health and safety standards. Self insurers should be role models for other employers in terms of workplace safety, claims management and occupational rehabilitation by virtue of their special status. Further self-insurers should be required to share with scheme contributing employers those systems and programs that allow them to achieve a superior performance.

11. On evidence available to the ACTU it is clear that many Comcare self-insurers OHS performance is far from what could be considered exemplars.

12. The Comcare OHS system has a consultative, compliance and enforcement philosophy that is vastly different to the position advocated by unions and is vastly different to State systems.

13. It is also clear from evidence available to us that many Comcare self-insurers when compared to scheme contributing employers, on a percentage basis, accept less claims for compensation, have more appeals against self-insurer decisions lodged with the Administrative Appeal Tribunal (AAT), pay less compensation to injured workers and spend more money on legal, administration and regulatory matters.

14. The Comcare workers compensation system does offer injured workers better weekly payments than State systems but has a cumbersome dispute settling process, significantly inferior lump sum payments and very limited access to common law review.

15. While employees moving from State/Territory systems to the Comcare scheme are encountering different rights and entitlements, employees traditionally in this scheme have had their rights decreased to accommodate scheme swapping employers.

16. The Comcare system requires an overhaul to ensure that it provides adequate OHS protections and workers compensation for workers covered by the system, including those for whom the system was originally designed to cover. A substantive review is warranted.
Safety and Compensation

Does the scheme provide appropriate OHS and workers’ compensation coverage for workers employed by self-insurers?

No. The Comcare OHS system has a consultative, compliance and enforcement philosophy that is vastly different to the position advocated by unions and is vastly different to State systems.

Comcare has a cumbersome dispute settling process, significantly inferior lump sum payments and very limited access to common law review.

OHS

17. The Comcare scheme was designed to cover the Commonwealth public sector with a distinctive injury and illness profile. The previous government opened up Comcare to businesses from very different industry types and injury and illness profiles. While no scheme is static, it was clear from the outset that Comcare was ill equipped to regulate these large private sector companies as it could no longer rely on state and territory laws from applying to Commonwealth employers as a result of the OHS and SRC Legislation Amendment Act 2006. This is exemplified by the fact that Comcare had not adopted the National Construction Standard until the John Holland Group companies were granted a licence.

18. Comcare has been forced into the far from ideal position of a stopgap approach to regulating dangerous industries, such as construction.

19. Ultimately the question is not whether Comcare can be re-fashioned into a scheme that has the legal capacity to regulate self insurers but should Comcare be used as a de facto national scheme? We submit that the answer is no.

20. It is important to note that it is one thing to adopt a law designed to regulate a specific industry, it is entirely another thing to enforce and administer that law and for the regulator to be able to build up the necessary personnel with the skills and knowledge to understand the industries it relates to.

21. It takes time to train inspectors and years of experience in the industry, be it mining, construction or the public service, to gain the necessary confidence and know how – in other words, these skilled people are a scarce resource and even more so with the mining boom sucking trained health and safety people into more lucrative jobs. The Comcare Annual Report claims that they have “developed a cadre of fully-trained investigators” but in the same paragraph states “that we are well down the path of ensuring that all investigators have diploma-level investigation training or better.” Surely they are either fully trained or they are not.

22. Comcare is desperately trying to fill the holes created by the rapid expansion of the scheme and its hard working investigators are trying to obtain the necessary training and experience but ultimately it is too little and too late; and the ACTU will elaborate on the issue of enforcement and compliance in answer to question (b) in the terms of reference.
23. It is worth noting at this point that the 1991 Commonwealth OHS Act was amended in 2006. After being rejected 3 times before, the OHS (Commonwealth Employment) Amendment Bill was again introduced into federal parliament in 2005 by the previous government after it had obtained a majority in the Senate. The Bill (among other changes):

- removed all references to trade unions from the 1991 Act
- set up extreme bureaucratic hurdles for unions to jump over to be able to provide assistance to workers
- placed the control over the election of health and safety representatives (i.e. worker representatives) in the hands of the employer. This was a first in any Australian OHS jurisprudence.

24. The parliamentary library noted at the time the Bill was introduced that:

“The more stringent certification process involving an administrative decision maker and possible reluctance by employees to request representation without the assurance of anonymity, may prove to be a strong deterrent for seeking employee representation. As the mechanisms for employee representation could operate as a deterrent to representation, Parliament may want to consider when debating this Bill that:

- even the unintended exclusion of unions from representing in OHS consultations may weaken OHS for Commonwealth employees overall. Leading OHS experts Johnstone, Quinlan and Walters have recently argued that:

- the analysis of international research suggests that consultative arrangements and union representation:
  - on health and safety at the workplace are associated with better health and safety outcomes than when employers manage OHS without representative worker participation.’

Further, the authors have emphasised that there:

‘... no reliable evidence of the effectiveness of arrangements to represent worker’s interests in OHS in which trade unions are not involved in a supportive and enabling capacity

- the representation of employees can lead to significant attitudinal changes in the workplace and an increase in OHS compliance
- unions provide important contributions to OHS support and training.’

These changes were at odds with OHS legislation around the country and ILO standards and constitute a reduction in standards for workers of self-insured companies who have scheme swapped into Comcare.

25. Since the introduction of laws to excise state and territory laws applying to Comcare self-insurers, the confusing legal coverage issue on worksites involving companies self-insured under Comcare who engage local contractors on the site is exacerbated by increased numbers of workers and worksites.

26. This creates a nightmare for state and territory regulators unsure of their rights and powers to enter, investigate and issue enforcement orders - and for unions who have right of entry powers under state and territory OHS Acts but not under the commonwealth OHS Act. The ACTU will expand on this issue in answer to question (c) in the terms of reference.

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4 Parliamentary Library, Bills Digest No. 18, 2005–06 Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005
Recommendation:

a) That the provisions of the:
   - Occupational Health and Safety (Commonwealth Employment) Amendment Act 2006;
   - OHS and SRC Legislation Amendment Act 2006; and,
   - Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act 2004

are rescinded from the Occupational Health and Safety Act 1991 and that the Act include union right of entry provisions.

Workers Compensation

27. Recent changes to the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) have reduced worker access to compensation under the Comcare scheme. Amendments to the definition of ‘disease’ and definition of ‘injury’ in March 2007 were aimed squarely at denying entitlements to injured workers.

28. The ‘tightening’ of these definitions was opposed by unions at the time it was proposed and by the then Opposition Labor Senators in their Senate Report on the provisions of the Safety, Rehabilitation and Compensation and other Legislation Amendment Bill 2006.5

29. Coupled with these changes was the removal from the statute of compensation and rehabilitation coverage for journey and recess claims. For almost 20 years coverage for injuries occurring during journeys to and from work and during recess breaks was an integral part of the Comcare scheme available to all workers covered by that system.

30. Workers from scheme swapping employers are also affected by this lack of coverage as a number of State and Territory schemes provide such journey & recess rights.

31. The Comcare scheme has a compensation regime with associated payments to workers that is vastly different to the State/Territory schemes.

32. Compensation payment regimes vary for a variety of reasons; the political considerations within jurisdictions at a particular time and scheme imperatives at a particular time are two such reasons.

33. Compensation payment regimes are also focused towards those injuries most commonly occurring within specific jurisdictions.

34. The information in the following graph is taken from the 2007 Comparative Performance Monitoring (CPM) Report.6

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5 Senate Standing Committee on Employment, workplace Relations and Education – Safety Rehabilitation and Compensation and Other Legislation Amendment Bill 2006 [Provisions], February 2006

This graph shows that the Comcare scheme (Aus Gov) is predominantly a weekly payment scheme. Ninety one out of each one hundred dollars paid to injured workers in the Comcare scheme is paid out as weekly payment compensation. This is contrasted by the Australian average of fifty eight dollars per one hundred paid as weekly compensation.

35. It is not surprising that Comcare is predominantly a weekly payment scheme. The injury profile that has influenced the make-up of the scheme’s compensation matrix is completely different to all other scheme profiles. The following 2 graphs are taken from the CPM Seventh Report.\(^7\)

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\(^7\) Workplace Relations Ministers Council, Comparative Performance Monitoring Report, Seventh Edition, November 2005
36. The highest percentage of claims resulting in 12 weeks or more compensation in all jurisdictions in 2003-04 was body stressing. Comcare’s incidence of mental stress claims resulting in 12 weeks or more compensation, 32.4%, is almost 3 times as great as the next highest result in South Australia, 11.5%. The jurisdiction with an injury profile closest to the national average is New South Wales.

37. Further stark differences between the injury profile for Comcare and the Australian average are evidenced when considering the sub-categories of body stressing, the highest percentage of claims resulting in 12 weeks or more compensation in all jurisdictions in 2003-04.

38. The Comcare profile for body stressing is again totally different to the rest of the country. The percentage of Comcare body stressing claims as a result of repetitive movement, low muscle loading, 51.8%, is more than 3 times higher than the next highest result in Victoria 15.9%. Again the jurisdiction with a body stressing injury profile closest to the national average is New South Wales (or maybe Victoria).

39. It is not known why such illustrative tables are no longer available in CPM Reports.

40. It is not in question that the Comcare scheme provides reasonable weekly payments compensation. However not all workers who have significant injuries need long periods of weekly compensation. The following example was in the 2006 CPM Report:

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Comcare Review Submission Of Australian Council Of Trade Unions
29 February 2008
Page 12
The following scenario is indicative only for these types [permanent impairment] of payments.

Scenario
The injured employee received an award wage of $1000 per week, performed no regular overtime and has a dependent spouse and no children. In a workplace incident the employee had two digits severed, with the loss of the thumb and forefinger of the right hand. The employee returned to full-time duties after six weeks off work.

Payments under the Australian schemes ranged from $113 500 in New South Wales to $59 178 in the Australian Capital Territory.

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41. The Comcare permanent impairment payment for this injury is the second lowest at $66,000, equal with entitlements payable in the Northern Territory. Workers moving from all State schemes to Comcare would be disadvantaged under this example.

42. Such examples are no longer included in the CPM Reports.

43. It is reported in the SRCC Annual Report 2006-07 that five work-related injury fatalities were recorded in the Comcare scheme in 2006-07. The following table is taken from CPM Ninth Edition and details level of entitlements for permanent impairment or fatality in each jurisdiction under the following scenario:

‘The employee’s pre-injury earnings were $1,000 gross per week. The employee is 35 years of age and has a dependent spouse and two children aged 7 and 8 – the older child entered the workforce at 16 and the other remained in full-time education until age 25. The employee contributed to a superannuation fund. There was no contributory negligence on his part and no mitigating factors.'
Permanent Incapacity: As a result of the workplace incident, the employee was diagnosed with complete tetraplegia below the 6th cervical neurological segment. This resulted in paralysis of his hands, impaired upper body movement and paralysis of the trunk and lower limbs. He lost all lower body function and there was no real prospect of returning to work.

Fatality: This scenario is the same as above but in this case the workplace incident resulted in death. The spouse did not re-enter the workforce or re-marry for ten years.

Note the permanent incapacity figure for Western Australian is indicative only. Western Australia has no upper limits on estimates of compensation that could be expected from a common law claim.

44. Comcare provides the second lowest entitlements payable to the dependants of a worker killed as the result of a workplace accident. The dependants of workers moving to Comcare would be disadvantaged under this scenario.

45. It is disingenuous to advance the proposition that, while workers may have reduced benefits in some areas following a swap of jurisdictions by their employer, the ‘generous’ Comcare weekly compensation payments negate this reduction. Reducing one type of benefit while increasing another is never an equal transaction, some workers are always going to lose.

Recommendation:

b) That the provisions of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007 relating to the definition of disease, the definition of injury, coverage for journey and recess claims the definition of suitable employment and notional superannuation contributions are rescinded from the Safety Rehabilitation and Compensation Act 1988.

c) That a substantive review of the Comcare system is immediately undertaken to ensure that workers’ in the scheme are provided adequate OHS protections and workers compensation rights and entitlements.
Does the scheme regulator now have the enforcement policy and operational capacity to ensure self-insurers provide safe workplaces? What are the likely operational requirements should the scheme’s coverage be expanded?

**No.** The Comcare OHS system has a consultative, compliance and enforcement philosophy that is vastly different to the position advocated by unions and is vastly different to State systems.

Comcare does not have adequate numbers of investigators operating in all States and Territories.

Workers employed by Comcare self insurers are more frequently injured than workers' employed by scheme contributing employers and more frequently injured than the Australian average.

Comcare self-insurers when compared to scheme contributing employers, accept less claims for compensation, have more appeals against self-insurer decisions lodged with the Administrative Appeal Tribunal (AAT), pay less compensation to injured workers and spend more money on legal, administration and regulatory matters.

46. Extending the coverage of the Commonwealth OHS Act to multi-state employers self-insuring under Comcare and excising state and territory laws from applying has opened up a “safety gap” that threatens the welfare of the workers concerned and their families all across Australia.

47. The Comcare Annual Report figures indicate a 20%\(^{11}\) increase in employees covered by the scheme from 2003/04 to 2006/07, with most of the additional employees entering the scheme in the 2006/07 financial year. This increase is almost entirely due to opening Comcare up to multi-state employers.

   This dramatic increase in the number of employees covered by the scheme in such a short time has severely stretched Comcare’s enforcement and operating capacity.

48. Comcare was forced to employee and train more investigators (as of 30 June 2007 the Comcare Annual report notes there were 37 staff employed as investigators, up from 16 in 2005\(^{12}\)). The increase in investigators has not resolved the problem that self-insurers under Comcare operate across the continent, and for a scheme to be adequately enforced, there must be investigator activities located wherever self-insurers operate.

49. The sheer size of Australia poses a logistical problem unique to Comcare. While enforcement activities for other jurisdictions are limited to their state and territory borders, Comcare needs to have an adequate number of investigators operating in all states and territories. Unfortunately, this is not the case.

   For example, the National Australia Bank (NAB) received its self-insurance licence in December 2006. The NAB employees 38,000\(^{13}\) workers across Australia. In Western Australia there are 40 branches and in South Australia there are 47\(^{14}\) branches. On the last advice the ACTU has received, of the 37 Comcare investigators, five are stationed in Adelaide and are responsible for all of South Australia, the Northern Territory and Western Australia.

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\(^{11}\) Comcare Annual Report 2006/07 pg 49 – employees covered by OHS Act (FTE) in 2003/04 – 284,490 and in 2006/07 – 343,069

\(^{12}\) WRMC Comparative Performance Monitoring Seventh Report Australia and New Zealand Occupational Health and Safety and Workers’ Compensation Schemes November 2005

\(^{13}\) Address by Mr Michael Chaney, Chairman, National Australia Bank, Annual General Meeting, 31 January, 2007

\(^{14}\) Ibid
50. Comcare claims to have “Australia’s Safest Workplaces”, However there is a direct link between workplace safety and enforcement activity by the regulator. As concluded by the Royal Commission into the Building and Construction Industry, Final Report:

There is persuasive support for the view that the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important. (Royal Commission, Final Report, vol.6, p.83)

51. Comcare has informed the ACTU that of the investigations commenced by Comcare in 2006/07 a total of 57 involved self-insurers. Of that total, 43 related to the self-insurers covered by the OHS Act prior to the March 2007 amendments and 14 involved those who were newly covered by the legislation. As well as the NAB, Comcare has another 18 licensed self-insurers including the construction company John Holland Group, a national company with almost 4,000 employees in an industry considered one of the most dangerous, as stated by Comcare:

“The construction site is a dangerous workplace because it involves high risk activities such as demolition. On average one building worker is killed each week in Australia. The construction industry has the highest percentage of work related injuries presenting to emergency departments than any other industry with more than 1 in 5 construction workers having some kind of workplace injury”

52. In 2006/07, WorkSafe Victoria alone conducted 10,949 workplace visits and issued 2,497 notices and directions just in the construction and utilities industry.

53. How can workers, dragged into the Comcare scheme by companies who argue that safety and compensation costs too much to manage under other schemes, feel confident that their regulator, Comcare, will ensure these companies are “Australia’s Safest Workplaces” when there is little or no physical presence in workplaces, let alone within the state?

54. The ACTU will address the issue of a Memorandum of Understanding (MOU) for Comcare to use other jurisdiction’s safety inspectors in answer to question (c) of the Terms of Reference, but it is worth noting at this point that while the Commonwealth does not maintain an adequate force of safety investigators to service all states and territories it also failed to agree to a new MOU with the key eastern seaboard states where MOU’s have expired.

This is a matter of utmost urgency but has been neglected by the previous government. It effectively means workers of companies self-insured under Comcare, operating as they do within state and territory borders, will not be protected by the relevant jurisdiction’s safety police, as there is no legal power for those inspectors to enter a Commonwealth site. With a further 15 corporations declared eligible to apply for a license to self-insure, it is imperative that the issue of state inspections on commonwealth sites is resolved.

55. In addition to the problem of the increased pressures on the regulator’s operating capacity, Comcare’s enforcement activity is cause for concern.

56. The following tables, highlighting the safety gap, are from the Comparative Performance Monitoring Report Ninth Edition, February 2008:

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16 John Holland Quarterly Review, Issue 4, August 2007
18 WorkSafe Victoria, Victorian WorkCover Authority Annual Report 2007
### Indicator 14 - Enforcement activity by jurisdiction

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<td>0</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>714</td>
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</tr>
<tr>
<td>2004-05</td>
<td>1384</td>
<td>93</td>
<td>156</td>
<td>48</td>
<td>31</td>
<td>7</td>
<td>0</td>
<td>11</td>
<td>0</td>
<td>1</td>
<td>731</td>
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<td>2005-06</td>
<td>340</td>
<td>70</td>
<td>143</td>
<td>41</td>
<td>51</td>
<td>12</td>
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<td>5</td>
<td>0</td>
<td>0</td>
<td>662</td>
<td>79</td>
</tr>
<tr>
<td><strong>Total amount of fines awarded by the courts ($‘000)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001-02</td>
<td>$9 500</td>
<td>$6 069</td>
<td>$1 593</td>
<td>$187</td>
<td>$101</td>
<td>$32</td>
<td>$2</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$17 484</td>
<td>NZ$19 16</td>
</tr>
<tr>
<td>2002-03</td>
<td>$13 000</td>
<td>$2 997</td>
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<td>$152</td>
<td>$379</td>
<td>$199</td>
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<td>$3</td>
<td>$0</td>
<td>$0</td>
<td>$18 724</td>
<td>NZ$8 999</td>
</tr>
<tr>
<td>2003-04</td>
<td>$13 300</td>
<td>$4 159</td>
<td>$2 034</td>
<td>$385</td>
<td>$628</td>
<td>$87</td>
<td>$0</td>
<td>$55</td>
<td>$0</td>
<td>$0</td>
<td>$20 668</td>
<td>NZ$1 037</td>
</tr>
<tr>
<td>2004-05</td>
<td>$11 500</td>
<td>$3 294</td>
<td>$3 344</td>
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<td>$0</td>
<td>$0</td>
<td>$19 145</td>
<td>NZ$18 599</td>
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<td>2005-06</td>
<td>$13 878</td>
<td>$3 532</td>
<td>$3 823</td>
<td>$383</td>
<td>$1 042</td>
<td>$157</td>
<td>$0</td>
<td>$134</td>
<td>$0</td>
<td>$0</td>
<td>$22 949</td>
<td>NZ$19 29</td>
</tr>
</tbody>
</table>

*Aus Gov data cannot be compared directly with the other jurisdictions. *In WA, 'total workplace interventions' does not include inspectors delivering educational advice or information. *There is no legislative requirement for infringement notices in WA. *NZ data for Improvement and prohibition notices shown under Improvement. *New Inspector intake training occurred in SA in January 2004, full duties commenced in mid June 2004. *Includes inspectors who investigate unsafe asbestos. *Victoria data is for legal proceedings completed. *In Victoria 2001-02 there was one unusual prosecution of $2 million. *Seacare are awaiting sentence of the court regarding the legal proceeding resulting in conviction listed above. *New South Wales previously reported the number of breaches rather than the number of companies being prosecuted.
57. The following table, based on the figures above, highlights the problems with Comcare’s enforcement culture:

<table>
<thead>
<tr>
<th></th>
<th>Victoria’s WorkSafe</th>
<th>Comcare (Aus Gov)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Workplace Interventions</strong></td>
<td>41,163</td>
<td>189</td>
</tr>
<tr>
<td><strong>Number of Proactive workplace Interventions</strong></td>
<td>27,834</td>
<td>113</td>
</tr>
<tr>
<td><strong>Number of Reactive Workplace Interventions</strong></td>
<td>13,329</td>
<td>76</td>
</tr>
<tr>
<td><strong>Number of Improvement Notices Issued</strong></td>
<td>11,168</td>
<td>12</td>
</tr>
<tr>
<td><strong>Number of Prohibition Notices Issued</strong></td>
<td>1876</td>
<td>10</td>
</tr>
<tr>
<td><strong>Number of Field Active Inspectors</strong></td>
<td>236</td>
<td>22</td>
</tr>
<tr>
<td><strong>Number of Field Active Inspectors per 10,000 employees</strong></td>
<td>1.1</td>
<td>0.8</td>
</tr>
<tr>
<td><strong>Number of Legal Proceedings Commenced</strong></td>
<td>136</td>
<td>1</td>
</tr>
<tr>
<td><strong>Number of Legal Proceedings Commenced Resulting in a Prosecution</strong></td>
<td>70</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total amount of fines awarded by the courts ($,000)</strong></td>
<td>$3532</td>
<td>$0</td>
</tr>
</tbody>
</table>

*Note: The Aus Gov included the blanket condition that their jurisdiction cannot be compared with other jurisdictions. This is misleading and is arguably only relevant when comparing the number of inspectors. The CPM states that Comcare accessed “other” skilled and qualified people to perform inspections although no detail was provided. However, it is unclear whether other jurisdiction also used “other” skilled and qualified people not recorded in their statistics. Furthermore, Comcare claims their “workplace interventions” statistics don’t include providing advice, routine workplace visits or industry forums and presentations. These actions fall outside the definition of “intervention” and again it is unclear whether these types of activities were included by other jurisdictions either. It appears that Comcare is disparately trying to avoid direct comparisons with other jurisdictions because it exposes their low rates of enforcement activity.*

58. Employers have lobbied for a long time for self-regulation and voluntary compliance as an alternative to regulator enforcement and penalties. Comcare fits this model and is thus attractive to those businesses seeking to escape more rigorous systems.

59. In his June 2003 submission to the Productivity Commission, Professor Richard Johnstone invited the Commission to take full account of the proceedings of the *Australian OHS Regulation for the 21st Century* conference, July 2003. In his presentation to the conference, Professor Johnstone observed that:

- There is very little, if any, empirical evidence that the ‘advise and persuade’ mode does reduce workplace injury and disease. (Johnstone Presentation p.9)
- There must be higher maximum fines and a broader range of sanctions, including possible imprisonment for culpable corporate officers. (Johnstone Presentation p.46)
- Prosecutions should focus not only on punishing organisations for contraventions resulting in illness, injury or death, but also on organisations which expose workers to significant risk of injury, illness or death. (Johnstone Presentation p.49)

60. The rigorous enforcement of occupational, health and safety laws and other related legislation sends a powerful and effective message to employers and the community generally that the failure to abide by occupational health and safety laws has serious consequences.

61. There should not be a system allowing companies to ‘jurisdiction shop’ effectively allowing them to choose which OH&S and compensation law applies.

62. One can only conclude that the Commonwealth system has very limited capacity to inspect and enforce or penalise. By allowing more employers into the system, Comcare’s capacity to ensure compliance with OHS standards is reduced.
63. It is recorded in the Employment and Workplace Relations Portfolio Budget Statements 2007-08 that: ‘Comcare performs the assessment for an application for a [self-insurance] licence on behalf of the [Safety, Rehabilitation and Compensation] Commission and makes its recommendation to the Commission.’

64. It is detailed in the SRCC Annual Report 2006-07 that before granting a Comcare self-insurance licence the Commission must be satisfied that:

- the applicant has sufficient resources to fulfill the responsibilities imposed on it under the licence
- the applicant has the capacity to ensure that claims will be managed in accordance with standards set by the Commission for the management of claims
- the grant of the licence will not be contrary to the interests of the employees of the licensee whose affairs fall within the scope of the licence
- the applicant has the capacity to meet the standards set by the Commission for the rehabilitation and occupational health and safety of its employees.

65. Evidence submitted above details that the granting of a Comcare self-insurance licence is definitely contrary to the interests of affected employees.

66. Our experience is that there is minimal, if any, employee engagement during the licence application and approval process by either Comcare or employers.

67. Neither Comcare nor the SRCC has undertaken any assessment of the impact of swapping schemes on workers or sought consultation with workers about their attitudes to such a move. It appears that Comcare has relied entirely on the evidence of employers when assessing what the interests of employees are.

68. Also detailed in the SRCC Annual Report 2006-07 is a summary of each self-insurers’ claims activity and performance against the key Commission Indicators. It may be the case that Comcare and the SRCC assesses the capacity of each applicant to meet the SRCC’s standards, however it is an entirely different matter whether scheme swappers actually meet or maintain those standards.

69. We have submitted above that if self-insurance is to be a feature of a workers compensation system it should only be available to employers who demonstrate a continued ability to provide superior performance in all areas of injury prevention, claims management and occupational health and safety standards. The summary of each self-insurers claims activity for 2006-07, illustrates that in most instances self-insurers rarely reach the standards expected by the Commission for the scheme. For example, with regard to the key OHS performance indicators of claim incidence and frequency the following is reported:

---

Incidence of claims resulting in one week or more lost time per 1,000 FTE employees | Frequency of claims resulting in one day or more lost time per 1,000,000 hours worked
---|---
SRCC Target Range 06-07 | 8.9 to 13.3 | 7.4 to 11.0
Comcare | 13.0 | 9.6

**SELF-INSURER**

<table>
<thead>
<tr>
<th>Licensee</th>
<th>Incidence</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADI (Thales)</td>
<td>10.6</td>
<td>10.8</td>
</tr>
<tr>
<td>Australian Air Express</td>
<td>25.5</td>
<td>17.3</td>
</tr>
<tr>
<td>Australia Post</td>
<td>19.3</td>
<td>15.4</td>
</tr>
<tr>
<td>CSL Limited</td>
<td>12.6</td>
<td>12.0</td>
</tr>
<tr>
<td>K &amp; S Freighters</td>
<td>37.7</td>
<td>22.0</td>
</tr>
<tr>
<td>Linfox Armaguard</td>
<td>23.7</td>
<td>23.2</td>
</tr>
<tr>
<td>Linfox Australia</td>
<td>40.3</td>
<td>37.9</td>
</tr>
<tr>
<td>Pacific National</td>
<td>18.3</td>
<td>15.9</td>
</tr>
<tr>
<td>Optus</td>
<td>5.3</td>
<td>4.5</td>
</tr>
<tr>
<td>Reserve Bank of Australia</td>
<td>11.5</td>
<td>10.7</td>
</tr>
<tr>
<td>Visionstream</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Telstra</td>
<td>7.2</td>
<td>5.8</td>
</tr>
<tr>
<td><strong>Australian Ave 2005-06</strong></td>
<td><strong>15.6</strong></td>
<td><strong>9.4</strong></td>
</tr>
</tbody>
</table>

Source: SRCC Annual Report 2006-07

70. The Licensee Improvement Program (LIP) and the Tier Model are detailed in the SCRR Annual Report 2006-07. The LIP is described thus: ‘The LIP examines any significant variations in the licensees’ prudential profile, results of internal and external audits in prevention, rehabilitation and claims management and performance against Commission defined indicators.’ The outcomes and report of the LIP form the basis for the SRCC’s consideration of license extensions, license fees and each self insurers tier status. (Curiously each LIP report concludes with the self-insurers request for the following years level of tier status).

The tier model is ‘. . . designed to allow the level, intensity and nature of regulatory oversight to be determined having regard to each licensee’s performance outcomes and relative maturity.’ The first tier has external audits of self-insurers performance, desktop audits for the second tier and self audits for the third tier.

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71. Full copies of LIP reports are not publically available and Comcare advise that they regard the tier status of each licensee as commercially sensitive information, for disclosure only between the SRCC, Comcare and each licensee.

To consider that revealing actions taken by a public service agency in pursuit of its stated aims of reducing the human and financial cost of workplace injury and disease would compromise some commercial fiduciary obligation is perverse.

Self–insurers need to be open and transparent about their performance. The regulator needs to be open and transparent about the scrutiny poor performers are subjected to. From the above data it is evident that workers are often more frequently injured by self-insurers than scheme contributing employers. In one case, workers are 4 times more likely to be injured. Comcare self-insurers are not outstanding OHS performers and the workers concerned need to know what measures the scheme regulator is undertaking to protect their safety at work and improve their lackluster OHS results.

72. Experience in other jurisdictions is that following a period of continued poor performance during which appropriate remedial action was sought by regulators, a self-insurance license may be revoked. Indeed the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) makes provision for the revocation of Comcare self-insurance licenses. Without the knowledge of the intimate details of the SRCC LIP or tier model, we would expect that continued unsatisfactory performances could result in license revocation.

73. While it is demonstrated that Comcare has a cavalier approach to monitoring self-insurers OHS performance we also wish to make comment about the compensation payment profile of self-insurers against the scheme profile.

Each SRCC Annual Report from 2002-03 to 2006-07 details for both scheme contributing employers and self insurers the number of full time equivalent employees (FTE), total payments to claimants, total medical and rehabilitation payments and total amounts paid as legal, administrative and regulatory costs for the relevant reporting period. Those figures are reproduced below:

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23 Safety, Rehabilitation and Compensation Act 1988, s. 106
24 Safety, Rehabilitation and Compensation Commission Annual Report 2002-03, page 14
Safety, Rehabilitation and Compensation Commission Annual Report 2000-06, page 21
<table>
<thead>
<tr>
<th></th>
<th>FTE (% of Total FTE)</th>
<th>Paid to claimant ($m)</th>
<th>Medical and rehabilitation ($m)</th>
<th>Legal, admin and regulatory costs ($m)</th>
<th>Total ($m) (% of Total $)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2002-03</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comcare</td>
<td>175,551 (57%)</td>
<td>132.88 (78%)</td>
<td>38.95 (67%)</td>
<td>56.02 (64%)</td>
<td>227.85 (72%)</td>
</tr>
<tr>
<td>Self-insurers</td>
<td>130,367 (43%)</td>
<td>36.77 (22%)</td>
<td>19.50 (33%)</td>
<td>31.74 (36%)</td>
<td>88.01 (28%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>305,918</td>
<td>169.65</td>
<td>58.45</td>
<td>87.76</td>
<td>315.86</td>
</tr>
<tr>
<td><strong>2003-04</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comcare</td>
<td>178,170 (58%)</td>
<td>135.39 (77%)</td>
<td>44.98 (67%)</td>
<td>55.68 (65%)</td>
<td>236.05 (72%)</td>
</tr>
<tr>
<td>Self-insurers</td>
<td>128,183 (42%)</td>
<td>39.52 (23%)</td>
<td>22.62 (33%)</td>
<td>29.72 (35%)</td>
<td>91.86 (28%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>306,353</td>
<td>174.91</td>
<td>67.60</td>
<td>85.40</td>
<td>327.91</td>
</tr>
<tr>
<td><strong>2004-05</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comcare</td>
<td>178,148 (71%)</td>
<td>145.81 (80%)</td>
<td>51.50 (72%)</td>
<td>58.68 (65%)</td>
<td>255.99 (75%)</td>
</tr>
<tr>
<td>Self-insurers</td>
<td>73,748 (29%)</td>
<td>36.22 (20%)</td>
<td>20.24 (28%)</td>
<td>28.21 (35%)</td>
<td>84.67 (25%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>251,896</td>
<td>182.03</td>
<td>71.74</td>
<td>86.89</td>
<td>340.66</td>
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<td><strong>2005-06</strong></td>
<td></td>
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<tr>
<td>Comcare</td>
<td>185,475 (69%)</td>
<td>141.30 (79%)</td>
<td>62.20 (77%)</td>
<td>65.30 (69%)</td>
<td>268.80 (76%)</td>
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<tr>
<td>Self-insurers</td>
<td>82,689 (31%)</td>
<td>38.00 (21%)</td>
<td>19.10 (23%)</td>
<td>28.90 (31%)</td>
<td>86.00 (24%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>268,164</td>
<td>179.30</td>
<td>81.30</td>
<td>94.20</td>
<td>354.80</td>
</tr>
<tr>
<td><strong>2006-07</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Comcare</td>
<td>194,013 (67%)</td>
<td>135.10 (80%)</td>
<td>60.50 (74%)</td>
<td>58.40 (65%)</td>
<td>254.00 (75%)</td>
</tr>
<tr>
<td>Self-insurers</td>
<td>95,878 (33%)</td>
<td>33.20 (20%)</td>
<td>21.30 (26%)</td>
<td>31.20 (35%)</td>
<td>85.70 (25%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>289,891</td>
<td>168.30</td>
<td>81.80</td>
<td>89.60</td>
<td>339.70</td>
</tr>
</tbody>
</table>

It should be noted that on 1 July 2004, members of the Australian Defence Force (approx. 50,000 FTE) ceased to be covered by the SRC Act and are not included in the above figures.

It is remarkable that although the percentage of workers' employed by self insurers under the SRC Act has fluctuated from a high in 2002-03 of 43% to 29 % in 2004-05 and 33% in 2006-07 the total expenditure of self insurers has remained almost constant at between 24-28%.
We can also look at these figures another way, which is to consider the percentage of the total amount expended as payments to claimants, total medical and rehabilitation payments and total amounts paid as legal, administrative and regulatory costs for both scheme contributors and self insurers for the relevant reporting period.

<table>
<thead>
<tr>
<th></th>
<th>Total ($m)</th>
<th>Paid to claimant</th>
<th>Medical and rehabilitation</th>
<th>Legal, administrative and regulatory costs</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Comcare 2002-03</strong></td>
<td>227.85</td>
<td>132.88 (58%)</td>
<td>38.95 (17%)</td>
<td>56.02 (25%)</td>
</tr>
<tr>
<td><strong>Comcare 2003-04</strong></td>
<td>236.05</td>
<td>135.39 (57%)</td>
<td>44.98 (19%)</td>
<td>55.68 (24%)</td>
</tr>
<tr>
<td><strong>Comcare 2004-05</strong></td>
<td>255.99</td>
<td>145.81 (57%)</td>
<td>51.50 (20%)</td>
<td>58.68 (23%)</td>
</tr>
<tr>
<td><strong>Comcare 2005-06</strong></td>
<td>268.80</td>
<td>141.30 (53%)</td>
<td>62.20 (23%)</td>
<td>65.30 (24%)</td>
</tr>
<tr>
<td><strong>Comcare 2006-07</strong></td>
<td>254.00</td>
<td>135.10 (53%)</td>
<td>60.50 (24%)</td>
<td>58.40 (23%)</td>
</tr>
<tr>
<td><strong>Self-insurers 2002-03</strong></td>
<td>88.01</td>
<td>36.77 (42%)</td>
<td>19.50 (22%)</td>
<td>31.74 (36%)</td>
</tr>
<tr>
<td><strong>Self-insurers 2003-04</strong></td>
<td>91.86</td>
<td>39.52 (43%)</td>
<td>22.62 (25%)</td>
<td>29.72 (32%)</td>
</tr>
<tr>
<td><strong>Self-insurers 2004-05</strong></td>
<td>84.67</td>
<td>36.22 (43%)</td>
<td>20.24 (24%)</td>
<td>28.21 (33%)</td>
</tr>
<tr>
<td><strong>Self-insurers 2005-06</strong></td>
<td>86.00</td>
<td>38.00 (44%)</td>
<td>19.10 (22%)</td>
<td>28.90 (34%)</td>
</tr>
<tr>
<td><strong>Self-insurers 2006-07</strong></td>
<td>85.70</td>
<td>33.20 (39%)</td>
<td>21.30 (25%)</td>
<td>31.20 (36%)</td>
</tr>
</tbody>
</table>

The following chart shows the ratio of these three payments as a percentage of the total payments made during each reporting year for both scheme contributors and self-insurers:

It has been apparent since 2002-03 that self-insurers pay less money directly to injured workers and pay more money on legal, administrative and regulatory costs.
The CPM 9th Edition details that in 2005-06 compensation paid direct to workers' accounted for just over half of all scheme expenditure.\textsuperscript{25} The evidence above shows that self-insurers pay far less than half of their expenditure directly to workers'.

Further, it is reported that in 2005-06 that claims management costs in Australia accounted for 18% of total expenditure. These costs were highest in Tasmania, accounting for 30% of expenditure.\textsuperscript{26} These costs for self insurers are higher than the highest state expenditure and have grown each year since 2003-04. In the last recorded year, 2006-07, these costs were a massive 20% higher that the highest State cost in 2005-06

74. The 2006-07 SRCC Annual Report details that from the reporting years 2005-06 to 2006-07:

- Comcare premium payers had an employment growth of 4% while the self-insurers workforce increased by more than 13%;
- Comcare claims reduced by 3% while self-insurers claims increased by 6 %;
- Comcare claims accepted reduced by 4% while claims accepted by self-insurers increased by 3%;

and,

- AAT appeals increased 2% for scheme contributors and by 8% for self-insurers.

75. Even though in 2006-07 self-insurers had a growth in claims rate 9% greater than scheme contributors and had a growth in accepted claims 7% greater than scheme contributors, they still managed to reduce direct payments to injured workers by more than 14%.

76. On the face of it, it appears that self-insurers are more willing to challenge injured workers claims for compensation and are more willing to force workers to utilise the costly process of the AAT to resolve disputes.

\textsuperscript{26} Workplace Relations Ministers Council, Comparative Performance Monitoring Report, Ninth Edition, December 2007, page 26
77. We may not agree with every decision Comcare may make with regard to claims management. However we are confident that Comcare approaches claims management tasks in an even handed manner. It is concerning that self-insurers in the Comcare scheme have consistently paid less to injured workers on a percentage basis than the scheme proper. It is also concerning that this information is readily available, is known to Comcare, and the scheme administrator has not undertaken any analysis of why this should occur.

78. Above we detailed that Comcare makes recommendations to the SRCC when considering applications for self-insurance in on a number of matters, one being: ‘... the grant of the licence will not be contrary to the interests of the employees of the licensee whose affairs fall within the scope of the licence’. A simple look at the above figures raises questions about whether granting a license is contrary to the interests of workers.

It is one thing to consider if the Comcare scheme is appropriate for workers being moved from other jurisdictions. Clearly from our submission we do not believe it is. It is quite another matter to be in procession of data that shows that it is clearly contrary to the interests of workers to be employed by a self-insurer within the scheme you administer and still recommend that employers from outside the scheme are allowed in.

79. It would be clearly contrary to the interests of workers for a scheme contributing employer to move to self-insurance.

Recommendation:

d) That the regulator of Federal OHS and workers' compensation legislation effectively enforce that legislation. This includes a requirement for the regulator to consult and provide information, support and advice to all workplace parties.

e) That the regulator ensures that workplace representatives are supported and protected and actively brings prosecutions for legislative breaches in a timely, appropriate and forthright manner.

f) That the inspectorate of workplace health and safety and compensation and rehabilitation is adequately resourced, pro-active and willing to fulfil an enforcement role as well as an advisory role.

g) That the regulator actively monitors self-insurers and ensures transparency and fairness of their workers' compensation and return to work systems.
What arrangements are required to ensure that all workers and contractors working at workplaces controlled by self-insurers have their health and safety protected, regardless of coverage by Commonwealth, or State and Territory OHS legislation?

Adoption of the Union Charter of Workplace Rights for Occupational Health and Safety and Workers’ Compensation

While the Commonwealth does not maintain an adequate force of safety investigators to service all States/Territories it also failed to agree to a new Memorandum of Understanding with the key eastern seaboard states where MOU’s have expired.

80. The ACTU have produced a Union Charter of Workplace Rights for Occupational Health and Safety and Workers’ Compensation (“The Charter”). The Charter is attached and forms part of this submission.

81. The Charter outlines the arrangements required to ensure that all workers and contractors working at workplaces controlled by self-insurers have their health and safety protected, regardless of coverage by Commonwealth or State and Territory OHS legislation.

82. While the ACTU is seeking an end to the use of Comcare as a de facto national scheme, it is still necessary to have an active agreement between the commonwealth and the jurisdictions.

To this end, the ACTU supports the following agreement:

HEADS OF AGREEMENT

AUSTRALIAN WORKPLACE SAFETY AGREEMENT

Removing the confusion for employers and workers

The Commonwealth will make regulations to ensure that external contractors or workers present on Comcare self-insured workplaces are covered only by State OHS laws.

A uniform workplace-based approach to compliance

State-based safety inspectors will be able to enter Comcare self-insured workplaces within their territorial boundaries at any time and exercise their current enforcement policy in applying both the Commonwealth and State OHS Acts.

State-based safety inspectors will notify Comcare before entering premises of Comcare self-insured employers as far as practically possible.

Investigations of serious safety failures and prosecutions

Where appropriate State-based inspectors will investigate safety breaches by Comcare self-insured employers at their own or other workplaces and refer the matters to Comcare for prosecution.

Any decisions by Comcare not to prosecute will be referred to Commonwealth Director of Public Prosecutions for review and publication.

Meeting the costs of nationally uniform safety compliance

The Commonwealth will provide payments to State authorities to account for the costs of both proactive and reactive compliance activity related to Comcare self-insurer’s workplaces. An agreed schedule of fees will be developed.

The Commonwealth will provide State-based regulators with claims and injury data related to Comcare self-insured employers to enable a continuation of strategic planning purposes by State-based schemes.
Recommendation:

h) That as a matter of utmost urgency the Memorandum of Understanding (MOU) for Comcare to use other jurisdiction’s safety inspectors is re-established between Comcare and those jurisdictions with expired MOU’s.

What effect have the recent changes to the Safety, Rehabilitation and Compensation Act 1988 had on the rehabilitation and return to work of injured workers?

Does the scheme achieve effective return to work outcomes?

83. While the ACTU has clear policy positions on Comcare self-insurance, without details of individual cases it is difficult for us to comment on these questions. Instead we refer to the comments of our affiliate unions who have intimate knowledge of the effects of these matters.

84. Based on advice from our affiliates we do however wish to made the following recommendation:

Recommendation:

i) That the SRC Act 1988 and the scheme operation be strengthened to improve the schemes effectiveness, efficiency and fairness in return to work and rehabilitation outcomes for employees, including:

• addressing problems in the operation of the Administrative Appeals Tribunal as outlined;
• setting strict timelines for compensation and appeal decisions;
• consideration to the establishment of a special section within the Office of the Ombudsman to handle complaints about Comcare practices;
• reviewing the use and role of case managers; and,
• clear, transparent and accessible information on benefits, client services for injured employees and their families.
Consultation

Does the requirement that employees be consulted about their employer’s intention to apply for a self-insurance licence with Comcare (or vary an existing licence) result in meaningful discussion about occupational health and safety and workers’ compensation coverage?

The experience of unions is that our members have not been involved in meaningful discussion or consultation regarding their employers intended move to the Comcare system.

85. The Safety, Rehabilitation and Compensation Regulations require that an applicant give evidence of consulting employees about their intention to apply for a licence, and give examples of forms that evidence may come in. It may be written notice of that intention to employees, it may be any responses from employees, or it may be minutes of a consultative meeting. In no part does legislation stipulate exactly what consultation is, or how it should take place. Without a clear and enforceable definition of what ‘consultation’ is, or instruction on how it is to take place, the requirement is open to abuse. The experience of workers has not involved an engagement in meaningful discussion.

86. Comcare’s own guide to OHS workplace consultative arrangements quotes the Australian Industrial Relations Commission definition of consultation:

“... [to] appropriately inform employees, inviting and considering their response. Sufficient action must be taken to secure employee’s responses and give the employees’ views proper attention. Consultation requires more than a mere exchange of information. Employees must be contributing to the decision-making process.”

87. The emphasis on the employees contribution to the decision making process is crucial here. This has not been the experience of our members when faced with an employer intending to apply for a self insurance licence through the Comcare scheme.

88. If it is an objective of the Act “to foster a cooperative, consultative relationship” between employer and employee, then this concept of worker involvement – and furthermore cooperation - in the decision making process, then surely consultation itself should not be open to interpretation.

89. Comcare licence applicants can fulfill the requirement to ‘consult with employees’, simply by issuing correspondence to staff, notifying them of this intention. This process plays out not as meaningful consultation, but merely distributing information.

90. Pacific National (ACT) Limited, one of 38 separate legal entities under Asciano Limited has for some time had a Comcare Self-Insurance license. All other legal entities within Pacific National are currently covered by State OHS and workers' compensation arrangements.

Asciano met with Comcare and the then Department of Employment and Workplace Relations in May 2007 to discuss a proposal by Asciano to transfer 5,330 employees from the other 37 Asciano legal entities to Pacific National (ACT) Limited and to be cover for OHS and workers' compensation by the Comcare Self-Insurance license.

27 Australian Workers' Union v Campbell Mushrooms Pty Ltd 1183/96 Print N4852 (1996)
28 Comcare Guide to OHS workplace consultative arrangements 2007
On 18 June 2007, the then Minister for Workplace Relations, Joe Hockey, approved the expansion of the Pacific National (ACT) Limited Comcare license to cover all of Asciano.

Asciano advised the SRCC that it intended to transfer workers in stages, with all transfers completed 1 September 2007. Asciano claimed this staged approach will allow it to consult with its employees.

91. Comcare guidelines on the application process for a new Comcare Self-Insurance license require applicants to provide: ‘Evidence of the likely attitude of employees of the applicant to the grant of a license . . . to assess whether the grant of a license will not be contrary to the interests of employees.’ There is no requirement to consult with employees when a license is expanded.

92. It is astonishing that a move involving shifting such a large number of workers’ to another OHS and workers’ compensation jurisdiction without their knowledge and without consultation could be approved by the Minister and condoned by Comcare.

93. Unions became aware of the secret meeting between Comcare and the Department in August 2007 and requested a meeting with Asciano. A meeting took place around the first week of September 2007 where Asciano committed to provide a detailed summary of the compensation entitlements workers will receive under Comcare and ask unions to provide comments on areas they consider to less than currently available to workers. No further discussion has occurred between Asciano and unions regarding this matter.

Recommendation:

j) That workers’ are fully informed and engaged in meaningful consultation, in ways appropriate for the workforce about their employers’ intention to apply for, seek an extension to or significantly vary a Comcare self-insurance license.

k) That a Comcare self-insurance license will only be granted, extended or significantly varied if a majority of affected workers’ agree.

Does the scheme ensure ongoing consultation with, and the involvement of, employees and their representatives in relation to workplace safety arrangements at workplaces of self-insurers?

There are several workplace health and safety arrangements that require ‘consultation’ with employees, but “continuing consultation on OHS matters” is not a requirement under the Act. Rather it is an item which may be included in a Health and Safety Management Arrangement.

We are unaware of any mechanisms established by Comcare, the SRCC or the Department of Education, Employment and Workplace Relations (DEEWR) that allows workers or their union direct consultation with the regulator on operational policy matters relating to compensation, rehabilitation and return to work or on matters affecting the OHS of workers. Further there are no special forums on these matters with regard to self-insurance.

94. The concept of “Management Arrangements” was introduced in 2006 amendments to the Act, replacing the legislated requirement to develop OHS policies negotiated with employees and their unions (Section 16 (2)(d)). This removes the need for employers/government agencies to negotiate health and safety agreements with unions and employees. Agreements have been replaced by Health and Safety Management Arrangements (HSMAs) which can – but do not necessarily – address consultation, training and risk management issues. The previously legislated

29 Comcare Guidelines, License Application Evaluation, January 2006
frequency of OHS Committee meetings (every 3 months) and the 3 year timeframe to keep OHS committee minutes are now decided by the “management arrangements”.

95. Another amendment to the Commonwealth OHS Act means that for any employee representative to be able to represent employees in developing the HSMA, the CEO of Comcare must issue a certificate to that representative, which is only valid for 12 months (Section 16). Such certification means more barriers for employees seeking representation. The right of employees to representation is a vital facet of meaningful consultation, and placing these barriers in the way is a further degradation of a genuine consultative process.

96. Even when a Comcare licensee fulfills all their consultative obligations under the Act, employee involvement is limited. Control of the OHS consultation process is squarely in the hands of an employer. The rights and protections of elected representatives, (HSRs) are steadily being eroded, and the ability of a union to represent its members hampered. In amendments made to Section 25 A, control of HSR elections is now in the hands of the employer. Previously this was a function performed by the union or person specified by the Commission. It is an appalling conflict of interest to allow an employer to control the election for a worker representative – this process should be controlled by the employee’s union.

97. There has been a significant change in Comcare policy as to how it conducts investigations and the role of the HSR during investigations. Comcare has now confirmed that investigators will not, as a matter of practice, advise the HSR of any information collected from the employer or advise when they will be conducting interviews. Thus rendering unusable the HSR's power to access information, be present during an interview and ensure the investigator has access to relevant information. This is a further erosion of the rights of the HSR – rights which must be restored if they are to continue the vital role they have traditionally played in workplace health and safety – in this case, through effective consultative processes.

98. There are several workplace health and safety arrangements that require ‘consultation’ with employees, but “continuing consultation on OHS matters” is not a requirement under the Act. Rather it is an item which may be included in a Health and Safety Management Arrangement. Ongoing, genuine consultation on health and safety matters between employers and employees cannot be a good faith arrangement.

99. We are unaware of any mechanisms established by Comcare, the SRCC or the Department of Education, Employment and Workplace Relations (DEEWR) that allow workers or their union direct consultation with the regulator on operational policy matters relating to compensation, rehabilitation and return to work or on matters affecting the OHS of workers. Further there are no special forums on these matters with regard to self-insurance.

100. We note that Comcare has a Licensee/Comcare Consultative Forum (LCCF), that Comcare describes as ‘. . .one of the established mechanisms for communication between licensed self-insurers and Comcare (in its role of assisting the Commission)’.

The ACTU has not been invited to participate in this forum and are not aware of any worker involvement.

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30 Comcare guide to OHS workplace consultative arrangements 2007
31 Comcare Annual Report 2006-07, page 24
101. We also note that Comcare has a Commonwealth Compensation Liaison Committee (CCLC)\textsuperscript{32}, that was established by Comcare in 2003-04. Comcare describes the CCLC as providing ‘... an avenue for communication between plaintiff lawyers, Comcare, Comcare’s legal panel members and licensed self-insurers on a wide range of legal issues arising from the operation of the SRC Act’. It is reported that the CCLC discussed issues including amendments to the SRC Act and amendments to the occupational health and safety legislation.

Unions will always seek the advice of their specialist lawyers on technical legal matters with regard to workers compensation and OHS regulation. While plaintiff lawyers and Comcare’s legal panel may have an interest in and may be affected by amendments to legislation, it seems to us self evident that workers and employers are more likely to be affected and more directly affected, than their legal representatives.

102. As submitted, the Robens Committee Report\textsuperscript{33} detailed the need for the full participation of employees in the making and monitoring of arrangements for safety and health at work. Recognising joint consultative practices also requires the recognition that ‘... freedom of association principles were the cornerstone of the Robens Committee’s approach, recognising, as it did, the unique role of the representatives of employees (unions) and, whereas individual employees may not have had personal experience of health and safety adversity, collective organisations acquired what now may be called ‘corporate knowledge’ of OHS issues, particularly those specific to an industry.’\textsuperscript{34}

Into the future we expect to be represented at all Comcare, SRCC and DEEWR forums regarding OHS and workers compensation/rehabilitation.

We also expect that Comcare, SRCC and DEEWR will provide the necessary machinery to allow our full participation.

**Recommendation:**

| m) | That he ACTU is represented at all Comcare, SRCC and DEEWR forums regarding OHS and workers compensation/rehabilitation and that Comcare, SRCC and DEEWR will be provided with the necessary assistance to allow its full participation. |

\textsuperscript{32} Comcare Annual Report 2006-07, page 25

\textsuperscript{33} Op cit

\textsuperscript{34} Parliament of Australia, Bills Digest, 30 August 2005, nos. 37-38, 2005-06, ISSN 1328-8091
Finance

Do the financial arrangements for self-insurers present any risk to premium payers in the scheme or to the Commonwealth?

Yes. Those who may be entitled to claim entitlements to workers’ compensation, rehabilitation and return to work under the SRC Act in certain circumstances is determined by the State/Territory legislation. It would seem an impossible task for the Comcare and the SRCC predict future workers’ compensation liabilities when ultimately scheme swappers need to provide workers’ compensation coverage for some workers’ which may be determined such by State and Territory laws as they exist from time to time.

103. The definition of employee in the SRC Act. Section 5 of the SRC Act states:

‘Employees

(1) In this Act, unless the contrary intention appears: . . .

employee means:

(a) a person who is employed by the Commonwealth or by a Commonwealth authority, whether the person is so employed under a law of the Commonwealth or of a Territory or under a contract of service or apprenticeship; or

(b) a person who is employed by a licensed corporation.

(1A) For the purposes of paragraph (b) of the definition of employee in subsection (1), a person is taken to be employed by a licensed corporation if, and only if:

(a) a person performs work for that corporation under a law or a contract; and

(b) pursuant to that law or pursuant to the law that is the proper law of that contract, as the case may be, the person would, if that corporation were not a licensed corporation, be entitled to compensation in respect of injury, loss or damage suffered by, or in respect of the death of, the person in connection with that work.’

104. The Productivity Commission made the following observation on this curious part of the SRC Act:

‘Coverage under Comcare

Companies that self insure under Comcare (that is under section 100(c) of the Safety, Rehabilitation and Compensation Act 1988) are referred to as ‘licensed corporations’. The Act states that a person who is employed by a licensed corporation is eligible to seek compensation and that person is taken to be employed by a licensed corporation if, and only if:

a) a person performs work for that corporation under a law or a contract; and

b) pursuant to that law or pursuant to the law that is the proper law of that contract, as the case may be, the person would, if that corporation were not a licensed corporation, be entitled to compensation in respect of injury, loss or damage suffered by, or in respect of the death of, the person in connection with that work. (s.5(1A))
This indicates that, for licensed corporations, eligibility is to be determined by reference to the legislation of the jurisdiction in which they operate. However, licensing is subject to the approval of the Safety, Rehabilitation and Compensation Commission and as part of this approvals process it must be satisfied that ‘the grant of the licence will not be contrary to the interests of the employees of the licensee whose affairs fall within the scope of the licence’ (s. 104(2(c))). This would allow coverage issues to be considered and determined at the licensing stage.  

105. If the interpretation of this part of the SRC Act by the Productivity Commission is correct, and we have no reason to suspect it is not, then this creates an impossible scenario for the SRCC to consider an appropriate bank guarantee for scheme swapping self-insurers.

106. Scheme swappers can only join Comcare as self-insurers. There is no capacity for them to join as Comcare premium paying employers.  

107. Therefore our reading of s.5(1A)(b) of the SRC Act is that if a worker of a scheme swiper is entitled to compensation in the State/Territory jurisdiction they are working in then this entitlement is also granted under the Comcare system regardless of restrictions in definition of employee/worker in the Commonwealth statute.

Those who may be entitled to claim entitlements to workers’ compensation, rehabilitation and return to work under the SRC Act in certain circumstances is determined by the State/Territory legislation.

108. State Governments have in recent times introduced deeming legislation to declare workers’ considered ‘independent contractors’, employees for the purposes of workers’ compensation legislation.  

109. The SRCC Annual Report 2006-07 details that: ‘The LIP also imposes certain prudential obligations on licensees. These include licensees providing a liability report describing current and predicted outstanding workers’ compensation liability – this information is used to calculate the Bank Guarantee amount – provision of that Bank Guarantee, a reinsurance policy, yearly accounts and financial statements.’

110. It would seem an impossible task for the Comcare and the SRCC predict future workers’ compensation liabilities when ultimately scheme swappers need to provide workers’ compensation coverage for some workers’ which may be determined such by State and Territory laws as they exist from time to time.
What are the likely impacts on state and territory workers’ compensation schemes of corporations exiting those schemes to join Comcare?

There is general agreement among actuaries that State/Territory premiums will rise as a result of employers leaving those systems.

It would be reckless for the Government to continue the policy of allowing companies to scheme swap when it is known that this strategy results in increased business costs for employers outside Comcare.

111. It has been proffered that a move to Comcare self-insurance results in a single workers’ compensation regime applying to multi-state employers. For example the Productivity Commission reported that:

‘Participants such as the Plastics and Chemicals Industries Association (IRsub. 222, p. 2), Manpower Services (Australia) (IRsub. 178, p. 2) and Sing Tel Optus (sub. 57, p. 3) unequivocally supported the model. Sing Tel Optus considered that there would cost savings from self-insuring under the Comcare scheme, even in its existing state:

Though there are weaknesses in the Comcare system — and some of the coverage they provide and some of the structures behind it seem at times to be overly generous and other times not necessarily consistent — by having one consistent scheme Australia-wide, the defects associated with the system, we believe, are far outweighed by the advantages.‘

112. The reality is that a move to Comcare self-insurance adds another jurisdiction to those already applicable to the scheme swapper. This is because employers will have existing claims at the time of swapping schemes that will require servicing following a move to Comcare. Claims management for these claims, including rehabilitation and return to work obligations will continue to be proscribed by the relevant State law.

113. It is unreasonable to expect that employers remaining in State/Territory systems should pick up the bill for outstanding workers’ compensation liabilities of exiting employers, and a number of State/Territory schemes have introduced “exit” arrangements for employers leaving their systems.

114. We are concerned that there would no longer be an incentive for employers, such as a reduction in premium or outstanding liabilities, in providing on going rehabilitation and return to work opportunities for workers’ injured in schemes no longer applicable to scheme swappers.

115. There appears to be general agreement among actuaries that State/Territory premiums will rise as a result of employers leaving those systems.

116. The Queensland Government has reported that: ‘The top 2,000 premium payers in Queensland account for approximately 90% of the premium pool. The movement of a number of these large companies to self-insurance will result in pressure on the fixed costs of maintaining Queensland’s service delivery network and greater volatility may arise as the premium pool decreases.’

39 Op cit, page 112
40 E.g. Workers’ Compensation and Rehabilitation and Other Acts Amendment Bill 2005 (Qld)
117. The Productivity Commission reported that following advice from Taylor Fry: ‘based on an estimated level of exiting employers’ premium as a proportion of premium income falling between 2.7 per cent (if one in five employers exited) to 13.5 per cent (if all eligible employers exited); and cross-subsidies falling between 15 per cent to 25 per cent, the impact on average premiums would fall within the range of 0.3 per cent to just over 3.0 per cent’.\(^{42}\) Bruce Watson, Rod McInnes and Mark Hurst in a presentation to the Institute of Actuaries of Australia, Xth Accident Compensation Seminar April 2007 concluded that, ‘... we estimate that the movement of 10% [estimate of scheme premium base eligible to self-insurer under Comcare] of a state scheme to the (sic) Comcare implies a premium increase in the order of 2.5%’.\(^{43}\)

118. Submissions this month from employer associations to the Review of the Victoria’s Accident Compensation Act praised the four consecutive premium reductions of 10%.\(^{44}\)

119. All Australian jurisdictions except for Comcare currently have stable or falling average premium rates. The following graph is taken for data contained once more in CPM 9th Edition:

![Standardised average premium rates](image)

120. The former Federal Government encouraged employers to scheme swap into Comcare knowing that this would result in increased premiums for those employers remaining in State/Territory systems.

121. It would be reckless for the Government to continue the policy of allowing companies to scheme swap when it is known that this strategy results in increased business costs for employers outside Comcare.

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\(^{42}\) Productivity Commission Inquiry Report No. 27, National Workers’ Compensation and Occupational Health and Safety Frameworks, 16 March 2004, pg 126


122. As submitted the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) makes provision for the revocation of Comcare self-insurance licenses. Detailed in the Safety Rehabilitation and Compensation Regulations 2002 are the consequences of revocation of license for eligible corporations, or scheme swappers. These regulations detail that:

‘For paragraph 107A (b) of the Act, the consequences of the revocation of a licence, held by an eligible corporation, under section 106 or 107 of the Act are set out in this regulation. . . .

(4) Except as provided by subregulations (2) and (3):

(a) the Act ceases to apply to the licensee and its employees;

and

(b) the laws of the States and Territories providing for workers’ compensation apply to the licensee.’

123. The OHS and SRC Legislation Amendment Act 2006, make it clear that the OHS act applies to ‘. . . a body corporate:

. . . for which a licence under Part VIII of the Safety, Rehabilitation and Compensation Act 1988 is in force (whether or not the licence is suspended).’

124. Therefore if, for what ever reasons it considers appropriate the SRCC revokes a scheme swapper license, the OHS regulation and workers' compensation obligations for that employer fall back to the applicable State/Territory system.

125. We also note that under s. 107 of the SRC Act the SRCC may, at the written request of a scheme swapper, revoke their self-insurance. Again resulting in the OHS regulation and workers' compensation obligations for that employer fall back to the applicable State/Territory system.

126. In order for the SRCC to grant a licence to a scheme swapper, the Commission must be satisfied that, inter alia:

- the applicant has sufficient resources to fulfil the responsibilities imposed on it under a license;
- the applicant has the capacity to meet the standards set by the SRCC for the rehabilitation and occupational health and safety of its employees; and,
- the applicant acknowledges that a condition of a license is that the licensee will comply with the requirements of the Act and any directions of the SRCC.

127. If the SRCC has evidence to consider that a scheme swapper fails to maintain sufficient resources to comply with its license, is not meeting the OHS standards set by the Commission or is not complying with the Act, we submit that the Commission must consider revocation of the self-insurance license.

128. The consequence of revocation however would be that the State/Territory's would be left to deal with an under-resourced and poor performing employer.

45 Safety, Rehabilitation and Compensation Act 1988, s. 106
47 Op Cit section 5, Commonwealth authority, (d)(ii)
48 Comcare Guidelines, License Application Evaluation, January 2006
129. In its report on the Inquiry into Workers' Compensation and Occupational Health and Safety Frameworks, the Productivity Commission detailed that ‘Sing Tel Optus estimated that it would save approximately $2 million of its annual workers’ compensation cost of $6 million, were it permitted to self-insure under the Comcare scheme’. On the next page the Productivity Commission reported that ‘Telstra pointed out that, in respect of its total incapacity payments under the Comcare scheme, there would be overall reduction on weekly benefits of about 10 per cent or $1.4 million a year if it were to come under State and Territory schemes’.

130. It is conceivable than that a scheme swapper, with raising outstanding liabilities due again to poor OHS practices could see an advantage in returning to a scheme contributing based workers’ compensation arrangements and seek to move back to the State/Territory’s - and the jurisdictions must accept these employers.

131. We are unaware of any agreement between Comcare and the State/Territory schemes regarding the affect of a revocation by the SRCC of an eligible corporation self-insurance license.

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<th>Recommendation:</th>
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<td>n) That as a matter or urgency protocols are established between Comcare and the State/Territory jurisdictions regarding actions to be taken if a Comcare self-insurance license is revoked.</td>
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49 Op Cit Page 115
50 Op Cit Page 116
Access

Why do private companies seek self insurance with Comcare? Are there alternatives available to address the costs and red tape for employers with operations across jurisdictions having to deal with multiple occupational health and safety and workers’ compensation systems?

Some lawyers are advising their employer clients to move to Comcare to:

- reduce the administrative costs of maintaining separate workers compensation and OHS arrangements;
- reduce business costs by deny workers compensation benefits; and,
- avoid state enacted OHS obligations and penalties.

There is a commitment of all State/Territory schemes and the Federal Government to the development of common approaches to administering premium, compensation, safety issues, and self insurance arrangements.

132. The reasons employers seek self-insurance with Comcare were succinctly summarised by Mallesons Stephen Jaques, self described as ‘Australia’s most successful commercial law firm’. In a remarkably frank assessment in an online publication entitled OHS (e)ssentials, Partner Andrew Gray details that the benefits for employees becoming a Comcare licence self-insurer are:

  - administration benefits that arise from being subject to single and uniform workers compensation and OHS system (as opposed to several separate state based systems),
  - the potential for a reduction in premium costs,
  - reduced statutory benefits and common law damages payable to injured employees,
  - obligations under the OHS Act are less onerous than those that exist in some states (particularly New South Wales),
  - the maximum penalty under the OHS Act is $495,000 which is significantly lower than the penalties under State legislation, and
  - criminal prosecutions under the OHS Act are only available for serious safety breaches.’

133. We commend the brave move by Mallesons in committing to writing the reasons we have always suspected influenced employers to consider Comcare self-insurance.

We will respond to each dot point.

134. *Administration benefits that arise from being subject to single and uniform workers compensation and OHS system (as opposed to several separate state based systems)*

We note the commitment of the State/Territory schemes to the development of common approaches to administering premium, compensation, safety issues, and self insurance arrangements. 52

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We also note the policy of the Australian Government at the 2007 Federal Election\textsuperscript{53} that: ‘Labor will work with all states to ensure that this first phase of harmonisation, as described in Table 2, is fully implemented within the first term of a Rudd Labor Government. With the leadership of a Rudd Labor Government, many more elements can be harmonised to reduce the compliance burden on multi-state business.’

\begin{table}[h]
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\begin{tabular}{|l|}
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Development of uniform WorkCover claim and premium forms with common and more efficient lodgement processes. \\
Development of common administrative processes for premium payments and payroll declaration including payment plan options. \\
Establishment of ‘one-stop shops’ within each WorkCover Insurance Agent to service multi-state employers. Account managers will provide a single point of entry for common claims and premium estimation reports, and resolving queries. \\
New ‘mutual recognition’ rules to enable return to work co-ordinators to work across states when supporting injured workers. \\
New mutual recognition arrangements for construction induction cards issued in states and adoption of the national training agenda for OHS induction training for the construction industry. \\
Mutual recognition of plant and machinery and a uniform system of accreditation of verifiers of pieces of plant and machinery. \\
Alignment of regulatory approaches in the domestic construction industry in collaboration with employers and unions. \\
Sharing of advertising campaigns focused on improving safety at work. \\
Use of common guidance material for employers to help improve workplace safety and compliance with workers’ compensation. \\
In line with the work of the Heads of Workers Compensation Authorities, implementation of a common ‘gateway’ analysis for employers applying for self-insurance. The development of uniform financial indicators and a common audit tool to assess safety performance. \\
\hline
\end{tabular}
\caption{FIRST PHASE OF HARMONISATION}
\end{table}

Implementation of the above work already commenced by the State/Territory jurisdictions by the Federal government will, we believe, overcome many of the employer perceived administrative disadvantages of operating under different State based systems.

\textbf{135. The potential for a reduction in premium costs}

Premium reduction or minimisation should not be achievable by simply scheme swapping. There are many ways for employers to reduce premiums. All of these methods involve improving the occupational health and safety of their workers.

The ACTU and unions and are always keen to discuss with employers effective means of providing healthy and safe work environments that will in time reduce their premium rates.

\textbf{136. Reduced statutory benefits and common law damages payable to injured employees,}

Obviously we will never agree to a reduction in entitlements for injured workers.

\textbf{137. Obligations under the OHS Act are less onerous than those that exist in some states (particularly New South Wales),}

\textsuperscript{53} Australian Labor Party, Election 07 Fact Sheet, Workplace health and safety
The maximum penalty under the OHS Act is $495,000 which is significantly lower than the penalties under State legislation, and

Criminal prosecutions under the OHS Act are only available for serious safety breaches

While improvements are needed in all schemes and the ACTU invites all governments to adopt the provisions of our Charter, Comcare has lower standards than other schemes in a number of key areas. Namely that it has no union right of entry provisions, no industrial manslaughter laws (and the previous government passed a law excising state and territory manslaughter laws from applying to Comcare self insurers), no 3rd party prosecutions for OHS breaches and has lower penalties than the majority of other jurisdiction for breaches of the Act.

These provisions, and those contained in The Charter, are fundamental to improving Comcare’s OHS legislation and ensuring that worker’s health and safety is protected.

Recommendation:

o) That the implementation of the OHS and workers’ compensation harmonisation arrangements is completed as soon as practicable.

If self insurance under the Comcare scheme remains open to eligible corporations, should there be changes to the eligibility rules for obtaining a licence to self-insure under Comcare?

138. It is our position that no further corporations are declared eligible to apply for self-insurance and that no applications from those already declared eligible are considered by the Safety Rehabilitation and Compensation Commission, until such time that a comprehensive review of the scheme is undertaken and a consideration of the value of self-insurance to a workers compensation system is fully discussed.

139. We have submitted above that if self-insurance is to be a feature of a workers' compensation scheme it should only be available in very limited circumstances and must involve a high level of ongoing oversight and monitoring by scheme regulators. Self-insurance in this scenario should be viewed as a privilege not a right.

140. Employers wishing to become or remain self-insurers must earn that privilege by bringing to workers compensation systems a superior performance in all areas of injury prevention, claims management and occupational health and safety standards. Self insurers should be role models for other employers in terms of workplace safety, claims management and occupational rehabilitation by virtue of their special status. Further self-insurers should be required to share with scheme contributing employers those systems and programs that allow them to achieve a superior performance.

141. Workers' must be fully informed and engaged in meaningful consultation, in ways appropriate for the workforce about their employers intention to apply for, seek an extension to or significantly vary a Comcare self-insurance license.

142. A Comcare self-insurance license will only be granted, extended or significantly varied if a majority of affected workers’ agree.
Union Charter of Workplace Rights

This Charter of Rights sets out the rights and responsibilities of all workplace parties in the promotion of decent and fair health, safety, compensation and rehabilitation systems and practices within Australian workplaces.

1. Workers

Every worker has the rights to:
- A safe and healthy workplace
- Travel to and from work in safety and with appropriate protections
- Return home from work free of injury or illness
- Enjoy retirement without suffering adverse consequences of workplace injury or illness
- Enjoy the highest level of protection, representation, compensation and rehabilitation, regardless of the jurisdiction within which they work
- The highest level of protection to prevent injury, illness and disease
- Take collective action over any health and safety matter, including the right to cause unsafe or unhealthy work
- Discuss, negotiate and be consulted in all issues affecting their health, safety and welfare

2. Representation

Every worker has the right to be represented on health, safety, compensation, rehabilitation and return to work issues by their elected Workplace Health and Safety Representatives and their union. Every worker has the right to select health and safety representatives.

Unions have the rights to:
- Enter workplaces on health and safety issues
- Investigate breaches of health and safety laws
- Represent members and prospective members
- Initiate investigations and prosecutions for occupational health and safety breaches
- Initiate cessation of work in unsafe areas
- Access all relevant information and reports

Workplace Health and Safety Representatives have the right to:
- Be democratically elected by a process determined by workers, in conjunction with their union
- Utilise legal rights and powers to represent workers on health and safety matters
- Inspect the workplace
- Access relevant information and be informed of all incidents
- Be consulted by the employer before workplace changes occur that may affect health and safety
- Issue notices when breaches are detected
- Call in government inspectors
- Direct workers to cease work where there is a belief of imminent risk to health and safety
- Seek resolution of health and safety issues
- Perform all OHS activities on paid time and have adequate facilities
- Be assisted by any person at any time
- Be protected by law from discrimination, harassment, bullying, intimidation and prosecution
- Access training of their choice in paid work time
- Appeal any decision of a regulator or court regarding any health and safety, compensation or rehabilitation matter

3. Discrimination and Bullying

All workers (or prospective workers), including health and safety representatives, will be protected by law from discrimination, harassment, bullying or detriment to their employment because they have raised a health and safety issue, lodged a compensation claim or been involved in consultation or workplace health and safety matters.

4. Employer Responsibilities

Persons who control, manage or own workplaces have an absolute duty of care without limitation to provide and maintain safe and healthy workplace environments. Employers will not shift jurisdictions to avoid their OHS and workers’ compensation responsibilities and obligations. Employers are subject to all the obligations and responsibilities contained within this Charter.

5. Role of Regulator

OHS law must be effectively enforced by regulators in all jurisdictions. The regulator must also consult and provide information, support and advice to all workplace parties, including unions. The regulator must ensure that workplace representatives are supported and protected and bring prosecutions in a timely, appropriate and courageous manner. Regulators will actively monitor and enforce compliance and ensure transparency and fairness of their workers’ compensation and return to work systems. An inspectorate must be adequately resourced, proactive and willing to fail enforcement role as well as an advisory role.

6. Compensation

Following a physical or psychological injury all workers have the right to a fair and just and equitable compensation system, which promotes the best medical and life support, the most effective rehabilitation for injured workers and facilitates a safe return to work that offers genuine job security.

Workers’ compensation standards are to:
- Be available to all members of the workforce
- Provide compensation for all injuries that arise from travel to, from or during work including and during meal breaks
- Be available upon the death of a worker and for dependents of that worker
- Be based on the 100% replacement of lost income
- Provide total cost of medical rehabilitation and other related expenses
- Provide lump sum compensation for permanent disability
- Ensure common law rights
- Support rehabilitation and return to work
- Ensure that workers are entitled to timely and effective claim determination and dispute resolution processes
- Ensure the worker has access to the doctor of their choice

7. Rehabilitation

All workers have the right to return to safe, suitable and sustainable work, following the provision of quality rehabilitation services, commensurate to need.

Rehabilitation will include the right to:
- Union representation
- Early intervention workplace injury and illness
- High quality, appropriate, effective and timely rehabilitation plans and services
- Consultation about all aspects of rehabilitation
- All documentation and information relating to their rehabilitation
- Fair and equitable rehabilitation plans and services
- Privacy in the management of all records and information
- Personal choice of medical provider and rehabilitation service

8. Penalties

Penalties must be commensurate with the degree of the breach, including recognition of gross negligence. Penalties should be sufficient to act as a deterrent. A range of penalties, including but not limited to imprisonment, fines, monies, imprisonment, enforceable undertakings, and adverse publicity orders must be provided to allow for a range of penalties for breaches of health and safety and compensation laws to be actively applied.

9. Development of Laws

All occupational health and safety, compensation and rehabilitation laws are to be developed in a transparent manner.

All laws must be developed incorporating but not limited to the ILO Conventions, Protocols and Recommendations concerning health and safety.
Attachment 2

As stated in the main part of our submission, the ACTU considers that there is a need for the immediate attention of government to provide relief to workers’ from Comcare’s inadequate OHS protections and workers’ compensation entitlements.

Key Recommendations

The 5 key recommendations of this submission are summarised as follows:

I. Repeal the 2nd Edition and Disregard the 3rd Edition of Comcare’s Permanent Impairment Guide

II. Repeal the Disease and Injury Amendments

III. Introduce Time Limits on Decision Making

IV. Increase and Index the Cap on Damages for Non-Economic Loss

V. Repeal the Travel and Recess Amendments


The SRC Act provides compensation for employees who suffer a permanent impairment as a result of a work-related injury. For example, if an employee loses their hand, or loses the use of their hand, they may receive lump sum compensation for that loss. This compensation is in addition to compensation for loss of wages or for medical treatment expenses.

The entitlement to permanent impairment compensation is provided under s.24 of the SRC Act, which requires Comcare to pay compensation unless the employee's impairment is less than 10%. The threshold for hearing loss is 5%. There is no threshold for loss of use of the fingers and toes, or for the loss of taste and smell.

Creation of the Guide

Section 28 of the SRC Act gives Comcare the authority to prepare a document called the Guide to the Assessment of the Degree of Permanent Impairment (’Guide’), which sets out the criteria for determining how the percentage impairment of an injured employee is assessed.

The Guide is a Legislative Instrument, made with approval of the Minister. The significance of this is that Comcare can set the threshold for the entitlement of compensation for impaired employees without the need for legislative change, albeit with the approval of the Minister.

Objective of the Second Edition Guide

In a consultative process leading up to Comcare announcing the 2nd Edition Guide, Comcare regularly stated that the 2nd Edition Guide was not intended to reduce entitlements to compensation.

In a statement on the Comcare website introducing the implementation of the 2nd Edition Guide, the then CEO of Comcare, Ms Barbara Bennett, stated that the 2nd Edition Guide was implemented to overcome specific concerns expressed by medical assessors, the Administrative Appeals Tribunal (‘AAT’) and the Federal Court about the 1st Edition Guide.

Ms Bennett stated that the 2nd Edition Guide was based on the 5th edition of the American Medical Association’s Guides to the Evaluation of Permanent Impairment (‘AMA Guide’) Guide and had been adapted to suit Australian clinical practice. However, the adaptation of Australian clinical practice meant that the 2nd Edition Guide was made more onerous than the AMA Guide.

Ms Bennett went on to state that the 2nd Edition Guide was designed to provide a clear and objective system for measuring all impairments. In fact, the 2nd Edition Guide is far more complicated than the 1st Edition Guide making it almost impossible for a non-medically trained person to understand. The 2nd Edition Guide is not only overly complicated but has extensively restricted or prohibited injured employees from receiving any entitlement to compensation for permanent impairment.

Effect of the Second Edition Guide

In a number of key areas, such as spinal injuries, the 2nd Edition Guide fails to provide an assessment of 10% forcing an assessor to determine whether the employee meets 8% or 13% (lower back), or 8% or 18% (upper back and neck), with nothing in between. The 2nd Edition Guide also regularly sets unachievable impairment levels and sets criteria that are virtually impossible for an injured person to meet.

Where an employee covered by the Comcare Scheme is injured by the negligence of her or his employer, or another employee, compensation must be payable under s.24 before the injured employee can elect to institute a common law action for damages. Therefore, the higher thresholds in the 2nd Edition Guide have directly impacted on the ability of employees to hold their employers accountable at law for negligence.
The most recent Comcare Annual Report (2006-07) shows that expenditure on ‘legal, common law and lump sums’ for ‘premium claims’ (claims with a date of injury post July 1989), was approximately $7 million less than the previous year. Presumably, this figure does not include common law payouts in respect of asbestos liabilities acquired from the Commonwealth in 2005 (totalling $808.8 million). If it did, one would expect the amount to increase and not significantly decrease.

In the absence of any reasons published by Comcare in its 2006-07 Annual Report, the explanation for significant reduction in common law and lump sum payments for premium claims in 2006-07 (a reduction of 65%) must be the introduction of the 2nd Edition Guide in the second half of the 2005-06 financial year.

ACTU affiliate unions through their legal representatives have formally requested comparative statistics from Comcare regarding claims that were accepted for permanent impairment compensation under:

- The 1st Edition Guide for the 2 years leading up to and including 28 February 2006; and
- The 2nd Edition Guide for the period 1 March 2006 to date.

At the time of finalising this submission, Comcare has not provided the requested information. The ACTU requests that the Minister exercises her discretion to allow this important information to be considered in support of this submission even if received after the submission deadline of 29 February 2008.

Anecdotally, it is the ACTU affiliate unions’ first-hand experience that there has been at least 70% reduction in accepted permanent impairment claims since the 2nd Edition Guide was implemented.

Since the implementation of the 2nd Edition Guide, the majority of injured employees who suffer permanent physical impairment do not receive adequate or any compensation for the impairment. The resulting affect is that Comcare has severely restricted entitlements to compensation for injured employees and access to common law remedies in the presence of employer negligence.

Examples of the severe restrictions to entitlements in the 2nd Edition Guide include the following:

‘Raising of the Bar’

It is clear that 10% under the 1st Edition Guide is, in many cases, the equivalent of 30% under the 2nd Edition Guide. This is a significant difference which effectively means that employees will have far greater difficulty in achieving the 10% threshold level as required under the SRC Act.
Unattainable Threshold for Impairments

The 2nd Edition Guide also contains a number of Tables with criteria that are either impossible to satisfy or specifically target a particular impairment for removal from the realm of compensation.

Table 9.13.3 of the 2nd Edition Guide is an example of where an assessor can not make a positive finding leading to an entitlement to compensation. Table 9.13.3 concerns Complex Regional Pain Syndrome, which is common in employees with long-standing upper limb injuries.

Under Table 9.13.3, the medical assessor requires objective concurrent findings of at least 8 of the criteria set out in that Table. As an eminent Chronic Pain Specialist recently commented in an AAT hearing, in all his years of practice in treating Complex Regional Pain Syndrome, he has never found a patient with 8 or more of the criteria concurrently.

An example of a specifically targeted impairment is ankylosis of the ankle in optimal position. Under Table 9.2 of the 2nd Edition Guide, this impairment attracts a 4% assessment, while under the 1st Edition Guide the assessment was 20%.

‘Falling Between the Gaps’

The 2nd Edition Guide contains several Tables where there are no criteria for an assessment of 10%.

Section 24 of the SRC Act provides compensation where the impairment is 10% or more. Why then is there no assessment for 10% for spinal injuries? Effectively, employees now need to establish a threshold level of impairment of 18% pursuant to Tables 9.15 and 9.16 before qualifying for compensation.

It is the ACTU affiliate union’s direct experience that most employees with back or neck injuries who would have been entitled to compensation under the 1st Edition Guide will not receive compensation under the 2nd Edition Guide. Tables 9.15, 9.16 and 9.17 have, by themselves alone, extensively reduced the number of injured employees who are entitled to compensation for their impairment under the SRC Act.

In response to criticism of the 2nd Edition Guide, Comcare have commented that there are a number of Tables which make it easier for an injured employee to obtain compensation. This is correct. For example, employees with urinary tract impairment will likely receive more compensation under Table 10 of the 2nd Edition Guide. However, as one would imagine, employees suffering urinary tract impairments are relatively rare, while employees suffering lower back injuries are unfortunately common.

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54 Dr Garth Eaton (Occupational Physician) has participated in training provided by Comcare in the assessment of claimants under the Second Edition Guide.
The majority of compensation payments made under the 1st Edition Guide for an impaired employee were between $20,000 and $30,000 for an assessment of 10%. This modest payment of compensation was often for an employee with a permanent and life-changing injury. The 2nd Edition Guide has largely removed this form of compensation for seriously injured employees.

Case Studies

The following studies are based on direct experience of cases concerning assessment made under the 2nd Edition Guide in 2007:

Case 1

John has worked for Australia Post for over 37 years. He is 53 years of age. In 2001 and 2003, John had surgery on his right and left rotator cuffs respectively to repair torn tendons. Both shoulder conditions were accepted as work-related. In 2005, John had further surgery on his left shoulder. Since then, John has remained on medication, required physiotherapy and only been able to perform light duties. John has degeneration and weakness of both shoulders because of the injuries and surgery.

The injuries are considered permanent and affect John in all aspects of his life. He has no recreational pastimes that he can participate in and finds it very difficult to contribute around the home.

Under Table 9.11 of the 2nd Edition Guide, John’s impairment was assessed at 7% for the right and at 8% for the left shoulder meaning that he receives no compensation because impairments resulting from separate injuries cannot be combined. John’s impairment, if assessed under the 1st Edition Guide, resulting in restrictions to range of movement exceeded the 10% threshold for both shoulders. Under Table 9.1 of the 1st Edition Guide, John would have received more than $55,000.

Case 2

Sarah suffers chondromalacia of the right patella after another employee carelessly moved a desk (at the direction of a team leader) as Sarah walked past, causing her to hit her knee. The injury occurred in mid-2005 and the resulting condition has since proved resistant to treatment and on medical evidence is deteriorating. Sarah used to be a regular competitor in fun runs and mini triathlons prior to her injury. The condition now restricts Sarah’s activities and causes her daily pain and difficulty riding a bicycle and even walking up hills.
Sarah obtained an assessment from her specialist under Table 9.2 and 9.5 of the 1st Edition Guide. Had Sarah lodged her claim prior to 1 March 2006, she would have been entitled to $29,386 based on an assessment of 10% under either Table. Unfortunately, Sarah lodged her claim in April 2006 and was required to obtain a further assessment under Table 9.3 and 9.7 of the 2nd Edition Guide. Sarah was assessed at 5% under both Tables and therefore was not entitled to compensation.

Case 3

Tony worked for a trucking corporation for 2 years. In 2006, he injured his left arm (he is right-handed) when a defective mechanical device used to unload his vehicle failed in its operation. Tony permanently damaged the tendons in his arm and has since limited his ability to perform fine finger movements, domestic duties and play golf. Worse still, he has been assigned to office work at the depot because the lack of grip strength in his left hand prevents him from driving a heavy vehicle on long road-trips.

Assessed under Table 9.1 of the 1st Edition Guide, Tony’s impairment would be 10%. The identical impairment under Table 9.14 of the 2nd Edition Guide was assessed at 3%. Had Tony suffered his injury a year earlier, he would have no doubt been entitled to receive more than $25,000. Further, by reason of the 2nd Edition Guide, Tony is prevented from pursuing a common law claim even though his injury was arguably caused by the negligence of his employer.

The above studies are a very small sample of cases where employees have been adversely affected by the 2nd Edition Guide.

It should be noted that the 1st Edition Guide remains in place for most current and former defence personnel for injuries occurring prior to 1 July 2004. Clearly, the only reason the 2nd Edition Guide was not applied to defence personnel was that it would be unacceptable from a public policy point of view to so obviously reduce their entitlements. Put another way, a member of the armed forces would receive around $50,000 following an ankle fusion whereas an employee in the private sector suffering the identical injury receives nothing.
Draft 3rd Edition Guide

Comcare is proposing to implement a 3rd edition of the Guide (‘3rd Edition Guide’). The draft 3rd Edition Guide largely addresses a technical issue relating to separating entitlements under the SRC Act following a High Court decision. However, the draft 3rd Edition Guide perpetuates and reinforces all of the issues of unfairness addressed above under the 2nd Edition Guide.

Comcare’s Submission to the Review

Comcare, in its submission to the Review dated 22 February 2008, stated the following:

57. Because the Comcare scheme supports injured employees until they are able to return to work (until retirement age) and because it requires employers to provide suitable duties and rehabilitation, there is limited access to common law remedies. This has been a key feature of the scheme since its inception in 1988. In the second reading speech to the 1988 Bill, Brian Howe, the then Minister explained that:

"common law actions … will be replaced by the comprehensive benefits … [...]"

Although Comcare later in its submission points out that employees are also entitled to lump sum and non-economic loss benefits it is misleading of Comcare to imply that restricted access to common law remedies is a key feature of the Comcare Scheme only because it supports return to work and rehabilitation or economic support for totally incapacitated employees.

The second reading speech quoted by Comcare gives insight into the original Parliamentary intent behind the SRC Act, specifically that common law actions will be replaced by comprehensive benefits.

It is submitted that common law remedies were always intended to be replaced by comprehensive benefits and specifically preserve access to, and appropriate levels of, compensation for permanent impairment and non-economic loss. The Second Edition Guide severely curtails compensation payments and usurps the Parliament’s intention to provide comprehensive benefits to injured employees.

Recommendation 1: That the Minister takes urgent steps to revoke the 2nd Edition Guide and re-implement the 1st Edition Guide under s.28 of the SRC Act. If the Minister approves a further Guide, it should be on the proviso that if compensation would have been payable under the 1st Edition Guide, it should also be payable under any further version of the Guide.
II  Restriction of Compensation for Employees Suffering a Disease or Injury

Section 5B (Disease)

The previous Government amended the disease provisions of the SRC Act by introducing a new s.5B making it harder for employees to link a disease to her or his employment. Under the SRC Act, a disease includes a psychological condition and any underlying condition, such as a degenerative spinal disc.

In determining whether a disease was contributed to by employment in a significant degree, the issues that a decision-maker must now consider include:

(a) the duration of the employment;

(b) the nature of, and particular tasks involved in, the employment;

(c) any predisposition of the employee to the ailment or aggravation;

(d) any activities of the employee not related to the employment;

(e) any other matters affecting the employee’s health.

The above requirements mean that someone with a past history of mental illness would be less likely to receive compensation because s.5B demands that the decision-maker take into account an employee’s past mental health.

If work is a material causative or aggravating factor, then for so long as the employee is psychologically affected by employment, she or he should be entitled to compensation under the Comcare Scheme.

According to beyondblue, depression affects one in 5 people at some stage in their life and 14% of new mothers. Arguably, s.5B could deny compensation to at least one in 5 claimants.

Similarly, for physical injuries, if an employee ‘slips a disc’ whilst lifting or twisting at work, why should the duration of employment or predisposition to the ailment or aggravation have any bearing on whether the injury arose out of, or in the course of, employment?

The following extract is taken from the second reading of the bill to amend the SRC Act by the former Minister for Employment and Workplace Relations:

The [SRC Act] currently requires a material contribution by employment to a disease before compensation is payable. When originally enacted this provision was meant to establish a test requiring that an employee—and I quote from the then minister’s second reading speech in 1988—‘demonstrate that his or her employment was more than a mere contributing factor in the contraction of the disease’.
Given that the AAT and Courts in recent years have interpreted the term ‘material’ to be something approaching ‘significant’ then what appears to be required now is a connection that is substantially more than that. How can requiring a contribution of a significant degree (which is defined in s.5B as ‘substantially more than material’) reinstate legislative intent when all that was intended was a contribution that was ‘more than mere’?

It is noted that in the Explanatory Memorandum to the bill to amend the SRC Act, the impact analysis section states that requiring a ‘significant contribution’ by employment to the contraction of a disease would be a benefit to licensed self-insurers and to Government and ‘would reduce the incidence of compensable claims compared to the present situation and provide scope for a reduction in workers’ compensation costs’ (pp.vii-viii).

It is no secret then that cost saving rather than reinstating original legislative intent underpinned this amendment.

It is submitted the new s.5B should be repealed and the original provision reinstated. The failure to do so will mean that a number of employees in future will not receive compensation for legitimate work-related claims.

Section 5A (Injury)

The new s.5A adds a further barrier for employees to link a medical condition to her or his employment. A disease, injury or aggravation suffered as a result of ‘reasonable administrative action taken in a reasonable manner’ in respect of employment is no longer compensable and is taken to include the following:

(a) a reasonable appraisal of the employee’s performance;

(b) a reasonable counselling action (whether formal or informal) taken in respect of the employee’s employment;

(c) a reasonable suspension action in respect of the employee’s employment;

(d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee’s employment;

(e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);
(f) anything reasonable done in connection with the employee’s failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.

If an employee claims for stress and makes any reference in the claim form or a statement regarding the actions of a supervisor or management, s.5A allows Comcare or the licensed self-insurer to apply an open interpretation of what constitutes administrative action (including informal counselling).

The number of rejected stress claims has increased significantly as a result of s.5A. Many employees are forced into costly and stressful litigation to prove the actions of their employer were not reasonable.

It is submitted the new s.5A should be repealed and replaced with a definition, which is closer to what the original legislators clearly intended. In our submission, the following definition should be re-instated, as amended (underlined):

injury means:

(a) a disease suffered by an employee; or

(b) 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

(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee’s employment), being an aggravation that arose out of, or in the course of, that employment;

but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or anything reasonably done in connection with the employee’s failure to obtain a promotion, transfer or benefit in connection with his or her employment.

Case Studies

The following is an example of a claim rejected by Comcare and illustrates the above points:
Case 4

Jan is a Commonwealth employee who lodged a complaint against a supervisor and the complaint was investigated over a period of months. As a result of the perceived harassment, Jan developed a psychological condition requiring medical treatment. Her psychiatrist supported her claim that her condition was aggravated by the stress associated with the drawn out investigation.

The employer’s internal investigation subsequently determined that there was no substance to Jan’s harassment complaint and no further action was taken in respect of the complaint. No independent review took place. Jan was subsequently certified unfit for work as a result of the psychological condition and lodged a claim for compensation.

Her claim was subsequently rejected. Although it was accepted that her employment significantly contributed to her injury, the employer relied on s.5A asserting that its conduct – being its own internal investigation – constituted ‘reasonable administrative action’.

Comcare in applying s5A did not consider it relevant that the original injury was caused by the harassment in spite of the evidence in support of this finding. In the end, the agency employer was not subjected to external review in respect of the actual harassment complaint.

As a consequence of the psychological condition, the employee was unable to return to work and suffered, and continues to suffer, considerable financial and health consequences.

Even if an employee passes the considerable hurdle to psychological claims presented by s.5B, the employee will forever be shadowed by the ongoing s.5A ‘liability-axe’. Moreover, in circumstances where the employer is able to rely on s.5A, the onus unfairly shifts to the employee to prove the actions of the employer were unreasonable.

This shift in onus leads to high levels of disputation and often results in protracted litigation for employee’s who have suffered a genuine psychological injury.
In the majority of cases, apart from the employee’s statement, the only non-medical evidence sought and obtained by Comcare or licensed self-insurers is from the employer. In conjunction with the length of time it takes to determine some disputed claims, the stress and long-term damage caused by s.5B and s.5A is contrary the attempts in other jurisdictions to address issues of mental health in the workplace.

Recommendation 2: That Parliament takes steps to repeal s.5B and s.5A of the SRC Act and replace it with a new definition, based on the earlier definition, which is closer to what the original legislators clearly intended.

III Introduction of Time Limits for Decisions

In the most recent Comcare Annual Report (2006-07), the Acting CEO of Comcare stated the following in the Director’s Report:

The [Comcare Scheme] provides a no-fault approach to claims which are determined accurately and quickly without regard to technicalities.

The above statement purports to present the scheme as efficient and one that delivers benefits to injured employees early. In reality, this is far from the truth.

In the ACTU affiliate unions’ long involvement in the Comcare Scheme, it can safely state that the usual timeframe to resolve a disputed claim is nearly 2 years.

Since the commencement of the SRC Act in 1988 there has been an anomaly under the legislation. That is, that there is no requirement under the SRC Act for time limits on decision-makers. This means that an employee can wait 12 months or more for a primary determination of liability or the completion of a reconsideration.

At present an employee has no right under the SRC Act to force a decision-maker to make a decision, or to make a complaint about the delay in the decision making process.

Without time limits imposed on decision-makers, Comcare and licensed self-insurers have no obligation to act promptly in determining claims.
Deeming

In some Australian workers’ compensation jurisdictions, where an insurer does not make a decision within the imposed time period, the insurer is deemed automatically to have ‘rejected’ the claim.

Interestingly, the Seafarers Compensation and Rehabilitation Act 1992 (‘Seafarers Act’), which is modelled on the SRC Act, imposes a time limit for determining claims relating to incapacity for work, loss of or damage to property or cost of medical treatment.

Under the Seafarers Act, the employer must determine its liability in relation to the claim within 12 days of receiving a claim (s.73), or information or a document requested by the decision-maker (if requested before the expiration of 12 days from receiving a claim). Similarly, a decision-maker has 30 days to determine a claim for permanent impairment (s.73A), 60 days to determine a claim for dependency (s.72) and 60 days to reconsider a determination (s.79). If a decision is not made in the specified timeframe, the decision-maker is deemed to have rejected the claim.

It is submitted that a reasonable time for Comcare, or a licensed self-insurer, to make a primary determination of all claims is 30 days and to complete a reconsideration within in a further 30 days. In circumstances where a primary determination is not made or a reconsideration not completed within the stipulated timeframe, the determining authority should be deemed to have rejected the claim.

Recommendation 3: That Parliament takes steps to amend s.60 and s.62 of the SRC Act to introduce a time limit of 30 days for the making of primary determinations and a further time limit of 30 days for completing a reconsideration. Where the determining authority fails to make a decision within the stipulated timeframe, the determining authority is deemed to have rejected the claim.

IV Introduction of Indexed CPI Increases for Non-Economic Loss Claims

A further anomaly under the SRC Act is the capping of the lump sum entitlement for non-economic loss. Under s.45 of the SRC Act, an employee may elect to sue her or his employer for non-economic loss if the employee was injured as a result of the negligence of the employer or another employee.

The maximum compensation payable under s.45 was determined in 1988 at $110,000 and has not been increased. Since 1988 the real value of the capped amount under s.45 has diminished significantly. The affect of failing to index the maximum amount (and the introduction of the 2nd Edition Guide) has been to de facto abolish employees’ common law rights.
If maximum amount under s.45 had been indexed to the consumer price index, the present value of the maximum amount would be approximately $194,291.31

All that would be required to give effect to this would be to amend s.45(4) to reflect the above amount and insert a reference in the indexing provision (s.13(1)) such that the ‘relevant amount’ also means the amount specified in s.45(4).

Recommendation 4: That Parliament takes steps to amend the SRC Act to increase the cap on common law damages under s.45 (presently $110,000) to today’s value and thereafter index that amount.

V Abolition of Compensation for Injuries Occurring While Travelling to and from Work or During an Ordinary Recess

The previous Government has virtually abolished travel claims and ordinary recess claims under amendments to s.6 of the SRC Act. The ideology behind the changes is that an employer should not be responsible for injuries of an employee if the injuries occurred outside of the control of the employer.

Contrary to the economic rationale behind this ideology, it is submitted that an employer should be responsible for injuries sustained by an employee while travelling to and from work or during an ordinary recess. Travel is a fundamental part of employment, as is recess during the course of a working day. It is contended that injuries that arise in this context would not have occurred but for the employee’s requirement to attend their place of work. The ‘but for’ test is a long established common law doctrine.

Furthermore, if an injury is not accepted under the SRC Act, there is no incentive for the employer to rehabilitate the employee. There is also no positive obligation to provide suitable employment, which is a requirement of an employer in the Comcare Scheme where the employee is undertaking or has undertaken a rehabilitation program under the SRC Act.

In any event, a large number of Comcare travel claims involve motor vehicle accidents. Under the SRC Act, Comcare can, and regularly does, recover damages where the employee has an entitlement against a 3rd party such as the driver of a motor vehicle who caused the accident. During 2006–07 Comcare recovered $12.122 million under ss.48 and 50 of the SRC Act.

55 The figure of 194,291.31 was obtained from the Reserve Bank of Australia’s online inflation calculator: http://www.rba.gov.au/calculator/calc.go.
It is submitted that the net cost to Comcare of travel claims, having regard to the recoveries it makes from 3rd parties, would be minimal and the travel amendments under s.6 should be repealed.

**Recommendation 5:** That Parliament takes steps to repeal the travel amendments recently made to s.6 of the SRC Act and reinstate the original coverage for travel between work and home.