

Department of Education, Employment and Workplace Relations

Review of self-insurance arrangements under the Comcare scheme

Martin H Fry

Fellow of the Institute
of Actuaries of
Australia

Professor Michael Quinlan

University of New South Wales
Fellow of the Safety Institute of
Australia

Professor Richard Johnstone

Director Socio-Legal Research Centre
and Deputy-Dean (Research), Griffith
Law School, Griffith University

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Sydney

Level 8, 30 Clarence Street
Sydney NSW 2000

Tel (02) 9249 2900

Fax (02) 9249 2999

Web www.taylorfry.com.au

Melbourne

Level 6, 52 Collins Street
Melbourne VIC 3000

Tel (03) 9658 2333

Fax (03) 9658 2344

Taylor Fry Pty. Ltd. ACN 087 047 809 ABN 29 087 047 809



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1 Introduction

The Department of Education, Employment and Workplace Relations (DEEWR) engaged Taylor Fry Consulting Actuaries (Taylor Fry) to review and undertake consultations in relation to self-insurance arrangements under the Commonwealth's scheme of workers' compensation and occupational health and safety.

The purpose of the review is to ensure that Comcare provides a suitable occupational health and safety (OHS) and workers' compensation system for self-insurers and their employees.

1.1 Background

The *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) establishes a statutory framework of workers' compensation for employers and employees in the Commonwealth jurisdiction, including corporations that are licensed to self-insure their workers' compensation liabilities (referred to in this report as self-insurers). Non-licensed authorities, primarily Australian and Australian Capital Territory Government agencies, pay annual premiums to insure their liabilities (referred to in this report as premium payers).

The scheme of workers' compensation under the SRC Act is administered by the Safety, Rehabilitation and Compensation Commission (the Commission) and Comcare, and is commonly referred to as 'the Comcare Scheme'. The Department of Education, Employment and Workplace Relations (DEEWR) has portfolio responsibility for Comcare and the Commission. DEEWR and Comcare advise the Minister for Employment and Workplace Relations (the Minister) on matters relating to the SRC Act.

Since 14 March 2007, premium paying agencies and self-insurers under the SRC Act have been subject to a single national workplace health and safety regime under the provisions of the *Occupational Health and Safety Act 1991* (The OHS Act). DEEWR and Comcare also advise the Minister on matters relating to the OHS Act.

In the lead up to the 2007 federal election, the Australian Labor Party proposed a moratorium on the future granting of licences to corporations seeking to self-insure, until the arrangements in the Comcare scheme were reviewed.

On 11 December 2007, the Minister, the Hon Julia Gillard MP, issued a media release formally announcing a moratorium on granting further self-insurance licences under the Comcare scheme, as well as the need for a review of the scheme.

There are currently 25 self-insurers under the Comcare scheme, with nine corporations being declared eligible but not yet granted a licence, and a further eleven applications for eligibility lodged.

On 23 January 2008, the Minister announced the terms of reference for the review of self-insurance arrangements under the Comcare scheme. The Minister's press release stated that the purpose of the review was to ensure that the scheme is a suitable OHS and workers' compensation system for self-insurers and their employees. The Government announced its intention to hear the views of stakeholders and undertake national consultation with relevant groups as part of the review.

In March 2008, DEEWR engaged Taylor Fry to collect information and provide expert advice to inform its report to the Minister, which is to be completed by 31 July 2008.

Taylor Fry is an actuarial consulting firm with expertise in workers' compensation. Taylor Fry teamed with two recognised OHS experts, Professor Michael Quinlan of UNSW and Professor Richard Johnstone of Griffith University to prepare this report.

1.2 Terms of Reference

The terms of reference for the review are split into four areas, as follows:

Safety and Compensation

- (a) Does the scheme provide appropriate OHS and workers' compensation coverage for workers employed by self-insurers?
- (b) 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?
- (c) 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?
- (d) 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?
- (e) Does the scheme achieve effective return to work outcomes?

Consultation

- (f) 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 a meaningful discussion about OHS and workers' compensation coverage?
- (g) 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?

Finance

- (h) Do the financial arrangements for self-insurers present any risk to premium payers in the scheme or to the Commonwealth?
- (i) What are the likely impacts on state and territory workers' compensation schemes of corporations exiting those schemes to join Comcare?

Access

- (j) 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 OHS and workers' compensation systems?
- (k) 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?

1.3 Submissions and consultation

The deadline for submissions was 29 February 2008 and consultations were to be completed by 31 March 2008, although some meetings were held after that date for logistical reasons.

Some clear messages came out of the submissions and consultations:

- OHS is the most important issue for all stakeholders;
- there are differences in approach to OHS between Commonwealth and state and territory schemes;
- there are a number of different ways of providing appropriate workers' compensation benefits;
- while there are opposing views about the main reasons employers seek to self-insure under the Comcare scheme, most submissions conceded that a uniform national OHS and workers' compensation regime is a major factor; and
- virtually all submissions supported moves toward national harmonisation, although there were widely differing views about how this could be achieved.

1.4 Conclusions and Recommendations

This report provides background, analysis, conclusions and recommendations to enable DEEWR to prepare a report for the Minister.

Where possible, we have interpreted submissions to the review and consultations with stakeholders, together with our observations of the operation of OHS and workers' compensation systems to draw conclusions to inform DEEWR.

Often, the evidence available to the review and from reviews of other OHS and workers' compensation systems can be interpreted in different ways, and submissions to the review have shown both very subtle and starkly different perspectives on the same facts. As far as possible, we have provided our views on the most likely interpretation of facts presented to us, while acknowledging that those facts are often equivocal.

In some cases, the conclusions we have come to seem to point strongly toward firm recommendations, and where this is the case we have made those recommendations. A summary of our recommendations is as follows:

Recommendation 1.

The employer's duty of care provisions in sections 16 and 17 of the OHS Act (read together with sections 9A and 15) and the degree to which they relate to contractors, sub-contractors and other third parties should be clarified (for example, by adopting the wording of section 23 of the *Occupational Health and Safety Act 2004* (Vic)) to ensure that all persons affected by an employer's operations are protected.

Recommendation 2.

While the specific issue of the duties of self-employed persons was not raised in any of the submissions, we suggest that DEEWR examine whether the Commonwealth has legislative power to enact a provision imposing a duty on self-employed persons and providing the same degree of protection to workers as enacted in the *Occupational Health and Safety Act 2004* (Vic).

Recommendation 3.

The coverage, consistency and standards of existing state and federal OHS regulations in relation to industries now covered by Comcare need to be carefully assessed and measures devised to ensure that Comcare self-insurers meet consistent standards that equate to best practice.

Recommendation 4.

That a means of harmonising and establishing best practice standards in relation to codes and regulations and industry codes, be incorporated as part of the national review of OHS legislation.

Recommendation 5.

For the purposes of harmonisation, the OHS Act should be amended to vest Comcare investigators with the same powers and functions as are vested in state and territory inspectors.

Recommendation 6.

Comcare's structure could be improved by greater industry specialization in recruitment and training to deal with the new class of self-insurers. There are lessons to be drawn from state and territory inspectorates in this regard.

Where this is not possible to achieve, Comcare should maximise opportunities to draw on industry experts or state inspectors.

Recommendation 7.

It is unclear whether, even accounting for recent increases in staff, Comcare has the resources to carry out the type of proactive enforcement regime adopted by state jurisdictions, especially in geographically demanding regions like Western Australia. This matter requires careful review before any expansion in Comcare coverage is considered. Unless effective resourcing (including deployment) moves in tandem with coverage, a regulatory vacuum is inevitable.

Recommendation 8.

The processes of selecting and training Comcare investigators should be reviewed in light of practice in state jurisdictions. This should include not only general training but also training/mentoring programs aimed to provide particular skills (such as bullying/occupational violence). Account in recruitment needs to be taken of areas requiring specialist expertise (such as hazardous substances) and/or prior work experience (such as construction).

Recommendation 9.

That the Australian government should support increased cooperation and interaction between Comcare, state and territory OHS agencies at the operational level, including meetings and secondments, beyond those activities presently being undertaken in relation to national campaigns.

Recommendation 10.

That Comcare adopt the principles of responsive enforcement and alter its practices in terms of more proactive and interactive workplace visits and tactical use of notices and other sanctions.

Recommendation 11.

We suggest that Comcare remove the requirement of seeking the opinion of a legal officer before issuing an improvement notice.

Recommendation 12.

Infringement notices should be introduced in the OHS Act. The level of penalty in an infringement notices should not exceed 20 % of the maximum penalty that could be imposed by a court. A tiered system of on-the-spot fines might be considered in which the most serious offences merit a more substantial penalty. Increased penalties might also be imposed for repeat offences of the same type within a given period.

Recommendation 13.

Comcare continue to offer the possibility of enforceable undertakings, but benchmark procedures and processes against best practice.

Recommendation 14.

That the requirements of recklessness or criminal negligence, and of a resultant death or serious injury, be removed from the elements of OHS offences.

Aggravated offences of recklessness or criminal negligence, and of a resultant death or serious injury, can be retained.

That consideration be given to reducing the role of civil penalties

That fines for convictions should be significantly increased, to a level where they are comparable with the maximum penalties in the eastern states.

That new sanctions such as court-ordered publicity, orders to participate in OHS-related projects and corporate probation be considered.

Recommendation 15.

The Commonwealth should consider the introduction of a provision imposing liability upon directors and senior managers (at least of non-Commonwealth licensees) following either the NSW or Victorian provision.

Recommendation 16.

Section 14 of the OHS Act should be repealed, and section 17 of the OHS Act should be revised so as to replicate section 23 of the Victorian Act, and a similar duty should be placed on self-employed persons.

There is a need for consistent policies in terms of enforcement if coordinated activities are to be effective (see earlier recommendations).

In the existing context it is not recommended that Comcare's workers' compensation coverage be expanded to include Labour Hire firms.

Recommendation 17.

The lump sum death benefit should be increased to be comparable with those in state and territory schemes.

The lump sum impairment benefit for lower levels of permanent impairment should be increased to be comparable with those in state and territory schemes.

A practical review of the permanent impairment arrangements within the Comcare scheme should be conducted to ensure that it provides reasonable access to and reasonable levels of compensation. The review should address:

- **The possibility of better aligning the guidelines with the 10% threshold**
- **The need for improved understanding by doctors of the guidelines, as increased objectivity results in increased complexity**
- **A realistic and achievable deadline should be set to ensure stakeholders take positive steps to progress this work.**

The arrangements should also be reviewed in light of the Canute decision to ensure that injuries arising from one incident are compensated appropriately.

Recommendation 18.

Consideration should be given to setting time limits within which responses to each stage of a dispute must be provided. Failing a response within that time limit, the response should be deemed to be in favour of the injured worker.

Recommendation 19.

Two types of suspension should be considered:

- The first type of suspension would be as the SRC Act currently provides for; suspension of all benefits. This would be used when there is little prospect for the employee ‘coming to the party’ and engaging in a rehabilitation program (for example, they have left the country).
- The second type of suspension would be of all benefits except for medical treatment under section 16. This would enable the injured employee to continue to obtain treatment for their injury.

The choice of which type of suspension to apply would remain a choice for the rehabilitation authority, which is where the suspension delegation currently sits, that is, with the employing agency.

Recommendation 20.

That consideration be given to the implications of changing work arrangements in terms of the provisions of workers’ compensation and return to work with a view to providing adequate protection to temporary (both direct and indirect hire) and contractor workers. These measures should be coordinated with a view to establish a consistent approach in this area between jurisdictions.

Recommendation 21.

The OHS Act should be amended to enable workers who are not employees of the employer (for example, contractors, sub-contractors, and labour hire workers) to be included in arrangements for workplace participation in Part 3 of the Act.

Recommendation 22.

In principle, employees and their representatives should take responsibility for initiating processes for the election of HSRs. However, that there may be occasions where these processes are not triggered by employees, in which case the employer should be able to take steps to get the process going. Elections can be conducted by a relevant union, or where there is no union, by the employees in that work group. Employees should have the option of calling in a third party to conduct the election.

Recommendation 23.

The Commonwealth further investigate the possibility of vesting authorised union representatives who discover serious contraventions of the OHS Act during their authorised investigation with some enforcement or referral powers. These powers would only be available where there is no health and safety representative already at the workplace.

Recommendation 24.

The current right of entry requirements for unions are unduly restrictive and may, given apparent ambiguities or confusion on the part of some employers, be conducive to litigation rather than to a constructive resolution of OHS problems. Entry requirements should be revised so they equate to those found in other jurisdictions such as NSW and Victoria.

1.5 Structure of this report

The balance of this report considers the four areas covered by the terms of reference in four chapters:

Chapter 2	Safety and Compensation
Chapter 3	Consultation
Chapter 4	Finance
Chapter 5	Access

1.6 Thanks

We record our thanks to all the staff of DEEWR for providing assistance throughout the development of this report, sometimes at short notice and over long distances. We would also like to thank all the individuals and organisations that met us during the consultation phase and gave their time, thoughts and ideas freely and openly.

2 Safety and Compensation

2.1 Terms of reference

- (a) Does the scheme provide appropriate OHS and workers' compensation coverage for workers employed by self-insurers?
- (b) 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?
- (c) 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?
- (d) 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?
- (e) Does the scheme achieve effective return to work outcomes?

2.2 Background and Approach

We have summarised the submissions together with our analysis and views under the heading of each of the terms of reference. Because the OHS issues that have come out of this review indicate that it is far more of a dominant issue than workers' compensation, we deal with OHS first and workers' compensation later in the report.

Understanding the differences in systems

From the outset, we must stress that the way the Commonwealth government approaches the way it administers its OHS arrangements is fundamentally different to that of the states and territories.

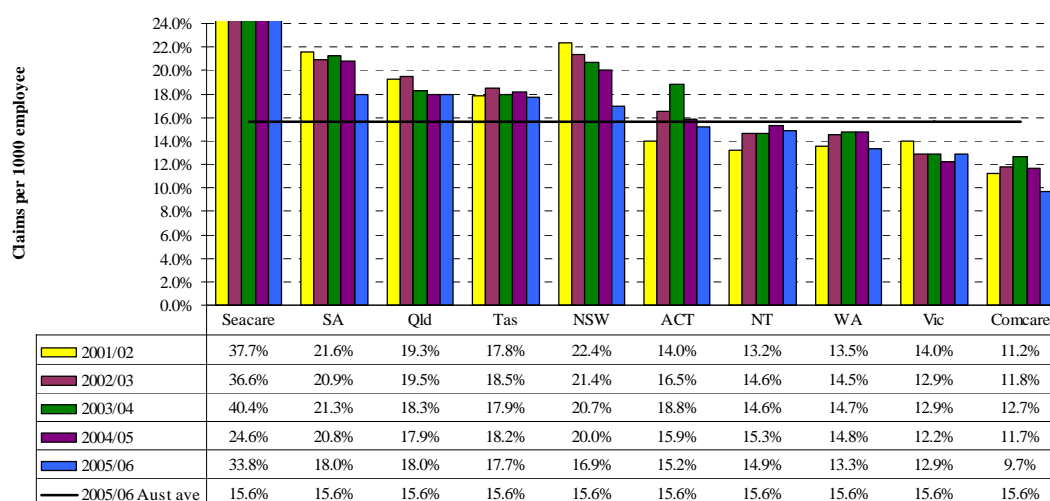
In keeping with its approach to a range of administrative laws such as taxation and superannuation, the Commonwealth's approach to OHS appears to rely heavily on employers' voluntary compliance, supported by targeted auditing and exception reporting. By contrast, state and territory OHS systems are far more based on proactive - rather than reactive - supervision, involvement and enforcement.

Incidence Rates

Comcare's workers' compensation claim incidence rates are below the average for Australian jurisdictions. Figure 2.1 shows the comparison of incidence rates for claims involving temporary incapacity of one or more weeks plus all claims for fatality and permanent impairment.¹ The observation has been included to provide contextual background to the review of OHS coverage and enforcement.

¹ Workplace Relations Ministers' Council, *Comparative Performance Monitoring Report, 9th Edition*, February 2008, Indicator 5, page 6.

Fig 2.1 Incidence rate of serious injury and disease claims



In making this observation, we recognise that the premium payers in the Comcare scheme cover predominantly 'white collar' workers so that comparisons with state and territory schemes may be affected by the different mixes of industries. We also recognise that conclusions regarding OHS performance can not be based solely on claim numbers, as there are many other factors that determine whether OHS coverage is effective.

Complexities in systems

When the Commonwealth OHS Act is compared with OHS statutes in the states and territories, it appears that the evolution of the OHS Act has resulted in complexities, especially in relation to coverage and jurisdictional boundaries, as it has tried to keep pace with the changing nature of the Comcare scheme.

To understand these complexities, we have structured our analysis into the key areas of:

- coverage;
- cross jurisdictional issues;
- operational issues; and
- enforcement.

2.2.1 Does the scheme provide appropriate OHS coverage for workers employed by self-insurers?

All of the employers who made submissions to this review believed that the scheme provides appropriate coverage (although two submissions said that there is still scope for further improvement).

Unions were concerned about what they perceived to be the low rate of inspections and prosecutions, and their assessment that Comcare is unable to regulate high-risk, specialised industries, because the scheme was originally designed to cover Commonwealth public servants – a specific and limited injury and illness profile.² They also expressed strong concern about lack of right of entry to workplaces by unions for OHS purposes.

State and territory governments (with whom the submissions from lawyers and lawyers' organisations mainly agreed) generally asserted that the Comcare scheme does not provide appropriate coverage. They suggested that Comcare was designed for primarily 'white collar' workers and is not equipped to handle the increasing range of industries coming into the scheme under self-insurance. They also asserted that the March 2007 changes to coverage under the OHS Act have caused confusion, particularly concerning contract and labour hire workers.

The SRCC argued that the scheme provides comprehensive OHS coverage, but suggests that consideration could be given to some enhancements, namely amending the OHS Act to include a duty on designers and raising entry requirements for self-insurers from 'capacity to meet OHS standards' to a higher test.

Comcare's submission stressed that the OHS Act is based on the 'Robens' model and features a general duty of care and a culture of consultation of and representation by employees. The legislation is supported by a range of supplementary materials including regulations, approved codes of practice, guidance material and fact sheets. Comcare actively ensures employers in the scheme comply with OHS regulations.

Key differences between the OHS Act and other statutes

There have been significant changes to the OHS Act since 1991, but unlike many of the state and territory statutes, the OHS Act has not been comprehensively reviewed, and many of the submissions suggested that a full review would be timely.

For example, our survey of OHS statutes suggests that there are a number of provisions in the OHS Act which leave gaps in coverage (or at least are unclear about coverage) or which take a different approach from those of the state and territory provisions.

The areas covered in this section include:

- Employers' general duties to persons who are not employees of the employer or contractors to the employer
- Duties of self-employed persons
- Duties of designers
- Regulations, Codes of Practice and Guidance Material.

² We note that this suggestion came up time and time again throughout submissions and consultations, but any reasonable analysis shows that the Commonwealth jurisdiction has always covered the entire spectrum of employment types and OHS risks. This includes: the military; policing and protective security; banking and financial services; weapons, vehicle, clothing and munitions manufacturing; air, water, rail and road transport logistics, safety, operation, construction and maintenance; communications infrastructure construction, development and maintenance; nuclear technology construction, operation and maintenance; a breadth of scientific activities; health services delivery; air traffic control and airport fire services; customs and quarantine services; the full range of municipal or urban maintenance services; environmental services, and on and on. This shows that Comcare has covered a wide range of activities and the only issue is the extent of this coverage when compared to the states and territories.

Employers' general duties to persons who are not employees or contractors of the employer

The most important general duties in all OHS statutes are the duties owed by employers³ to their employees, contractors, labour hire workers, outworkers and others who carry out work for the organisation, as well as others who may be affected by the activities of the organisation.

All of the OHS statutes impose a duty upon the 'employer' in broad terms to provide and maintain, so far as is reasonably practicable, a working environment for employees that is safe and without risks to health. The relevant provision in the OHS Act is section 16, which provides that:

- (1) An employer must take all reasonably practicable steps to protect the health and safety at work of the employer's employees.

The employer's duty has been broadly interpreted so as to have a reach outside the employment relationship and to affect, inter alia, independent contractors engaged by the employer. For example, it is clear that to take reasonably practicable steps to protect the health and safety at work of the employer's employees the employer will have to ensure that all workers, including contractors, sub-contractors, and their employees and sub-sub-contractors are, as far as is reasonably practicable, instructed, trained and supervised so that their work practices do not threaten the health and safety of the employer's employees.⁴

³ Section 5 of the OHS Act defines employer as 'the Commonwealth or a Commonwealth authority', which in turn means:

- (a) a body corporate established for a public purpose by or under a law of the Commonwealth or a law of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island); or
- (b) a body corporate:
 - (i) that is incorporated under a law of the Commonwealth or a State or Territory; and
 - (ii) in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest; and
 - (iii) that is not a body corporate that the Minister, by notice published in the Gazette, has declared not to be a Commonwealth authority for the purposes of this Act
- (c) a body corporate:
 - (i) that is incorporated under a law of the Commonwealth or a State or Territory; and
 - (ii) in which the Commonwealth has a substantial interest; and
 - (iii) that is a body corporate that the Minister, by notice published in the Gazette, has declared to be a Commonwealth authority for the purposes of this Act; or
- (d) a body corporate:
 - (i) that is not covered by paragraph (a), (b) or (c); and
 - (ii) 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); and
 - (iii) that was not an eligible corporation for the purposes of that Part when the licence was granted.

⁴ See, for example, *R v Swan Hunter Shipbuilders* [1982] 1 All ER 264; and see also *WorkCover Authority of NSW v Crown in the Right of the State of NSW (Police Service of New South Wales)* (No 2) (2001) 104 IR 268 at para 24.

Although it differs in its precise wording, the employer’s duty to employees in the OHS Act is largely similar to the corresponding provisions in the other OHS statutes.

Further, like many of the OHS statutes, section 16(4) of the OHS Act deems, for the purposes of the employer’s duty in sections 16(1) and (2), ‘persons who are contractors of the employer’ to be ‘employees’ protected by the employer’s general duty to ‘employees’ in relation to:

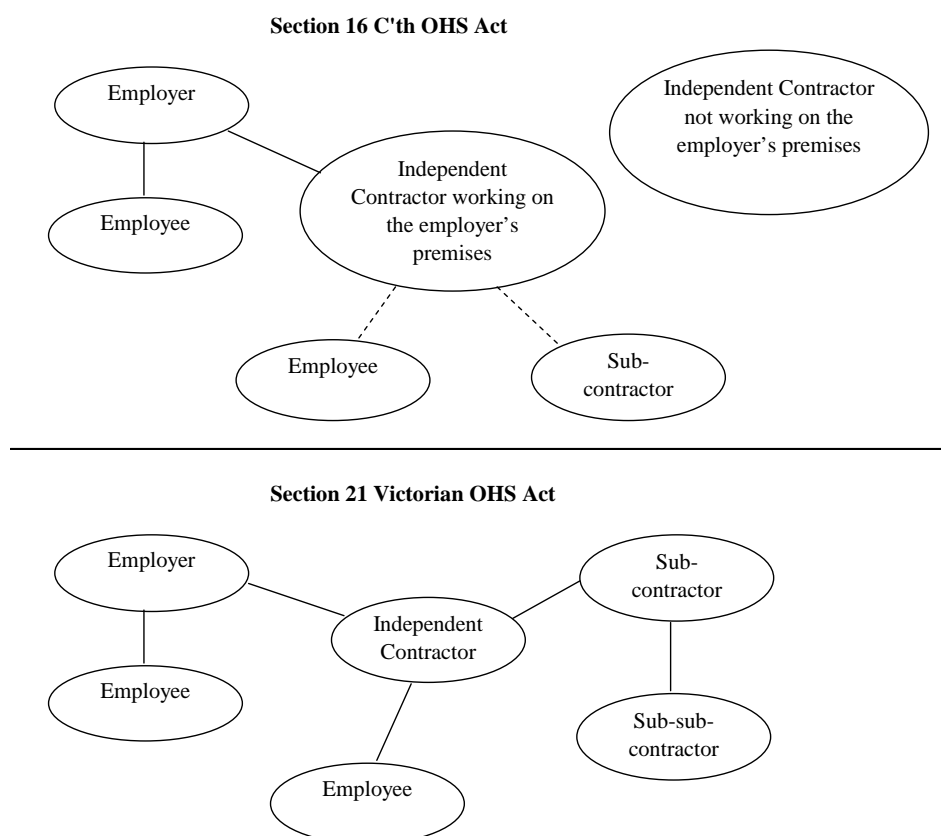
- (a) matters over which the employer has control; or
- (b) matters over which the employer would have had control but for an express provision in an agreement made by the employer with such a contractor to the contrary, being matters over which the employer would, in the circumstances, usually be expected to have control.

‘Contractor’ is defined in section 9A of the OHS Act as a natural person (other than a Commonwealth employee, a Commonwealth authority employee or an employee of the non-Commonwealth licensee) who performs work on an employer’s premises in connection with a contract between the employer and the natural person or another person (whether a natural person or not) which is in connection with an undertaking being carried out by the employer (where the ‘employer’ is the Commonwealth, a Commonwealth Authority or a non-Commonwealth licensee).

It would appear, then, that section 16 of the OHS Act has a very broad reach. It is clear that ‘contractors’ (as defined in section 9A) directly engaged by an employer can be deemed as employees, but it is not clear if the contractor’s employees, or sub-contractors, will be deemed to be employees because the wording in section 16(4) is different in one crucial aspect from the wording in other Acts, such as section 21(3) of the *Occupational Health and Safety Act 2004* (Vic). Section 21(3) of that Act deems, for the purposes of the employer’s duty to employees, independent contractors engaged by the employer, and the employees of the independent contractor, to be ‘employees’ of the ‘employer’ in matters over which the employer (i) has control, or (ii) would have control but for any agreement between the employer and the independent contractor to the contrary. In *R v ACR Roofing Pty Ltd* [2004] VSCA 215, the Victorian Supreme Court - Court of Appeal interpreted the term ‘engaged’ very broadly to include any independent contractor in relation to matters over which the employer has control even if the contractor was not in a direct contractual relationship with the employer, but instead was engaged as a sub-contractor, or even further down the contractual chain. Section 16(4) of the OHS Act is not as clearly far-reaching, because it does not use the word ‘engage’, but rather simply refers to ‘persons who are contractors of that employer’. Note also that section 9A limits the definition of ‘contractor’ to persons who are performing work on Commonwealth premises or on premises of the non-Commonwealth licensee. In other words, a person who is engaged by the employer to work at a site that is not the employer’s premises is not a contractor for the purposes of section 9A and consequently cannot be deemed to be an ‘employee’ of the employer by virtue of section 16(4).

Figure 2.2 illustrates the differences in definition of deemed employees under section 16 of the Commonwealth OHS Act and section 21 of the Victorian OHS Act. Note that the broken lines indicate coverage that is in doubt, and needs clarification. Where there are no lines, there is no coverage.

Fig 2.2 Deemed employees – C'th and Victorian OHS Acts



To some extent the restricted wording in section 16(4) of the OHS Act does not matter because the Act imposes on the employer a duty to ‘third parties’ (visitors, and other workers who are not ‘employees’ or ‘contractors’). More specifically, section 17 of the OHS Act requires an employer to ‘take all reasonably practicable steps to ensure that persons at or near a workplace⁵ under the employer’s control who are not the employer’s employees or contractors are not exposed to risk to their health and safety arising from the conduct of the employer’s undertaking.’

This provision is very similar to the corresponding provision in the *Occupational Health and Safety Act 1989* (ACT); and a little broader than the corresponding provision in the *Occupational Health and Safety Act 2000* (NSW) (section 8) which specifies that the duty only applies to non-employees while they are at the employer’s or self-employed person’s place of work. But all of these provisions are narrower than those in the *Occupational Health and Safety Act 2004* (Vic) sections 23 and 24 and the *Workplace Health and Safety Act 1995* (Qld) section 28.

⁵ Section 5 of the OHS Act defines a workplace as:

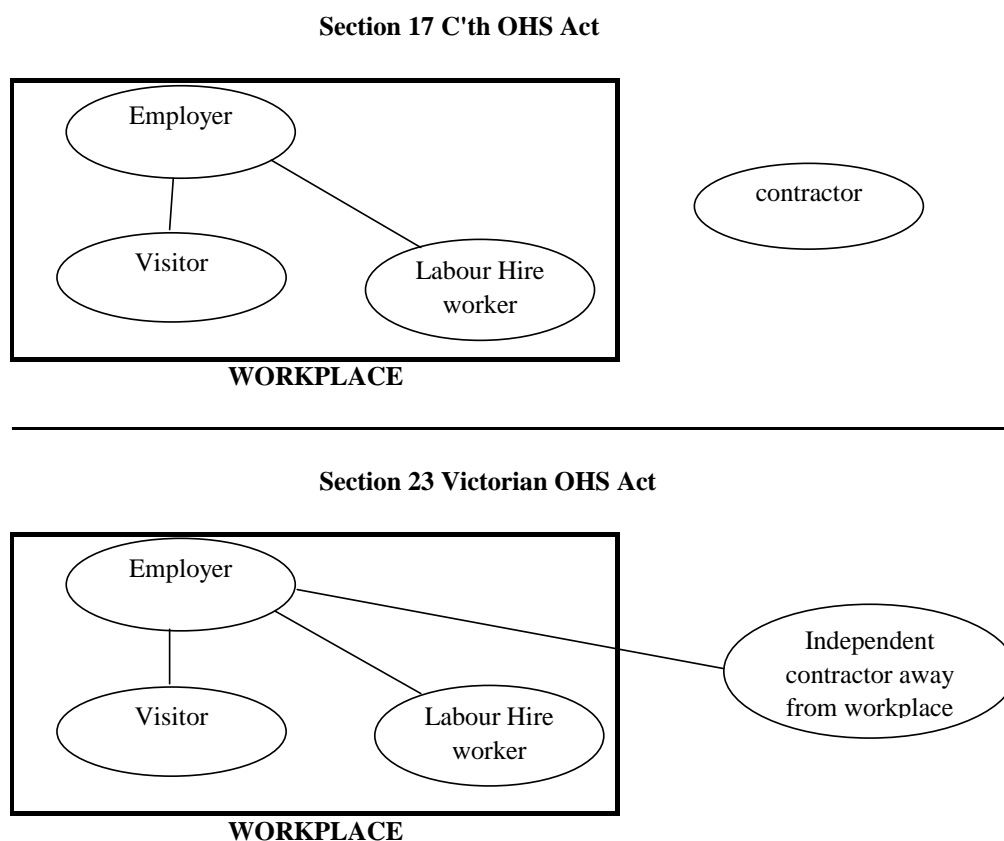
- (a) any Commonwealth premises in which Commonwealth employees or Commonwealth contractors work; or
- (b) any Commonwealth premises in which Commonwealth authority employees or Commonwealth authority contractors work; or
- (c) any non-Commonwealth licensee premises of a non-Commonwealth licensee in which non-Commonwealth licensee employees, or non-Commonwealth licensee contractors, of the licensee work.

However, *workplace* does not include any part of premises that is primarily used as a private dwelling.

In essence, the Victorian and Queensland provisions provide that employers and self-employed persons (or in Queensland, a person who conducts a business or an undertaking) must ensure persons who are not employees are ‘not exposed’ to OHS risks arising from ‘the conduct of the undertaking’.

Once again, the courts have taken a broad approach to interpreting the key expressions ‘exposed to risk’⁶ and ‘conduct of the undertaking’.⁷ Both the Victorian and the Queensland Acts do not exclude contractors from the protective scope of the duty to others, and they do not limit the scope of the duty to persons at or near the employer’s workplace. Figure 2.3 illustrates the differences in the duty to others between section 17 of the OHS Act and section 23 of the Victorian OHS Act.⁸

Fig 2.3 Duty to others – C’t’h and Victorian OHS Acts



⁶ See *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171.

⁷ *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 at 280-281; *WorkCover Authority of New South Wales (Inspector Martin) v Edmund Hubert Kuipers and Civil Services Pty Ltd* [2004] NSWIRComm 303 para [55]; *R v Associated Octel Co Ltd* [1996] 4 All ER 846 at 851-852; *R v Mara* [1987] 1 WLR 87; and *Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25.

⁸ Section 23 of the Victorian OHS Act provides that ‘An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.’

Non-delegable duties

Crucially, the employer's duty is a personal and non-delegable duty, so that an employer cannot delegate its duty by engaging an independent contractor to perform the work: an employer will be liable for contraventions of the OHS statutes resulting from the activities of the independent contractors.

The principal of non-delegability enables responsibility for OHS to be sheeted home to employers higher in a contractual chain, rather than enabling employers to outsource work so as to be responsible only for the acts or omissions of the employer's own employees or agents.

The employer (or a self-employed person) is under a duty to exercise control over the activity, and to ensure that it is done without exposing employees and non-employees to risk.⁹ In sum, these provisions impose a hierarchy of overlapping and complementary responsibilities on the different levels of contractors and sub-contractors. For example, employers, contractors and subcontractors at each level owe duties to all parties below them in the contractual chain. In a long contractual chain a sub-sub-contractor and its employees might be owed duties by two or more 'employers' or 'self-employed persons' higher in the contractual chain.

Proximity to workplaces

The limitations in the OHS Act (that the person protected by the duty must be at or near the duty holder's workplace) prevent the duties from extending to work which is not carried out at an employer's workplace (very broadly defined in section 5): for example, home-based sub-contractors, or contractor truck drivers affected by consignment conditions are workplaces, but not necessarily the employer's workplace.

There was considerable criticism in some submissions of the wording of the employer's generally duty in section 8 of the *Occupational Health and Safety Act 2000* (NSW), in that it expresses the duty as an absolute duty on employers, while section 28 of that Act provides that the duty holder has a defence that, on the balance of probabilities, the required measures are not reasonably practicable. In other words, the NSW provision, and a similar provision in Queensland, differs from the corresponding provisions in the other OHS statutes, in that once a prosecutor proves that a duty holder failed to provide a safe system of work, the duty holder can argue, in its defence, that the measures required to provide a safe workplace were not reasonably practicable. This, indeed, is the position in the *Health and Safety at Work Act 1974* (UK) which first embodied the 'Robens principles' which inspired current OHS statutes.

A common policy argument is that placing the onus of proving that measures were not reasonably practicable on the duty holder emphasises that the duty holder must be active in managing OHS, and must be able to demonstrate the steps that were taken. We also note that in 1995 the Industry Commission, in its Report *Work, Health and Safety* (at pages 55 to 56) concluded that it:

considers it is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time, than anyone else.

⁹ See *R v Associated Octel Co Ltd* [1996] 4 All ER 846

A number of submissions suggested that the absolute duty of care obligation on employers are not reasonable and are not suited to the Comcare scheme. We also note that this has been an issue raised in the media, and we understand will be covered as part of the move to harmonisation of national OHS laws.

However, the way coverage is expressed in the OHS Act does not make an employer's duty of care as clear as the corresponding provisions in the Victorian and Queensland Acts, with the potential consequence that non-Commonwealth self-insurers operating in those states may exercise lesser OHS obligations to workers performing work for them. In particular, the way the Act is worded may lead some employers to think that they will not owe obligations under the OHS Act to workers who are not *their* employees, and who perform work for the employer at a place that is not the employer's workplace: for example, owner drivers and self-employed home-based workers.

Recommendation 1.

The employer's duty of care provisions in sections 16 and 17 of the OHS Act (read together with sections 9A and 15) and the degree to which they relate to contractors, sub-contractors and other third parties should be clarified (for example, by adopting the wording of section 23 of the *Occupational Health and Safety Act 2004* (Vic)) to ensure that all persons affected by an employer's operations are protected.

Duties on Self-employed persons

All of the OHS statutes, apart from the OHS Act, impose a statutory duty of care on self-employed persons (in Queensland, the duty is imposed upon 'a person who conducts a business or an undertaking', which would clearly include a self-employed person) in relation to others affected by the self-employed person's work or conduct of the undertaking.

This is an important provision because it imposes duties on contractors and sub-contractors in relation to others who are exposed to risks or affected by their work or the conduct of their undertaking. Contractors and sub-contractors may not actually employ anyone to carry out their work, but rather sub-contract work when they are unable to complete it themselves.

The inclusion of such provisions in the OHS Act is an issue that should be considered as part of the process of harmonising national OHS laws, but as precursor, we suggest that the constitutional capacity for the Commonwealth to regulate the self-employed for OHS purposes be clarified.

Recommendation 2.

While the specific issue of the duties of self-employed persons was not raised in any of the submissions, we suggest that DEEWR examine whether the Commonwealth has legislative power to enact a provision imposing a duty on self-employed persons and providing the same degree of protection to workers as enacted in the *Occupational Health and Safety Act 2004* (Vic).

No duty on designers

The OHS Act does not impose a duty on designers of plant or buildings. But, the *Occupational Health and Safety (Safety Standards) Regulations 1994* (C'th), at Regulation 4.3, place an obligation on the employer. All of the other OHS statutes place duties on designers of plant to ensure that, as far as is reasonably practicable, plant is safe and without risks to health when properly used. Some of the statutes go further, and impose duties on designers of buildings and structures to ensure that structures can be safely built (see, for example, *Workplace Health and Safety Act 1995* (Qld) section 30B and *Occupational Safety and Health Act 1984* (WA) section 23(3a)) and that if it is to be used as a workplace, the structure is safe for people who will subsequently work in the structure (see, for example, *Workplace Health and Safety Act 1995* (Qld) section 30B, *Occupational Health, Safety and Welfare Act 1986* (SA) section 23A, *Occupational Health and Safety Act 2004* (Vic) section 28; and *Occupational Safety and Health Act 1984* (WA) section 23(3a)).

We note that this is an issue that should be addressed through the national process of harmonising OHS laws, rather than by seeking to amend the OHS in the near future, to avoid complication and duplication of legislative change.

Regulations

In addition to legislation, regulations provide more specific provisions relating to specific hazards, industries or processes (such as consultation and risk assessment). Given its previously relatively restricted coverage, and until recently, Comcare did not need to develop regulations relating to a range of different hazards and industries.

In a number of the industries Comcare now covers, some employers, such as construction and road transport/warehouses are regarded as hazardous industries (both account for a significant proportion of work-related fatalities in Australia) and quite detailed codes, regulations and guidance material have been developed.

The review was informed that Comcare had adopted all the national uniformity standards in regulation. The *Occupational Health and Safety (Safety Standards) Regulations 1994* (C'th) includes parts dealing with competency/certification of industrial equipment operators (Part 2), occupational noise (Part 3), Plant (Part 4), manual handling (Part 5), hazardous substances (Part 6), confined space (Part 7), storage and handling of dangerous goods (Part 8), major hazard facilities (Part 9), electricity (Part 10), driver fatigue (Part 11), construction work (Part 12), falls from 2 metres or more (Part 13). Additional information relating to standards is incorporated into the *Occupational Health and Safety Code of Practice 2008* (C'th) briefly discussed in the next subsection.

Several submissions made reference to regulations and the matter was also discussed in interviews. The submission of the Australian Industry Group (Ai Group) stressed the importance of moving towards uniformity in legislation, regulation and codes. A representative of Ai Group stated that employers often found the format of regulations daunting and would prefer something more user-friendly. Telstra's submission stated that while there had been concerns raised about the adequacy of standards compared to those found in the states, it did not believe these concerns applied to it (Telstra believed some federal regulations exceeded the requirements found in several states).

The Australian Council of Trade Unions (ACTU) submission pointed to a lag in the adoption of relevant standards, arguing that Comcare had not adopted the National Construction Standard until the John Holland group of companies was granted a licence. A representative of the ACT branch of the Construction Forestry Mining Energy Union (CFMEU) alleged that self-insurers were using ambiguities in coverage under federal and state OHS laws to avoid compliance with industry standards, codes and guidelines. The Transport Workers' Union of Australia (TWUA) called for federal regulations to mirror state regulations and codes and pointed to NSW as being best practice with regard to those applying to long haul trucking.

In its submission, the NSW government expressed concern about differential standards (magnified when different enforcement approaches are taken into account). It argued that existing harmonisation work on legislation should be allowed to run its course and that the pace of this process could be accelerated by the recently announced national review of OHS legislation (Western Australia expressed a similar view). The Queensland government stated that, unlike its own legislation (or that of a number of other jurisdictions) the OHS Act did not impose special obligations on principal contractors (in order to coordinate OHS on multiple employer work sites and protect the public near construction sites) or have provisions relating to mining (which it noted are necessary to regulate self-insurers who undertake construction work on mining leases).¹⁰ But note that Part 12 ('Construction Work') of the *Occupational Health and Safety (Safety Standards) Regulations 1994* refers to 'employer in control of a construction project' and thereby implements, as far as possible, principal contractor provisions in the Australian Safety and Compensation Council (ASCC) *National Standard for Construction Work*.

Given the short time available to conduct this review, it was not possible to explore in detail the relevance and applicability of regulations that Comcare has adopted with those that currently apply in state jurisdictions. Nevertheless, this matter requires serious attention because if Comcare's coverage were to expand, any gaps or incompatibility between state regulations and those used by Comcare could actually contribute to less, rather than more uniformity in OHS regulation. It could also result in significant differences in standards that lead to unfortunate and detrimental forms of competition in terms jurisdictional coverage and 'scheme-shopping' by employers (a problem raised in the past, notwithstanding the efforts of the National Transport Commission and its precursor the National Road Transport Commission).

¹⁰ The principal contractor provisions are sections 31, 94 & 95 of the *Workplace Health and Safety Act* and ss17, 160-189 of the *Workplace Health and Safety Regulation 1997 (Qld)*. Another area of concern for the Queensland government was the impact of expanding Comcare coverage on the position of Workplace Health and Safety Officer, an OHS management position required in all workplaces with more than 30 employees and only mandated in Queensland WHS legislation.

One potential problem that was identified is that where there is no uniform national standard to guide Comcare's regulations, or where an adopted regulation sets a lower standard. In its submission, the TWUA compared Driver Fatigue Regulations made as part 11 of the *Occupational Health and Safety (Safety Standards) Regulations 1994* (C'th) and regulation in NSW, including the *Occupational Health and Safety Amendment (Long Distance Truck Fatigue) Regulation 2005* (NSW) and an award and contract determination.¹¹ The TWUA identified significant differences in the class of vehicles covered; risk assessment requirements, safety outcomes and compliance measures; and contractor and consignor/consignee coverage that it contended rendered the Commonwealth regulation as inferior in terms of form/process and OHS standards laid down, which appeared to us to be valid.

It is also worth noting that interviews with two transport employers revealed very different perspective on what standards they had to meet with regard to fatigue. One representative stated that they continued to use the *Occupational Health and Safety Amendment (Long Distance Truck Fatigue) Regulation 2005* (NSW) because it set a higher standard that would make them compliant in managing driver fatigue in all jurisdictions – a fair assessment in our view. Representatives of another employer indicated that they had adopted the standards identified by the Australian Logistics Council, an industry body. While that approach appears commendable, we were left a little uncertain as to why neither employer mentioned part 11 of the *Occupational Health and Safety (Safety Standards) Regulations 1994* (C'th), or the model standard on fatigue developed by the National Transport Commission.

The problem of inconsistency and the risk of adopting inferior standards in regulations are not confined to road transport. Were Comcare's coverage to continue to expand problems could magnify where there are no uniform national standards and could include areas where there had been an attempt to gradually extend state-based protection to especially vulnerable groups. An example, albeit not yet relevant, but possibly so in the future, is clothing outworkers where NSW has introduced a raft of regulatory protections (and a mandatory code) and this has been copied to varying degrees by a number of other jurisdictions.¹²

At the same time, it needs to be noted that the relationship of state and federal jurisdictions to the adoption of national standards in regulations is a complex one, with the take-up rates of various forms of regulatory policy and guidance varying across the jurisdictions.

¹¹ NSW *Occupational Health and Safety Amendment (Long Distance Truck Fatigue) Regulation 2005* and *The Transport Industry – Mutual Responsibility for Road Safety (State) Award* and the *Transport Industry – Mutual Responsibility for Road Safety (State) Contract Determination*.

¹² The submission of the Law Society of NSW made reference to situation of clothing outworkers, long haul truck drivers and a number of other situations where it believed growing coverage by Comcare resulted in a diminution in regulatory requirements.

Codes of practice and guidance material

To assist in the implementation of OHS standards, and to provide guidance to employers and other duty-holders to meet their legislative duties state, territory and federal agencies have developed codes of practice and guidance material. Some of this material is generic, such as explaining what the general duties mean to various parties, requirements with regard worker participation/consultation, the process of risk assessment, the role of inspectors or particular hazards such as chemicals or occupational violence. However, a growing trend has been to produce industry-specific codes of practice that bring much of the relevant legislative requirements, including that under regulation, as well as articulating standards specific to the industry (such as the use and maintenance of chain saws in forestry) or process standards (such as meeting duties in relation to manual handling in retail and warehouses). The development of industry specific codes has advantages in that it provides a single source of reference that an employer or other stakeholders may consult and the information is also tailored to the context and needs of that industry.¹³ The development of industry-specific codes often involves some level of consultation with relevant industry associations and unions and in some cases (such as the forestry code in Tasmania) the code was developed as a tripartite process (though government clearly retains responsibility that the outcomes meet legislative requirements and are enforceable).

Comcare does not appear to have developed industry-specific codes to cover self-insurers in hazardous industries such as construction and road transport. The draft *Occupational Health and Safety Code of Practice 2008* proposes the revocation of all existing codes and replacing them with a more comprehensive document covering risk management, first aid, noise, manual tasks, vibration, HIV and Hepatitis B and C, confined spaces, indoor air quality, safety in laboratories, asbestos, storage and handling of dangerous goods, hazardous substances, vinyl chloride, carcinogenic substances, timber preservatives, inorganic lead, ethylene oxide, ultraviolet radiation in sunlight, occupational diving, spray painting, abrasive blasting, construction induction training, falls in construction and cash in transit.

It is also important to point out that there are numerous gaps and inconsistencies in the regulations and codes of practice of states and territories that would need to be addressed as part of a harmonisation process.¹⁴

Recommendation 3.

The coverage, consistency and standards of existing state and federal OHS regulations in relation industries now covered by Comcare need to be carefully assessed and measures devised to ensure that Comcare self-insurers meet consistent standards that equate to best practice.

Recommendation 4.

That a means of harmonising and establishing best practice standards in relation to codes and regulations and industry codes, be incorporated as part of the national review of OHS legislation.

¹³ In a parallel to this, the CFMEU referred to the value of tripartite Industry Reference Groups established by WorkCover NSW for developing industry-specific strategies for improving OHS.

¹⁴ For evidence of this see Office of Australian Safety and Compensation Council, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, (2006).

2.2.2 Does the scheme regulator have the enforcement policy and operational capacity to ensure self-insurers provide safe workplaces? What are the likely operational requirements should the scheme coverage be expanded?

Submissions

Employers and employer organisations generally stated in their submissions that Comcare is capable of carrying out its operational responsibilities under the OHS Act, with a suitable number of inspectors and a number of appropriate enforcement actions. Most noted, though, that if the scheme were to expand, there would need to be a corresponding increase in resources including an increase in the number of investigators with special skills/knowledge.

Many employers and employer associations argued that self-insurers are motivated to deliver better OHS outcomes because they directly bear the cost of injuries and ill-health, but suggested if the scheme were expanded, guidance to new self-insurers may need to be provided by Comcare.

Unions generally suggested that Comcare’s investigation and prosecution rate is low, and that Comcare takes a very different investigation and enforcement approach compared to the state and territory systems. They stated that if the scheme expands, Comcare will need to increase the number of inspectors and ensure inspectors have appropriate industry specific experience. They urged the Commonwealth to sign a Memoranda of Understanding (MOUs) for the provision of OHS services with the states and territories.

State and territory governments argued that the Comcare inspectorate is small, and without sufficient expertise for certain industries such as construction and transport. They noted that complexities of contractor provisions in the OHS Act could lead to confusion about jurisdiction where contractors are involved. They were also critical of the reactive nature of Comcare’s investigations, and argued that Comcare must work to prevent injuries, not merely respond to incidents. They also expressed concern that incidents are not responded to in a timely manner, particularly in Western Australia, where there is a very small number of Comcare investigators for a very large area. State and territory governments expressed a willingness to engage in MOUs with the Commonwealth for the provision of OHS inspection services.

Lawyers and lawyers’ associations suggested that Comcare does not currently have the operational capacity to ensure self-insurers provide safe workplaces. They say the scheme has inadequate resources and does not actively visit worksites. Other respondents (such as the Australian Rehabilitation Providers Association and the Association of Consulting Engineers) were concerned that Comcare does not appear have enough investigators and that they do not have necessary experience or expertise.¹⁵

Comcare’s submission argued that Comcare *does* have the enforcement policy and operational capacities to ensure self-insurers provide safe workplaces, because:

- Comcare has a balanced approach to regulatory intervention for self insurers including audits of their performance against licence conditions; proactive investigations to assess specific areas of regulatory compliance; and where

¹⁵ Other submissions, including one from an individual who stated that Comcare had failed to respond to a serious OHS issue they raised as a HSR. Logistical constraints prevented a detailed exploration of individual cases such as this one.

necessary reactive investigations in response to an accident or dangerous occurrence;

- Comcare investigators have extensive legal powers under the OHS Act, including the right of entry to any workplace covered by the Act;
- Comcare has sufficient people and resources to perform its OHS functions now and into the future. The ratio of 'field active' investigators to employees covered by the scheme is comparable with the figure for the state and territory OHS regulators;
- Comcare has had long-standing and effective responsibility for regulating dangerous and physical activities, even before the scheme expanded; and
- A model is in place to address the need for extra resources in response to growth in the size of the scheme or any changes in the industry types and risk profiles covered by the scheme.

Commonwealth and state interactions

Employers and employer associations in their submissions emphasised that a consistent, national, well-structured approach to OHS is needed.

State and territory governments suggested that there should only be one set of OHS laws (preferably state laws) per jurisdiction, administered at a local level, and that Commonwealth OHS laws should be administered by the states and territories through MOUs in the transition back to state OHS coverage at the culmination of the harmonisation process in 2012.

As noted above, unions argued that it is essential that Comcare utilise state and territory inspectorates, and in particular suggested that MOUs should be revived.

The SRCC recommended the development of MOUs with jurisdictions focusing on investigation services and protocols for cooperative working arrangements. The clarity of the OHS Act could be improved by making objects of the Act more explicit by including specific reference to contractors. It also suggested that there should be provision in the OHS Act for sharing of information with jurisdictional regulators and other relevant agencies.

Despite the foregoing, Comcare made it quite clear that because of the intransigence of certain states, it has been forced to negotiate individually with states and territories on MOUs with individual arrangements, rather than its preferred uniform approach.

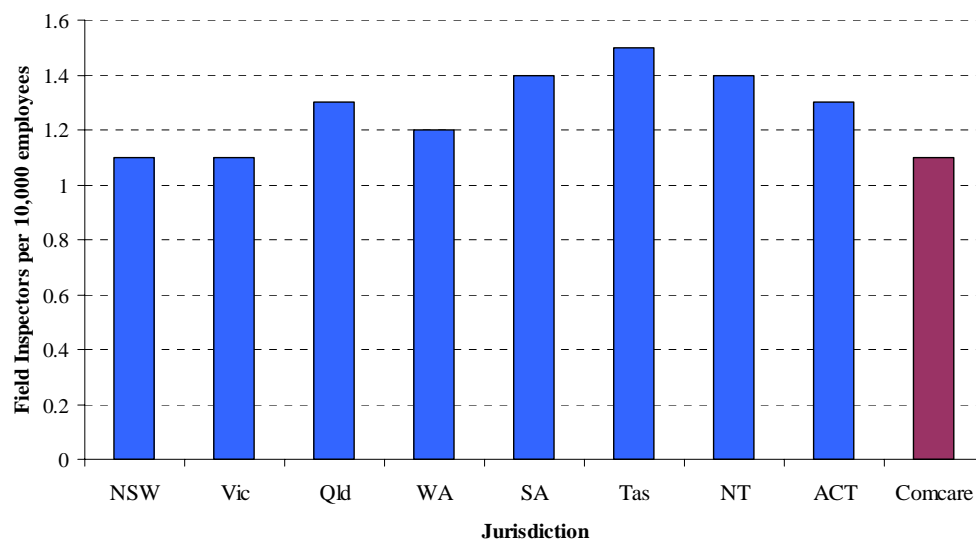
Overview of Enforcement Structure and Activity

Some of the views expressed in submissions are based on published material in Comparative Performance Monitoring (CPM) reports.¹⁶ The latest report covers the period 2005-06. Comcare supplied details to the review for 2006-07 which showed increased recruiting with a resulting ratio of investigators per 10,000 employees that is similar to state and territory schemes, as shown in figure 2.4.

¹⁶ Workplace Relations Ministers' Council, Comparative Performance Monitoring Report, 9th Edition, February 2008

The figures provided by Comcare indicate that the number of their investigators compared to state and territory inspectors per 10,000 employees is similar to that for New South Wales and Victoria, but is lower than the ratio for smaller jurisdictions. We do, however, note that smaller agencies have less opportunity to exploit economies of scale in their organisation and deployment leading to higher ratios.¹⁷

Fig 2.4 Active Field Inspectors per 10,000 Employees



A number of those criticising the level of enforcement activity of Comcare pointed to data from various CPM reports to support their claims. For example, the TWUA noted that the 9th edition of CPM indicated that in 2005-06 there were a national total of 114,000 workplace inspections, resulting in the issuing of 67,200 notices and 912 prosecutions resulting in 662 convictions and just under \$23 million in fines being imposed.¹⁸ During the same period Comcare launched one prosecution with no reported conviction in that year.¹⁹

The submission of the ACTU provided the most detailed data set in terms of resourcing, inspectoral workplace visits and actions taken by each jurisdiction in Australia (including Seacare) and New Zealand covering the five year period from 2001-02 to 2005-06. It has been reproduced in this report as Table 2.1.

¹⁷ According to Comcare's submission it covers 200 employers and 368,000 employees, making it smaller than all state jurisdictions apart from Tasmania. It is larger than the Northern Territory and ACT jurisdictions

¹⁸ Cited from Workplace Relations Ministers' Council, (2008), Comparative Performance Monitoring Report, 9th edition, 14-17.

¹⁹ Other submissions citing data on enforcement included that of the Australian Manufacturing Workers' Union and AON Consulting.

Table 2.1 Enforcement Activity by Jurisdiction

Indicator 14 – Enforcement activity by jurisdiction		NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aus Gov ^a	Seacare	Total Aus	NZ
Total		n/a	50 345	13 836	10 600	10 325	8 256	1 883	n/a	134	n/a	95 376	21 474
workplace interventions		n/a	48 425	17 375	16 774	12 582	6 003	2 233	n/a	194	n/a	95 586	23 552
		n/a	43 719	21 615	10 085	16 931	4 523	3 188	1 360	245	191	101 857	24 503
		n/a	41 842	21 068	11 708	21 841	6 964	4 384	2 476	203	277	110 763	20 989
		n/a	41 163	25 218	11 356	18 908	6 506	5 522	3 960	189	206	114 028	21 064
Number of proactive workplace interventions		n/a	38 550	n/a	6 335	n/a	4 188	1 435	n/a	74	n/a	n/a	13 676
		n/a	37 878	n/a	5 072	n/a	2 788	1 542	n/a	113	n/a	n/a	12 278
		n/a	33 606	13 251	5 809	8 973	1 915	2 393	n/a	146	181	66 274	12 124
		n/a	33 601	17 023	7 028	10 081	2 867	3 597	n/a	133	275	74 395	9 748
		n/a	27 834	23 344	6 310	9 075	2 953	4 623	n/a	113	201	74 453	10 985
Number of reactive workplace interventions		n/a	11 793	n/a	4 265	n/a	4 068	448	n/a	60	14	n/a	10 798
		n/a	10 547	n/a	3 702	n/a	3 125	881	n/a	81	12	n/a	11 274
		n/a	10 113	8 361	4 276	7 928	2 608	795	n/a	99	10	31 223	12 379
		n/a	8 241	4 045	4 680	11 760	4 107	787	n/a	70	3	33 693	11 241
		n/a	13 329	2 874	5 046	9 832	3 553	899	n/a	36	5	35 614	10 079
Number of infringement notices issued		1 471	n/a	99	n/a	n/a	n/a	71	0	n/a	n/a	1 641	0
		1 289	n/a	289	n/a	n/a	n/a	242	0	n/a	n/a	1 820	0
		915	n/a	488	n/a	n/a	n/a	31	0	n/a	n/a	1 434	6
		1 652	n/a	462	n/a	n/a	n/a	7	8	n/a	n/a	2 130	32
		1 195	n/a	489	n/a	n/a	n/a	47	28	n/a	n/a	1 769	20
Number of improvement notices issued		10 517	11 922	6 246	9 818	1 025	420	19	77	8	3	40 055	17 302
		12 646	14 964	11 136	10 263	1 977	346	22	80	18	0	51 462	14 652
		17 927	12 452	16 200	11 848	2 748	198	29	202	17	1	61 862	14 044
		18 213	12 117	13 348	12 391	4 688	423	17	163	12	9	61 381	10 691
		14 832	11 168	16 463	11 691	3 573	297	48	427	12	6	58 517	1 743
Number of prohibition notices issued		786	3 102	1 188	887	191	109	25	39	2	2	6 331	4
		779	2 904	1 256	895	364	131	56	48	9	2	6 444	990
		1 139	2 303	1 686	870	814	87	14	90	6	1	7 020	1 117
		1 421	2 308	1 788	963	899	266	14	66	20	6	7 751	745
		1 212	1 676	2 223	706	623	125	54	88	10	19	6 918	417

Table 2.1 Enforcement Activity by Jurisdiction (continued)

Indicator 14 – Enforcement activity by jurisdiction continued		NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aus Gov	Seacare	Total Aus	NZ
Number of field active inspectors	2001-02	301	226	127	70	57	n/a	10	12	16	1	820	158
	2002-03	301	236	148	70	57	n/a	10	12	16	2	852	161
	2003-04	301	236	155	94	89	25	12	12	16	5	945	168
	2004-05	301	236	189	94	89	27	12	12	16	3	979	166
	2005-06	301	236	206	103	89	29	12	12	22	3	1013	157
Number of field active inspectors per 10,000 employees	2001-02	1.1	1.1	1.0	0.9	1.0	n/a	1.1	1.0	0.7	3.3	1.0	0.9
	2002-03	1.1	1.1	1.1	0.9	0.9	n/a	1.1	1.0	0.7	6.3	1.0	0.9
	2003-04	1.1	1.1	1.1	1.2	1.4	1.4	1.4	1.1	0.7	15.4	1.1	0.9
	2004-05	1.1	1.1	1.2	1.1	1.4	1.4	1.4	1.0	0.6	8.7	1.1	0.9
	2005-06	1.1	1.1	1.3	1.2	1.4	1.5	1.4	1.0	0.8	8.2	1.1	0.8
Number of legal proceedings commenced	2001-02	550	986	131	29	21	33	2	1	0	0	953	145
	2002-03	462	4217	122	43	16	38	0	2	0	0	900	136
	2003-04	536	4206	136	65	45	9	1	27	0	0	825	138
	2004-05	587	4188	190	64	45	7	0	14	0	2	1 097	110
	2005-06	459	136	174	37	71	15	0	19	1	0	912	80
Number of prosecutions resulting in conviction	2001-02	466	115	114	41	8	11	2	0	0	0	746	132
	2002-03	443	106	101	38	22	24	0	2	0	0	736	119
	2003-04	599	110	120	43	30	7	0	5	0	0	714	100
	2004-05	584	93	156	48	31	7	0	11	0	1	731	119
	2005-06	340	70	143	41	51	12	0	5	0	0	662	79
Total amount of fines awarded by the courts (\$'000)	2001-02	\$9 500	\$46 069	\$1 593	\$187	\$101	\$32	\$2	\$0	\$0	\$0	\$17 484	NZ\$916
	2002-03	\$13 000	\$2 997	\$1 994	\$152	\$379	\$199	\$0	\$3	\$0	\$0	\$18 724	NZ\$899
	2003-04	\$13 300	\$4 159	\$2 024	\$385	\$628	\$87	\$0	\$55	\$0	\$0	\$20 668	NZ\$1 037
	2004-05	\$11 500	\$3 294	\$3 344	\$457	\$439	\$78	\$0	\$32	\$0	\$0	\$19 145	NZ\$1 859
	2005-06	\$13 878	\$3 532	\$3 823	\$383	\$1042	\$157	\$0	\$134	\$0	\$0	\$22 949	NZ\$1 929

⁴Aus Gov data cannot be compared directly with the other jurisdictions ⁵In WA, total workplace interventions does not include inspectors delivering educational advice or information. ⁶There is no legislative requirement for infringement notices in WA. ⁷NZ data for improvement and prohibition notices shown under improvement. ⁸New Inspector InTake training occurred in SA in January 2004, full duties commenced in mid June 2004. ⁹Includes inspectors who investigate unsafe asbestos. ¹⁰Victoria data is for legal proceedings completed. ¹¹In Victoria 2001-02 there was one unusual prosecution of \$2 million. ¹²Seacare are awaiting sentence of the court regarding the legal proceedings resulting in conviction listed above. ¹³New South Wales previously reported the number of breaches rather than the number of companies being prosecuted.

As can be seen from this data, compared to every other state and territory jurisdiction and Australia as a whole (and New Zealand for that matter), Comcare has conducted far fewer workplace interventions, proactive and reactive workplace visits; its investigators have issued far fewer improvement and prohibition notices; the agency has launched far fewer legal proceedings (even after 2004 when the immunity of the Crown was removed).

We note that divergence in inspection and enforcement activity is not accounted by jurisdiction size, since it applies to small state and territory jurisdictions.²⁰ While Comcare has informed the review that it is increasing its enforcement activity in line with increased numbers of investigators, benchmark evidence over the last five years (for which published information is available) indicates that a substantial divergence in enforcement activity between Comcare and other Australian jurisdictions will remain.

As noted elsewhere in this report, while Comcare indicated its preference for enforceable undertakings, its actual use of this option has been limited, so this cannot be seen as the reason for the low level of prosecutorial activity. Nor can differences in the level of enforcement activity be seen as simply an effect of covering larger and better managed employers and worksites. Apart from Tasmania, just over half of all employees in state jurisdictions work for large employers. Further, state agencies pursue proactive and reactive enforcement strategies in relation to both small and larger employers (often within the same industry).

Benchmarking

To gain further information with which to benchmark Comcare's activities in order to explore the contentions made in submissions above and gauge the issues of monitoring/enforcement policies and activities more generally, the matters were pursued in interviews with employers, unions and government agencies (both state and Comcare itself) and other stakeholders. This included interviews with the senior management of Comcare (including those directly responsible for enforcement) in Canberra and Melbourne, as well as Comcare investigators based in Canberra, Melbourne, Sydney and Brisbane. In addition to this, two of the review team accompanied Comcare officers to worksites, once in relation to the auditing of a workplace for self-insurance purposes and nine other workplaces as part of normal investigative activities. Details are summarised in Appendix C.

Institutional issues with enforcement

The OHS Act differs from those of other jurisdictions in that enforcement is primarily in the hands of 'investigators', rather than 'inspectors', as is the case in the other OHS statutes. While this distinction may appear to be semantic, there is a fundamental difference between Commonwealth 'investigations' and state and territory 'inspections.'

²⁰ More recent data supplied by one jurisdiction (Tasmania) indicates a continuation of activity. In 2006-7 Tasmanian inspectors undertook a total of 7,436 interventions (2,947 proactive and 4,489 reactive), issued 188 improvement notices, 105 prohibition notices, commenced 27 legal proceedings and secured 22 convictions (entailing a total of \$224,000 in fines). The Queensland Council of Unions' submission also provided a comparison of resources and activity by the Queensland Division of Workplace Health and Safety and Comcare that again pointed to a divergence in enforcement.

Comcare investigations: narrower than state and territory inspections

The state and territory OHS Acts tend to give inspectors powers to enter workplaces (sometimes only during working hours), to conduct formal and informal *inspections*, monitoring and investigation activities, for the purposes of enforcing their OHS laws.

On the other hand, Comcare appears to focus on formal *investigations* to ascertain whether there has been a contravention of the OHS Act in relation to specific incidents. This is evidenced by analysis of the OHS Act, Comcare’s policy, and observations of investigators’ activities.

For example, section 41 of the OHS Act enables a Comcare investigator at any time to conduct an *investigation* (a) to ascertain whether the requirements of the Act or regulations are being complied with; or (b) concerning a breach or possible breach of the Act or the regulations; or (c) concerning an accident or dangerous occurrence that has happened in the performing of work for an employer.

Section 42(1) then provides that ‘In conducting an *investigation*, an investigator may, to the extent that it is reasonably necessary to do so in connection with the *investigation*, enter, at any reasonable time by day or night, a workplace’, and search, inspect, examine,²¹ etc.

The position that Comcare expressed to the review is that investigators usually only enter workplaces to conduct formal investigations. While Comcare and its investigators have told us they can use this power broadly to examine other issues while they are at a workplace, because investigators are usually responding to specific incidents, their focus appears to be restricted to the incident they have been called to investigate.

One consequence of the difference between state and territory general inspections and Comcare formal investigations is that Comcare investigators do not conduct the kinds of more wide ranging informal inspections that state OHS inspectors seem to conduct. Typically, state inspectors conduct formal investigations when an injury or fatality takes place, and occasionally in relation to ‘simpliciter’ contraventions, where no injury or damage results, but much of their work is involved with proactive inspection programs.

Recommendation 5.

For the purposes of harmonisation, the OHS Act should be amended to vest Comcare investigators with the same powers and functions as are vested in state and territory inspectors.

²¹ The OHS Act, in section 38(A), does give Comcare the power to advise employers, employees or contractors on OHS issues affecting those employers, employees or contractors, but this provision is placed before the investigation provisions in the Act, and it does not seem to enable investigators to enter a workplace, inspect and give advice.

Comcare’s investigative arm

The movement of self-insurers into Comcare, and a decision to no longer outsource some activities to state inspectorates, has necessitated a rapid expansion of Comcare investigative staff. Investigators are located in Canberra, Sydney, Melbourne, Brisbane, Perth and Adelaide in general teams. By way of contrast, state agency inspectorates are predominantly organised into broad industry teams (such as construction; and warehouse and transport) with some agencies (like Victoria and Western Australia) maintaining separate teams to deal with high hazard workplaces (such as major chemical manufacturing and storage facilities).

Those special hazards teams normally include technical experts (ergonomists, hygienists and the like) able to offer specialised advice within that team or other teams when required. As noted in the Victorian government submission, state agencies have established stakeholder networks including industry forums or reference groups (in NSW, there are formal bipartite ‘Industry Reference Groups’).

For its part, Comcare has a reference list of experts who it may call on to provide specialist advice as well as OHS management more generally. While the outsourcing of expertise has advantages when demand for such expertise is too restricted to warrant an internal appointment (and state agencies have done this too when they lack the expertise internally) it has disadvantages in terms of timing, cost and policy/practice coherence where there is a routine and ongoing demand for such expertise.

If Comcare were to expand its coverage, such requirements could be expected to grow.

Structure of investigative teams

With regard to state inspectorates, groups of industry teams are housed in a series of city, suburban and regional offices, with team representation reflecting the scope of economic activities in that area. This structure has evolved over the past decade following their experience. While several agencies have experimented with non-specific team organisation in the past, this did not prove to be very successful, because it required inspectors to cover too wide a range of workplace specific knowledge and was not conducive to industry specific standards development, such as one-stop codes of practice, campaigns or enforcement strategies.

We have observed that industry teams in state jurisdictions have been able to provide more focus for inspectors to hone their skills and knowledge base (in the context where every industry and workplace contains a wide range of potential hazards), to secure consistency in enforcement practices within an industry, and for less experienced inspectors or those requiring specialist expertise or experience to draw on the knowledge of another team member. This approach, from our analysis, appears to provide a foundation for targeted industry-based prevention campaigns.²² Our earlier interviews with managers and inspectors in state agencies indicated that they thought this was the most effective approach.

²²

Successful examples of these were cited in the Victorian government submission.

Geographic location and capacity to respond

It needs to be noted that while self-insurers are large corporations, individual worksites may be small and they may be widely dispersed geographically. The issue is the relative capacity of Comcare investigators to respond to incidents relative to inspectors in the states and territories who are organised in regional offices. This is especially the case with construction sites and transport company depots/warehouses, a number of which will be located outside capital cities and even in quite remote locations in vast states like Queensland and Western Australia.

Although Comcare has emphasised the mobility of its investigators the present structure and deployment of its investigators does not allow the sort of ready response that might be required to a serious incident (in two workplace visits where investigators were accompanied in regional Queensland the incidents sparking the investigation - including a fatigue-related road fatality – had occurred weeks before the visit).²³

Licensing and enforcement

The auditing exercise associated with self-insurance is seen as setting a critical framework for preventative activities by the investigative unit of Comcare.²⁴ As far as we could determine, the process does not normally involve a Comcare investigator. At one level, this would seem to parallel what occurs in state jurisdictions, namely officers from the workers' compensation may assess organisations with regard to their suitability for self-insurance.

However, as far as we are aware, such determinations do not then set a context for the policies and practices of the preventative arm which, in fact, will determine its own enforcement strategy including proactive workplace visits. Since self-insurers are invariably large whether they are covered by state or federal jurisdiction, the issue of employer size has no relevance in terms of justification for this arrangement. In the view of this review, this structural arrangement within Comcare risks a disarticulation in terms of preventative and auditing practices.

²³ An example illustrates that the point could apply even to reaching a large regional city in a small state, with frequent air services such as Launceston. When a rockfall occurred at the Beaconsfield gold mine at around 9.23 pm on 25 April 2006, state mine inspectors based in Hobart were able to reach the mine within four hours to take control of the site, overview rescue efforts, and commence their investigation. Had the mine been under Comcare's jurisdiction, investigators based in Melbourne would not have been able to reach the mine before the first commercial flight into Hobart, followed by a forty minute drive to Launceston (at least 10-11 hours after the incident).

In relation to the timing of that incident it should be noted that much long haul trucking activity occurs late at night so it is quite possible Comcare investigators could be called to a serious incident late at night. Further, large manufacturing operations (and related construction) can be found in locations remote from capital cities such as Traralgon, Karratha and Gladstone and this is why state agencies have located regional offices to service them.

²⁴ This auditing process is administered by the self-insurance division of Comcare and as noted below the process witnessed was led by an independent expert (an external consultant not a Comcare employee) with Comcare officers also in attendance.

Use of data to focus enforcement

The relationship between auditing and investigation also raises an important issue. A number of submissions to the review, mainly from employers, argued that the effectiveness of Comcare's preventative measures was well evidenced by workers' compensation claims data. However, a simple and direct connection cannot be made between workers' compensation claims data and preventative activities and might actually inhibit prevention activities across the board.

First, there are well-known and significant limitations in workers' compensation data including serious under-reporting of work-related disease, the failure to cover many self-employed workers, including some working in dangerous occupations like road transport and construction, and other areas of under-reporting.²⁵

Second, our interviews indicated that while state OHS agencies used workers' compensation data tool to guide prevention activities its limitations were well recognised and state agencies used other sources, such as inspector observations, hospital admission date and the like.

Interviews with Comcare management revealed less awareness in these limitations (something possibly justified in the past by Comcare's more restricted coverage, but no longer the case). This review does not recommend a closer integration of self-insurance auditing and prevention, but rather a separation, where the latter does not make presumptions about OHS management based on the former. (As state agencies have recognised, a separation needs to be maintained because there are potential conflicts of interest, in that compensation agencies have little incentive to identify new sources of claims, whereas inspectorates should be keen to identify and address new and emerging hazards).

The present Comcare structure (which would seem to reflect the relatively restricted and uniform coverage of the past) does not facilitate the development of broad industry-based knowledge and, indeed, Comcare's coverage of employers in specific industries like construction mean that any such units would be too small to be viable now or in the immediate future, were the scope of coverage to be broadened within these industries.

Indeed, even Tasmania - a geographically small jurisdiction with far more employers within each industry group than Comcare, was obliged to reduce the number of industry teams several years ago from twelve to eight larger teams to secure a critical mass within each team.²⁶ This option of even a small number of industry teams does not appear to be viable for Comcare now or in the foreseeable future.

Submissions from a number of state jurisdictions noted the absence of specialist expertise amongst Comcare investigators in areas such as construction. Similar observations were made by several unions and even employers who were generally supportive of current arrangements identified a need for Comcare to develop more specialist expertise within the ranks of its investigators.

²⁵ Under-reporting and premium 'minimisation' is recognised by workers' compensation authorities and substantial under-reporting was also identified in two surveys conducted by the Australian Bureau of Statistics that found that fewer than half of work-related illnesses resulted in a workers' compensation claim. M Quinlan, (2004) "Workers' Compensation and the Challenges Posed by Changing Patterns of Work: Evidence from Australia" *Policy and Practice in Health and Safety*, 2(1): 25-52.

²⁶ Nonetheless, it is worth noting that like other jurisdictions, Tasmania has maintained a separate team in the area of construction in recognition of the particular challenges this industry poses and the detail knowledge base required by inspectors.

Recruitment of inspectors

The rapid expansion of Comcare’s investigators raises issues about recruitment and selection, an area that has undergone profound changes within state inspectorates over the past 15 years. Originally, inspectors tended to be selected from persons with a trade background, and overwhelmingly male, but in recognition of the broader coverage of workplaces, hazards and expanded role of inspectors encompassed in ‘post-Robens OHS legislation’, inspectors have been recruited from a wider range of sources: including non-trade industry experience; the public sector; and those who have either undertaken some OHS-related roles and/or those with specific tertiary qualifications in OHS or related fields.

In some areas, most notably construction, industry background is still viewed as essential. At the same time, an increasing emphasis is being placed on inspectors having OHS qualifications (diploma or even degree) as well as relevant specialist skills (such as forklift truck driver’s licence).

With regard to Comcare, interviews indicated that the agency was following a rather different path in terms of recruitment. In particular, while several investigators had previously acted as state OHS inspectors there appeared to be no emphasis on industry or OHS experience in terms of recruitment.²⁷ Unlike state agencies, a significant source of recruitment for Comcare investigators was reported as from the ranks of former police officers. While we acknowledge a strength of recruiting from the ranks of police, in terms of their knowledge and experience of investigations and evidence collection, it is unlikely that they have enough knowledge of workplaces generally and the complex array of OHS hazards to be found within them.

In our previous research and visits with state OHS inspectors, we noted state inspectors used their knowledge of OHS to identify hazards (especially those involving systems of work), to evaluate hazards and make judgements about the effectiveness of any control measures in place. Under the more clear duty of care provisions in state schemes, inspectors often make complex judgements and it is difficult to see how this can be done effectively without a sufficiently expert knowledge of OHS.

That assessment tended to be confirmed by workplace visits (with one exception) where we accompanied Comcare investigators with a police background. It was also a view expressed by several experienced Comcare investigators²⁸. The suitability of a preponderance of ex-police amongst investigators was questioned by at least one employer representative.

Transitional issues and training

It was emphasised to the review on several occasions that the problems just identified are essentially transitional and will be addressed over time.

However, there was no evidence to suggest that Comcare was seeking to learn from the recruitment experience of state OHS agencies, nor was there evidence that investigator training was addressing this issue, or even that changes were being introduced to do this.

²⁷ The submission of the South Australian Government referred to a ‘narrowness’ in the recruitment of Comcare investigators compared to states and territories, in terms of industry and OHS knowledge.

²⁸ Not attributed.

The recruitment of investigators also needs to take account of the training they receive. Interviews with Comcare indicated that newly recruited investigators undertook an intense two day induction program into the legislation and other aspects in followed by a five to six day course leading up to awarding of a Diploma in Government (this training was viewed as meeting the national standard and equivalent to state government programs in workplace inspection). A senior Comcare manager acknowledged that apart from the training in OHS legislation itself, OHS knowledge constituted a gap in the current initial training program.

Thereafter, investigators could request additional training (such as the attendance of specialist short courses or conferences/workshops) and evidence suggests Comcare is supportive in terms of such requests. State inspectorates, with which we are familiar, have varying initial training practices also adopt a generally supportive approach to further training and short course attendance.

Overall, there have been significant changes to training provided over the past decade reflecting, in part, a recognition of the increased demands placed on state inspectors by OHS legislation; current and emerging OHS challenges (such as those associated psychosocial factors like bullying in the workplace); the often complex judgements inspectors have to make; and to enhance their understanding and to capacity to deal with investigations, management systems/practices, worker consultation and inter-personal communication. In most states, agencies have developed specialist programs to deliver this training, with modifications being made on the basis of experience.

For example, Western Australia and Victoria offer specialist courses of around three to six months duration, including periods of supervised workplace interaction where skills can be tested and honed. Of the agencies reviewed, only Tasmania did not offer an integrated in-house training program, relying instead on a mixture of externally available or in-sourced courses as an adjunct to a ‘buddy-system’ where an inexperienced inspector would accompany a more experienced counterpart for a period of time (another jurisdiction made use of cameras in mobile phones to enable inspectors to check their assessment of a particular hazard). The major reason for this was the Tasmanian agency’s limited budget²⁹.

²⁹ Despite some specific criticisms (such as the need for more training in investigation) our interviews revealed a high level of satisfaction amongst state OHS inspectors with the training regimes now in place and a general view that training had improved over time. This included long-serving inspectors who had not benefited from the new regime but worked alongside those who had. Workplace visits with state inspectors also confirmed this impression, with inspectors generally displaying significant skills in identifying priority OHS issues and dealing with difficult situations (such as those where multiple duty-holders are responsible for an incident or breach and handling difficult inter-personal situations). Such skills were less evident in most of our visits with Comcare investigators.

Networking and knowledge sharing

A related issue to training is the capacity of inspectors to interact and learn from their counterparts in other jurisdictions. Our research with state agencies indicated a growing level of inter-jurisdictional, although without Comcare, co-ordination with their operations. Apart from nationally coordinated campaigns, such as falls from heights, manual handling in nursing homes, suppliers of farm machinery and machine guarding in manufacturing, it also involved recognition that coordination was more cost efficient and meant lessons learned in one jurisdiction could be transferred to another.³⁰ Budgets place a constraint on contact beyond those of occasional meetings between inspectors and phone/email contact. In our view, regular contact between inspectors with similar responsibilities and secondment, including those from Comcare, could make a significant contribution to national uniformity by encouraging greater inter-jurisdictional interaction at operational level, and cooperation would assist in the long term shift to a more nationally coordinated system of OHS regulation.

Overall, available evidence indicates that the initial training programs offered to Comcare investigators appears rather narrow in comparison to that offered by larger state agencies, and does not offset gaps in OHS knowledge that might be expected to flow from the recruitment practices of the agency. (Several experienced Comcare investigators made observations consistent with this interpretation.)

It might be suggested that the rapid expansion of Comcare investigators must be taken account of in any assessment of its current activities, because these will evolve as the inspectorate matures. While this may have some validity, such changes are heavily influenced by recruitment, training, organisation of inspectoral activities and enforcement policies and practices. There was little evidence presented to this review that selection and training programs were likely to move Comcare more *positively* closer to other OHS inspectorates.

Recommendation 6.

Comcare's structure could be improved by greater industry specialization in recruitment and training to deal with the new class of self-insured employers. There are lessons to be drawn from state and territory inspectorates in this regard.

Where this is not possible to achieve, Comcare should maximise opportunities to draw on industry experts or state inspectors.

³⁰

Examples of this included Worksafe Western Australia sending an inspector to South Australia to gain knowledge of inspection practices and a code relating to the wine industry in that state so he could coordinate similar developments in WA, and Worksafe Victoria sending its senior forestry inspector to Tasmania to learn about a harvesting method about to be introduced into Victoria. More informally, inspectors in one jurisdiction may contact their counterparts in other jurisdictions for information or advice – and the industry team structure helps to facilitate this by providing readily identifiable contact points. Inspectors interviewed were of the view that more contact in this regard – such as annual inter-jurisdictional meetings of representatives from construction industry teams – would enhance information flows and cooperation.

Recommendation 7.

It is unclear whether, even accounting for recent increases in staff, Comcare has the resources to carry out the type of proactive enforcement regime adopted by state jurisdictions, especially in geographically demanding regions like Western Australia. This matter requires careful review before any expansion in Comcare coverage is considered. Unless effective resourcing (including deployment) moves in tandem with coverage a regulatory vacuum is inevitable.

Recommendation 8.

The processes of selecting and training Comcare investigators should be reviewed in light of practice in state jurisdictions. This should include not only general training but also training/mentoring programs aimed to provide particular skills (such as bullying/occupational violence). Account in recruitment needs to be taken of areas requiring specialist expertise (such as hazardous substances) and/or prior work experience (such as construction).

Recommendation 9.

That the federal government should support increased cooperation and interaction between Comcare, state and territory OHS agencies at the operational level, including meetings and secondment, beyond those activities presently being undertaken in relation to national campaigns.

The role of Comcare investigators and enforcement

As we noted above, employers and employer associations were generally happy with Comcare's enforcement approach, while most other respondents were critical of Comcare's approach to investigation and enforcement – the principal issues being that Comcare was reactive and not proactive; that Comcare did not enforce strongly enough; and that Comcare was under-resourced.

Many submissions have referred to the relativity between Comcare's resourcing needs and the resources of state and territory jurisdictions. OHS legislation covers a wider range of workplaces and inspectors must recognise and address a more complex array of hazards. Inspectors can only hope to visit a small fraction of the workplaces they are responsible for in any given year. State and territory OHS agencies have increasingly sought to focus on strategically planned and proactive enforcement activities to gain the biggest effect from their limited resources (whilst still responding to complaints, incidents and the like).

State and territory agencies often set targets with regard to proactive enforcement (in terms of workplaces visited and outcomes) and graduated campaigns; that is, moving from the provision of information to be targeted and escalating levels of enforcement. While their strategic programs are normally determined at central policy level, there is a level of input from industry-based teams in formulation and more especially implementation (another valuable aspect of this structural arrangement).

As noted elsewhere in this report, the approach of Comcare has been that the corporations it covers are large, with comprehensive OHS management systems that have been audited as part of the self-insurance process, and given the additional requirement to notify serious or potential dangerous incidents, reliance can be placed on investigators reacting to this information rather than proactively engaging in workplace visits.³¹

Comcare's submission referred to its publicly available Enforcement Policy which explains the investigative and enforcement provisions of the OHS Act and the principles that govern how these provisions are applied. Comcare stated that it adopts a holistic approach with enforcement action forming one part of a comprehensive set of possible interventions. These interventions include assurance, education, training and compliance assistance.

Comcare's submission stated that it has a balanced approach to regulatory intervention for self-insurers which includes audits of their performance against licence conditions, proactive investigations to assess specific areas of regulatory compliance and where necessary, reactive investigations in response to an accident or dangerous occurrence. Comcare advised that it has significant enforcement powers including a range of civil remedies and sanctions, for example, pecuniary penalties, injunctions and enforceable undertakings and criminal prosecutions.

Comcare's submission stated that its investigators have extensive legal powers under the OHS Act including the right of entry to any workplace covered by the OHS Act. The definition of 'workplace' under the OHS Act not only relates to physical structures, but may extend to any place where work is being undertaken by employees or contractors. Investigators can exercise their right of entry at all reasonable times, during day or night, as required.

Data drawn from a range of sources shows a consistent pattern whereby, even accounting for the number of inspectors, workplaces and employees, state OHS inspectors carry out a far large number of workplace visits than their Comcare counterparts and take more action in issuing notices and the like when they visit workplaces.

The distinctive approach of Comcare to visiting workplaces was also reflected in visits we undertook with state OHS inspectors and those undertaken as part of this review. Table 2.2 shows that almost two thirds of the visits by state inspectors that we previously observed were proactive, while responses to complaints or information provided by the public accounted for 18.6% of inspections, and investigations accounted for a further 16%. The results in Table 2.2 may overstate the preponderance of proactive workplace visits by state agencies, but nonetheless they do capture a significant difference between the approach and activities of state and territory agencies when compared to Comcare.

³¹ A submission from a manager and workers' compensation claimant with 35 years experience in the federal public sector stated that Comcare's approach was not proactive and while the agency emphasised setting policy it did not conduct spot inspections to ensure these policies were implemented.

In relation to the 10 visits on which we accompanied Comcare investigators, only one could be regarded as proactive - an auditing process for self-insurance.³² The other nine visits were visits in response to notification of specific incidents, including follow up on the issuing of an improvement notice and a brief visit to show one of the review team changes made to a parking area following an earlier intervention. It is not feasible to distinguish between complaint/information based visits and investigations, as they all form part of an investigation. However, we also acknowledge this is a small sample and the figures below should not be taken to be absolute.

Table 2.2: Reason for/nature of visit by OHS inspectors/investigators

	State jurisdictions			Comcare	
	2004	2006	Total (%)	2008	Total (%)
Proactive/targeted visit	39	37	76 (64.4%)	1	10%
Response to complaint/information	12	10	22 (18.6%)	9	90%
Investigation	9	10	19 (16.1%)		
Other/unclear	1	0	1 (0.85%)	0	0
Total	61	57	118	10	100%

Overall, the workplace visit regime undertaken by Comcare differs from that of other OHS agencies in Australia or those within a number of other countries with which we are familiar (such as the UK, Sweden or Norway). State and territory regimes have moved away from a reactive approach because it is viewed as not securing the best outcomes and ineffective in terms of its use of available resources. Nor is it consistent with what we would understand to be generally accepted ‘best practice’ with regard to OHS enforcement³³ (other limitations with a reactive workplace visit regime are identified below). This inconsistency needs to be addressed if genuinely a more uniform system of OHS regulation is to be established in Australia.

There are other limitations with complaint-based enforcement. These include that the inspectorate may be unaware of an issue at a workplace where earlier intervention might prevent the situation escalating into an incident. An inspector may identify an issue even in large and relatively well-managed workplaces that management has ‘missed’ and in our visits with state OHS inspectors we witnessed such events on a number of occasions. Like Comcare, state and territory OHS laws also require employers to notify inspectorates of serious incidents or potentially dangerous events.

Reporting Incidents

In our interviews with state inspectorates there was a clear recognition that not all employers abide by reporting requirements and on occasion there is some degree of misunderstanding about what is notifiable. While these problems were seen as most common with regard to small employers in industries like agriculture, such incidents were not confined to small employers and in the course of workplace visits we were made aware of instances, such as a near crane collapse at a port facility, where the employer involved was not small. Under-reporting is common across all jurisdictions, but this could have greater impact in a reactive enforcement regime.

³² This was a three day exercise of reviewing documentation and workplace inspection (the review team member only attended half a day of this but including the actual workplace inspection) led by an external consultant and attended by Comcare representatives from the self insurance division of Comcare.

³³ Johnstone, “Rethinking OHS Enforcement” in E. Bluff, N Gunningham and R Johnstone (eds) *OHS Regulation for a Changing World of Work*, Federation Press, 2004

The accuracy and reliability of employer notification of serious incidents was raised in interviews with Comcare and a number of managers and investigators agreed this could be a problem. Indeed, that such a problem could occur was directly demonstrated in one of our workplace visits. In that case, the employer concerned had failed to notify Comcare of an incident but the worker involved (who believed their life had been placed at risk) did notify Comcare who commenced an investigation. The workplace visit tended to confirm that the matter should have been notified by the employer.

The fact that a worker raised concerns in the example raises a further issue. It cannot be relied upon that workers will report serious incidents to the inspectorate should their employer fail to do so, for fear of victimisation. During the course of our interviews with state inspectors a number raised this as an issue and when we then included it in interview questions we found that 60% (from a sample of 30 inspectors) believed worker reluctance to raise OHS was a serious issue and half of these could nominate at least one incident where a worker bringing a matter to the attention of the inspectorate had in their view been victimised (most often by being dismissed or re-assigned to a less desirable job).

While such action is a clear breach of OHS legislation inspectors indicated that, unless a Health and Safety Representative (HSR) was involved, it was extremely difficult to prove victimisation on OHS grounds. Workers in small business or non-union members were seen as especially vulnerable.

Contact with Employers and workers

An important issue in the process of undertaking workplace inspections/investigations is who is approached or spoken to by inspectors/investigators. With regard to our earlier workplace visits with state OHS inspectors we found that inspectors most commonly held discussions with managers (69%) and supervisors (46.6%), speaking to workers in 42.4% of the visits, HSRs in just over a third (36.4%) of visits, contractors in 12% of visits and OHS consultants engaged by the employer in 4.2% of visits. Workplace visits with Comcare investigators revealed a broadly similar pattern.

In our visits with state OHS inspectors and Comcare investigators we reached the conclusion that the level of contact with workers – arguably those with a most direct stake in OHS in terms of their personal wellbeing – was inadequate overall. Even where state inspectors speak to workers these discussions are often brief and with a limited exchange of information. On the other hand, we note that, significantly, section 42(2)(b) places a responsibility on Comcare investigators seek to speak to a HSR, where possible, during workplace visits.

The array of sanctions

When compared with the approaches taken by state OHS authorities, the criticisms pertaining to under-enforcement by Comcare appear to be justified. As Table 2.2 shows, despite variations between the states in the number of notices issued and prosecutions, Comcare is clearly the exceptional case. Size of the jurisdiction does not account for these differences, with even small jurisdictions such Tasmania and the two Territories far outstripping Comcare in this regard. Further, this difference cannot be explained by the size of self-insurers. The pattern of actions revealed in our own workplace visits (with inspectors from state jurisdictions and Comcare investigators) is consistent with the pattern indicated in Table 2.2.

Inspectors in state jurisdictions appear to have readier access to an array of potential sanctions to their Comcare counterparts during workplace visits and make use of this. Interviews with state OHS inspectors revealed that they were generally satisfied with the array of sanctions available to persuade or sanction employers who breached legislative standards.

It should be emphasised that the issuing of notices is only done in the case of serious contraventions of the OHS statutes and regulations. Typical examples include employees or subcontractors working at height (and near the edge) without any form of fall protection, an unguarded piece of machinery or a dangerous work method). State workplace visits also indicated these sanctions were used judiciously. For example, verbal directions were used when an issue could be readily rectified and in a number of instances fewer notices were issued than might have been because the inspector believed to do so would have a detrimental effect on overall compliance.

In our view, the workplaces visited with Comcare investigators were consistent in terms of OHS management to large workplaces we had visited with state inspectors. They did not appear to be immune from hazards for which we had seen notices issued by state OHS inspectors.

The development of improvement and prohibition notices was seen as one the key features of the post-Robens reforms to OHS legislation because rather they provided an immediate remedy to a hazardous breach that also focused attention on the employer, contractor or other party rectifying the problem rather than imposing some financial penalty.

In our research on the state jurisdictions we never encountered a serious or substantiated suggestion that the issuing of these notices was being abused in any general sense (as distinct from isolated cases). In general, there appeared to wide acceptance of the notices (as much as there is acceptance of any sanction) and on several occasions we witnessed managers urge an inspector to issue a notice so they could convince their superiors to take action on an issue. This interpretation was broadly echoed by a number of parties to this review. For example, an employer group stated that their members were generally happy with the determinations of inspectors, especially in the Victorian jurisdiction. The same representative indicated that employers would prefer inspectors to provide advice rather than take punitive action.

In Victoria, recent changes enable inspectors to provide advice as to solutions when they issue a notice. This is in line with section 35(A) of the OHS Act and would seem to be a valuable step that could be emulated in other jurisdictions. At the same time, it needs to be emphasised that notices are issued in relation to breaches in the legislation. Where inspectors believe a matter can be remedied before they leave a site a verbal direction can be used. However, where this is not possible, it is incumbent on the inspector to issue a notice to protect workers and others on that site and to meet their own statutory obligations.

In the more than 100 workplace visits we undertook with state OHS inspectors we witnessed inspectors make considered judgements when issuing notices (it was not uncommon for the inspector to identify a number of breaches of the legislation at the same workplace).

It should also be noted that the issuing of notices can form an important part of both educative and enforcement activities in the broader sense.³⁴

³⁴ One example may serve to illustrate this. In a regional city in Victoria an inspector issued notices in relation to absence of an adequate traffic control/pedestrian safety system within two workplaces. As a result of this both employers developed systems. At a later point inspection revealed that in neither case were the systems being implemented. Both firms were prosecuted by Worksafe Victoria even though no injury or incident had occurred and a conviction and fine secured. This action received considerable publicity in the city and was seen to result in a significant improvement in compliance more generally.

Turning to the question of more serious enforcement actions namely, prosecutions, it also appears that Comcare is the exception, notwithstanding significant variations in the prosecution rate between state jurisdictions. Comcare was unable to launch prosecutions (or what it terms criminal action) until the removal of immunity of the Crown in 2004.³⁵ Nonetheless, available evidence indicates the use of this tool is still well below that of even the least prosecutorial state jurisdiction.

Mature Systems

As noted, some respondents (principally Comcare, employers and employer associations) argued that most, if not all, organisations, regulated under the OHS Act are large companies with mature approaches to systematic OHS management. These organisations, it is argued, do not need close supervision. This argument was supported by a suggestion that, across the various OHS jurisdictions, most improvement and prohibition notices have been issued to small and medium sized enterprises (SMEs), and most prosecutions were taken against SMEs.

A related argument made by employers in the Comcare scheme and those outside it, was that the process and prescriptive approach of state regulators was counter-productive to employers developing safety cultures within their own business systems. It is perhaps worth noting that similar arguments were made by employers to the NSW Mine Safety Review (2004-2005) but this review did not endorse a winding back of enforcement, and also pointed to serious limitations (a disconnect) in the management systems and safety culture of mining companies.

While it is true that employers in the national jurisdiction are predominantly large, it should also be noted that, apart from Tasmania, over half the employees in state jurisdictions in Australia work for employers with more than 100 employees (see Table 2.3). In short, large private and public sector employers remain an important feature of state jurisdictions.

Table 2.3: Proportion of employees by size of business in Australian Jurisdictions and New Zealand

State	Proportions (%) by Employer Size				Total
	0 to 4 employees	5 to 19 employees	20 to 99 employees	100+ employees	
	%	%	%	%	%
NSW	10.63	18.26	17.41	53.70	100.00
VIC	10.48	17.40	21.53	50.59	100.00
QLD	8.84	21.92	17.75	51.50	100.00
WA	8.78	18.32	16.94	55.96	100.00
SA	9.59	19.82	18.51	52.08	100.00
TAS	8.08	16.51	30.60	44.81	100.00
NT	8.43	20.48	22.66	48.43	100.00
Aus Gov	0.13	0.41	2.93	96.53	100.00
ACT Total	6.65	14.89	15.70	62.76	100.00
AUS	9.85	18.80	18.92	52.42	100.00
NZ	12.80	24.81	32.08	30.30	100.00

Source: *Small Business in Australia 2001*; ABS catalogue number 1321.0

³⁵

However it has been possible to prosecute government business enterprises (GBEs), and there have been prosecutions in the past.

As noted elsewhere, in the course of a detailed study of four state OHS inspectorates we accompanied inspectors to wide array of workplaces including not only those of large employers but also national employers operating in the very same industries covered by Comcare (such as construction and transport) and with sophisticated OHS management systems in place. At a number of these we witnessed inspectors identifying serious hazards and issuing notices or take other actions. It was not our observed experience that state OHS inspectors were unlikely to find grounds for issuing notices in the workplaces of large employers, including those with elaborate OHS management systems. In some we observed, the ‘elaborate’ system had failed to identify and address serious hazards (this included both private and government employers). As incidents such as that which occurred at Esso’s Longford plant in Victoria testify, large companies with mature approaches to systematic OHS management are not immune to serious and even catastrophic failings.

Further, it should also be noted that some self-insurers received a number of notices from state OHS inspectors in the years prior to their entry. Several submissions, such as the Australian Manufacturing Workers Union and Maurice Blackburn Lawyers drew on state OHS inspectorate records to point to a pattern of serious incidents and notices issued in recent years at workplaces controlled by several of the self-insurers whose workplaces we visited for this review. While it might be argued that those self-insurers had ‘lifted their game’ to the point where notices were no longer necessary, it should be noted that, on three site visits we undertook with Comcare investigators: in one site a notice had been issued by a state OHS inspector with regard to a contractor that should have aroused concern about overall contractor management on the site (and indeed that is why Comcare investigators became involved); at another there was a failure to report what appeared to be a dangerous incident; and at a third site a provisional notice had been issued by a HSR – the basic validity of which was not in question. These and other observations from workplace visits were not symptomatic of demonstrably superior regimes of OHS management but rather a difference in enforcement policy.

In short, we do not accept that these arguments justify Comcare taking a more lenient approach to enforcement than is taken by the states. Rather we recommend that Comcare develop a responsive approach to enforcement.

Responsive enforcement

Responsive enforcement has gained favour in the OHS environment because regulators have increasingly realised that an approach based entirely on strong penal enforcement may produce a culture of regulatory resistance among some employers, including employers who are prepared voluntarily to improve OHS. However, regulators are also beginning to accept that reliance simply on informal measures can ‘easily degenerate into intolerable laxity and a failure to deter those who have no intention to comply voluntarily’³⁶. Evidence from a number of jurisdictions suggests that ‘cooperative approaches can decrease compliance if agencies permit law breakers to go unpunished.’³⁷ ‘Responsive regulation’ requires regulators to ‘be responsive to the conduct of those they seek to regulate’, or more particularly, ‘to how effectively citizens or corporations are regulating themselves’ before ‘deciding on whether to escalate intervention’³⁸. Responsive enforcement, using an interactive and graduated enforcement response, has been developed because of the limitations of both the ‘advise and persuade’ approach and the deterrence approach. It ‘covers the weakness of one with the strengths’ of the other³⁹.

Crucially, responsive enforcement is interactive, rather than based on an overall notion that particular kinds of employers are compliant. It involves OHS inspectors inspecting employers proactively to assess the quality of the employer’s compliance efforts, and then using sanctions firmly to get the employer to improve its compliance.

The challenge is to develop enforcement strategies that punish the worst offenders, while at the same time encouraging and helping employers to comply voluntarily. The OHS regulator cannot assume that all duty holders will comply voluntarily, although many will, and for various motivations⁴⁰. Some duty holders will need mild enforcement action to spur them on to improve OHS. Others will not comply unless strong enforcement action is taken against them, or at least threatened. For this reason, credible enforcement must include a significant deterrence component (which we discuss below), but this must be targeted to offenders and circumstances where ‘advise and persuasion’ have failed, and where deterrence is likely to be most effective. Strong enforcement measures are also required against the irrational and the incompetent.

Recommendation 10.

That Comcare adopt the principles of responsive enforcement and alter its practices in terms of more proactive and interactive workplace visits and tactical use of notices and other sanctions.

³⁶ Gunningham, N and Johnstone, R, *Systems and Sanctions: Regulating Workplace Safety*, (1999), 112.

³⁷ Shapiro, S.A. and Rabinowitz, R.S. (1997), *Punishment versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, *Administrative Law Review*, vol 49(4) 713-762, 722.

³⁸ Braithwaite, J., *Restorative Justice and Responsive Regulation*, OUP, Oxford, 2002, 29.

³⁹ *Ibid*, 32.

⁴⁰ Self-insurers are motivated to achieve better OHS outcomes as performance directly impacts on cost, according to submissions from Adecco, Vedior and Rio Tinto.

Improvement and Prohibition Notices

The OHS Act provisions empowering investigators to issue both improvement and prohibition notices (sections 47 and 46 respectively) both provide that such notices can only be issued once an investigator has conducted an investigation. This precondition to the issuing of notices is not found in the other OHS statutes. The submission from the South Australian government was critical of this constraint as impinging on the effectiveness of inspectors. At page one, the submission stated the 'inspectorate needs to operate independently – not constrained by agency operational policy that reduce the impact of an inspector's visit'.

Given that investigations in some cases can span many days, this precondition seems to us to be unnecessary and inappropriate. An inspector can form an opinion that it is reasonably necessary to issue a prohibition notice because there is an immediate threat to the health and safety of any person, or to issue an improvement notice because a provision of the OHS Act has been contravened without having to complete a full investigation.

Further, we understand that Comcare investigators cannot issue improvement notices without first confirming with a Comcare legal officer that there are reasonable grounds for the investigator to 'form the opinion' that a provision of the OHS Act has been contravened. Apparently, this requirement has been introduced because some employers challenge every enforcement decision made by Comcare, and Comcare is accordingly concerned to ensure that all enforcement action is well grounded. During interviews a number of Comcare investigators made reference to a particular employer in this regard (not one of the introduced self-insurers). We are not aware of such a procedural requirement in any of the other OHS inspectorates. During our interviews with state OHS inspectors a number made reference to employers who were more likely to appeal the issuing of a notice but this was never seen as a reason for not issuing the notice and appeal mechanisms. In sum, putting procedural constraints on the issuing of a notice by a duly trained inspector/investigator would seem to defeat the very purpose for which this tool was designed.

Recommendation 11.

We suggest that Comcare remove the requirement of seeking the opinion of a legal officer before issuing an improvement notice.

Infringement notices

In its submission, the SRCC suggested that infringement notices ('on-the-spot fines') be introduced into the OHS Act. The majority of the OHS statutes (New South Wales, Queensland, Tasmania, the ACT and the Northern Territory) empower inspectors to issue infringement notices. Infringement notices enable enforcement of lesser offences in a quick, easy and inexpensive process without costly court action or the need to prove the elements of an offence. Research suggests that infringement notices are perceived as a deterrent and an effective means of 'getting the safety message across'; that when issued they were treated as a significant 'blot on the record' which spurred preventive activities; and that, in some larger companies, infringement notices issued was an indicator for judging the safety performance of site/line managers.⁴¹ For a discussion as to how infringement notices should operate, see the 2002 Australian Law Reform Commission report into security compliance.⁴²

Recommendation 12.

Infringement notices should be introduced in the OHS Act. The level of penalty in an infringement notices should not exceed 20 % of the maximum penalty that could be imposed by a court.⁴³ A tiered system of on-the-spot fines might be considered in which the most serious offences merit a more substantial penalty. Increased penalties might also be imposed for repeat offences of the same type within a given period.

Enforceable undertakings

As enforcement mechanisms, enforceable undertakings are considered to be quicker, cheaper and more predictable than litigation, and, at the same time, unlike other purely administrative measures, they can be enforced and made public. They also provide a constructive, 'non-adversarial' way to genuinely 'fix' a problem, and provide regulators with 'more innovative, expansive and preventive remedies' than are available through court orders. Enforceable undertakings have been included in the OHS Act and OHS statutes in Victoria, Queensland, Tasmania and the ACT. Essentially these provisions empower the inspectorate to accept from a person a written undertaking about remedial measures in connection with a contravention of the OHS Act. If the inspectorate can prove that the person has contravened any of the terms of the undertaking, a court may make appropriate orders which might include directing the person to comply with the terms of the undertaking; and/or ordering the person to compensate any other person who has suffered loss or damage as a result of the contravention.

⁴¹ Gunningham, N., Sinclair, D. and Burritt, P. (1998), *On-the-spot fines and the prevention of injury and disease – the experience of Australian workplaces*, National Occupational Health and Safety Commission, Sydney

⁴² Australian Law Reform Commission. (2002) *Securing compliance. Civil and administrative penalties in Australian federal legislation*, Discussion paper 65. ; 418

⁴³ Ibid, 418

The research evidence⁴⁴ suggests that enforceable undertakings can be very effective enforcement measures, provided OHS regulators provide detailed guidance for duty holders to enable them to develop robust proposals; the regulator discusses the proposal as early as possible in the process; they are consistently used, they are not over-utilised, they are open to public scrutiny (for example, via the regulator’s website), they are entered into voluntarily; they require comprehensive systematic approaches to OHSM; and they include industry and community benefits.

OHS regulators must have specialist in-house staff to oversee the implementation (particularly the monitoring) of enforceable undertakings, and must develop auditing criteria, oversee the appointment of, and ensure the independence and quality of work of, auditors, and strongly enforce contraventions of undertakings. Importantly, enforceable undertakings should not be seen as a ‘soft option’, and not to be available when there are strong reasons for preferring a deterrent or retributive sanction (for example, where there are fatalities or serious injuries), unless the regulator is confident that the firm is remorseful and has been induced to take radical action as a result of the incident.

Senior managers in Comcare and the SRCC both expressed a preference for enforceable undertakings as a tool of enforcement. During the course of our interviews one large employer revealed that they had offered to make an undertaking (and were accepted by Comcare) and believed this had resulted in a far more satisfactory outcome in terms of addressing the hazard for which Comcare was considering to take action. While Comcare stated that enforceable undertakings is a key part of its enforcement activity, to date use of this option appears limited, in 2007-08 two enforceable undertakings were made, although this is consistent with the ratio of undertakings to covered workers under some state schemes.

Recommendation 13.

Comcare continue to offer the possibility of enforceable undertakings, but benchmark procedures and processes against research outlining best practice.

Sanctions for contraventions of the OHS Act

When compared with the state OHS statutes, the OHS Act provides weak criminal sanctions for employers who contravene the OHS Act. Amendments to the OHS Act in 2004 introduced a dual regime of enforcement, providing for civil sanctions for most contraventions of the Act, while maintaining criminal sanctions for what were considered to be the most serious contraventions of the Act — offences resulting in death or serious bodily harm, or exposing employees to a substantial risk of death or serious bodily harm. (Although we note that criminal sanctions are not available against Commonwealth employers).

⁴⁴ See, in particular, Parker, C. ‘Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings’ (2004) 67 (2) *Modern Law Review* 209–246; Australian Law Reform Commission (ALRC), *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Commonwealth of Australia, Sydney, 2002, Part A, 2; and ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation, Discussion Paper 65*, Commonwealth of Australia, Sydney, April 2002, 100-101. See also R Johnstone and M. King, *How do Enforceable Undertakings Work? An Exploration and Review of the Operation of Enforceable Undertakings as an Enforcement Strategy*, Workplace Health and Safety Queensland, Brisbane, 2007.

Criminal prosecution and civil law sanctions

Crucially, a criminal prosecution for a contravention against the OHS Act (the provisions subject to criminal prosecution for breach are listed in clause 18 of Schedule 2 to the Act, and include the employer's general duties under section 16 and 17, the manufacturer's, supplier's erectors and installer's duties under sections 18 to 20, the employee's duty under section 21, and other offences like failing to comply with directions and notices) can only be taken if the person contravening the relevant section of the Act (i) was negligent as to whether that breach caused death or serious bodily harm (or, in the case of a section 16 offence, exposed a person to such a risk) or (ii) was reckless as to whether that breach would cause death or serious bodily harm (or, in the case of a section 16 offence, would expose a person to such a risk). Some other offences are only committed if the person 'intentionally' breaches the relevant provisions (these offences include provisions like the requirement to give information or produce documents, failure of witnesses to attend, contempt of the Commission etc).

Negligence, in this context, means conduct involving (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the [negligent conduct] exists or will exist that the conduct merits criminal punishment for the offence' (Criminal Code chapter 2, 5.5). Recklessness with respect to circumstances involves the person being (a) ... aware of a substantial risk that the circumstances exist or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk (5.4).

None of the state or territory OHS statutes impose (i) reckless or criminal negligence and/or a death, serious bodily harm, or exposing a person to such a risk as a prerequisite to criminal prosecution for a contravention of the Act (although some of the statutes have such elements in aggravated offences). This means that while self-insurers who stayed in the state systems could be prosecuted for contravening a general duty if they failed to take all reasonable practicable measures to ensure the OHS of their employees or others affected by the conduct of its undertaking, under the OHS Act they can only be successfully prosecuted for contravening the employer's duties in section 16 and 17 (see above) (i) if they are reckless or criminally negligent and (ii) the contravention results in death or serious bodily harm, or, in the case of the section 16 contravention, they expose employees to a substantial risk of death or serious bodily harm.

Under Part 1 (especially clauses 2 and 4) of Schedule 2 of the OHS Act, a court can, upon an application by Comcare or an investigator, declare that a person has contravened the Act and can then order a person (including a corporation) who committed or was involved in the breach to pay a pecuniary penalty. Civil sanctions are available against all employers covered by the Act. They include civil penalties, injunctions, and remedial orders.

All *employees* covered by the OHS Act are subject to both civil and criminal sanctions for contraventions of the Act.

None of the other OHS statutes include civil penalties for OHS contraventions.

Level of penalties and non-pecuniary sanctions

Further, the penalties that can be imposed under the OHS Act are considerably smaller than those that could be imposed under the OHS statutes in the eastern states. The highest maximum criminal penalty for a contravention of the OHS Act is \$495,000 (for contraventions of the general duty provisions by corporations, where death or serious injury results). The maximum fines in Victoria for corporations is \$943,200; in New South Wales \$550,000 (\$825,000 for repeat offences and \$1,650,000 for reckless conduct causing death at work); in Queensland \$750,000; and in Western Australia \$500,000 (\$650,000 for repeat offences).

The maximum civil penalty in the OHS Act is \$242,000, for contraventions of the general duty provisions by corporations.

The OHS Act also empowers a court to (i) give injunctive relief if a person has breached, is breaching or proposes to breach the OHS Act or (ii) make remedial orders against the person contravening the Act.

The state and ACT OHS Acts include other sanctions, including:

- adverse publicity court orders (New South Wales, Victoria, South Australia,⁴⁵ and the ACT);
- orders to participate in an OHS-related project (New South Wales, Victoria and South Australia);
- forms of corporate probation (Victoria and Western Australia).

Comparison with state and territory regimes

In sum, the OHS Act is significantly out of step with the other OHS statutes, in that it (i) requires reckless or criminal negligence and a resulting fatality or serious injury before a criminal prosecution can take place for a contravention of a general duty, or a failure to comply with a improvement or prohibition notice etc can take place, and (ii) imposes significantly lower penalties than do the eastern states if a conviction is recorded. It also significantly decriminalises OHS offending by using civil penalties as the basic punitive measure for non-compliance – which is out of step with all of the state and territory OHS statutes.

For example, all of the state and territory OHS statutes make provision for criminal prosecutions to be initiated when a contravention of a general duty OHS statute occurs. In conducting a prosecution, the prosecutor has to prove that the general duty was contravened in that the duty holder did not do all that was reasonably practicable to mitigate or remove the risks⁴⁶ – there is no need to prove beyond reasonable doubt either that the duty holder was criminally negligent or reckless or that the contravention resulted in a fatality or serious injury. In some of the state OHS statutes there are 'aggravated offences', incurring greater penalties, where a prosecutor must show, beyond reasonable doubt that a duty holder was criminally negligent or reckless and/or that the contravention resulted in a fatality or serious injury. In the OHS Act, where a contravention takes place, Comcare can initiate civil proceedings for a contravention of a general duty, and simply has to prove on the balance of probabilities that the general duty was contravened in that the duty holder did not do all that was reasonably practicable to mitigate or remove the risks. The level of civil penalties under the OHS Act is significantly lower than the maximum penalties in the eastern states.

⁴⁵ This might include publicising the conviction in the company's annual report or in other notices to shareholders, or to the person affected by the offence.

⁴⁶ In NSW, the prosecutor has to prove beyond reasonable that the absolute general duty was contravened, with the duty holder having to show on the balance of probabilities that prevention measures were not reasonably practicable. In Queensland, the prosecutor must prove beyond reasonable doubt that the duty holder had contravened the absolute duty, after which the duty holder must prove on the balance of probabilities that it followed an applicable regulation or code of practice, or, if there were no applicable regulations or codes, had taken reasonable precautions and exercised proper diligence.

To conduct a criminal prosecution for a contravention of a general duty under the OHS Act, a prosecutor has to prove beyond reasonable doubt that beyond reasonable doubt that the duty holder was criminally negligent or reckless and that the contravention resulted in a fatality or serious injury – and if the prosecutor is successful the resulting maximum fine is considerably lower than the maxima available in the eastern states.

In short, the Commonwealth scheme is a low civil penalty scheme, with criminal prosecution (for relatively low fines) only available for aggravated offences. As a result, the possibility of specific and general deterrence in the Commonwealth scheme is significantly compromised.

Recommendation 14.

That the requirements of recklessness or criminal negligence, and of a resultant death or serious injury, be removed from the elements of OHS offences.

Aggravated offences of recklessness or criminal negligence, and of a resultant death or serious injury, can be retained.

That consideration be given to reducing the role of civil penalties.

That fines for convictions should be significantly increased, to a level where they are comparable with the maximum penalties in the eastern states.

That new sanctions such as court-ordered publicity, orders to participate in OHS-related projects and corporate probation be considered.

Directors and managers not personally liable other than as employees

The OHS Act does not include provisions enabling directors or senior managers of corporations from being prosecuted for failing to ensure that the corporation complied with its OHS legal obligations. This omission significantly undermines the possibility of individual accountability for OHS contraventions by employers under the OHS Act where the individual manager was culpable for the contravention.

While it is possible for a senior manager to be prosecuted under the employee's duty in section 21 of the Act (particularly paragraph (1)(a)) for a contravention of that duty, as discussed above, such a prosecution can only be conducted as a criminal prosecution if the contravention resulted in serious injury or death; and the employee was reckless or negligent. Even in this case, the manager is not being held responsible for a managerial failure, but for the manager's personal act or omission.

Most of the OHS statutes make provision for individual directors, managers or officers of a corporation to be prosecuted in certain circumstances for offences committed by the corporation. For example, section 26 of the *Occupational Health and Safety Act 2000* (NSW) provides that:

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each individual director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or manager satisfies the court that:
 - (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
 - (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

A second approach to corporate officer liability is found in section 55(1) of the *Occupational Safety and Health Act 1984* (WA) (see also section 37 of the *Health and Safety etc at Work Act 1974* (UK)) which provides that where an offence against the Act committed by a body corporate is proved to have ‘occurred with the consent or connivance of, or to have been attributable to any wilful neglect on the part of, any director, manager, secretary or officer of the body corporate’, that person is also guilty of that offence.

The 2004 Maxwell Report of the Review of the Victorian OHS Act argued strongly that the liability of directors should not be a merely ‘accessorial’ one, ‘treating them as accessories to the company’s contravention’. While not adopting the provision recommended by the Maxwell Report, the *Occupational Health and Safety Act 2004* (Vic) has adopted the Report’s recommendation that directors have a positive and personal duty to ensure that the company complies with OHS duties. Under section 144 of the Victorian Act, a corporate officer will be liable if the corporate employer’s contravention ‘is attributable to an officer of the body corporate failing to take reasonable care’ to prevent the contravention. This positive legislative duty overcomes any risk that a corporate officer might otherwise be regarded as in breach of the duty to ‘act in the best interests of the company’ and acting in the interests of employees’ health and safety. The Maxwell Report also recommended the adoption of the Corporations Act definition of ‘officer’, in order to ensure that every person concerned in company management can potentially be liable in respect of contraventions. Thus Section 5 of the *Occupational Health and Safety Act 2004* (Vic) picks up the definition of ‘officer’ in the *Corporations Act 2001* (C’th) as including

a person

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) who has the capacity to affect significantly the corporation’s financial standing; or
- (iii) in accordance with whose instructions or wishes directors of the corporation are accustomed to act...

This definition is wide enough to include holding companies in corporate groups, as ‘shadow officers’, and is therefore a significant provision in terms of ensuring that those responsible for contraventions will face liability and not escape under the principle of limited liability.

Recommendation 15.

The Commonwealth should consider the introduction of a provision imposing liability upon directors and senior managers (at least of non-Commonwealth licensees) following either the NSW or Victorian provision.

2.2.3 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?

Submissions

Employers and employer associations in their submissions pointed to problems with the OHS Act in relation to contractors. A number of employers indicated that there should only be one OHS regime covering a workplace.

State and territory governments argued that multiple OHS laws operating at one worksite are confusing.

Unions pointed to significant jurisdictional issues relating to the use and coverage of contractors. For example, the CFMEU argued the OHS Act failed to adequately cover the contracting chain; a lack of clarity affected egress, induction and reporting; and some employers were using the OHS Act to deny the union access to a site by claiming they were not in control of the workplace.

The SRCC suggested that the provisions regulating contractors show no gap in coverage, but rather an overlap.

Use of contractors

It should be noted that a number of self-insurers make extensive use of contractors, subcontractors and labour hire workers. Telstra, for example, estimated that around 40% of field work (fixing phones, making connections) is done by contractors and subcontractors. In construction much of the actual work is done by contractors and subcontractors rather than employees of a principal. Subcontracting is also extensive in road transport. Interviews and workplace visits carried out for this Review indicated that self-insurers fitted the general pattern for the industries just mentioned.

Contractor provisions in the OHS Act

The provisions in the OHS Act which govern the regulation of contractors are, in our view, extremely complex (Appendix D contains a detailed explanation), and in their current form may have unintended consequences. Apart from the provisions (sections 16 and 17) discussed in response to the first term of reference, the key provisions in the OHS Act are sections 4 and 14.

In brief, section 4 provides that to the extent that the OHS Act applies in relation to employers, employees or the employment of employees, it overrides state and territory OHS legislation except where section 14 applies. Thus, when ‘an employer’ (including a non-Commonwealth licensee) under the OHS Act engages a ‘contractor’ who is in control of the workplace for construction or maintenance purposes:

- the employer will not have any significant obligations at that workplace under the OHS Act (including obligations to its own employees, ‘contractors’ (to whom it might otherwise owe an obligation as a result of section 16(4)), and duties to persons other than employees and contractors to whom it might otherwise owe obligations under section 17);
- the contractor and sub-contractors will be governed by state and territory OHS laws, and
- the OHS Act will only apply to the extent that the exceptions outlined in section 14 are applicable.

As the Infrastructure Asset Development (IAD) Branch of the Department of Defence submission (at para 10) to the review observed:

‘[t]he benefit of this approach is that parties involved in ... construction projects operate under a single and seamless OHS regime at the construction site. The parties operate under the basis that state OHS laws and state OHS enforcement procedures apply and this promotes clear lines of responsibility and arguably superior OHS outcomes.’

We note, however, that it may effectively enable an employer to contract out of its OHS obligations to the parties at the construction (or maintenance) workplace controlled by the contractor (including its own employees at that workplace) – a situation which goes against the fundamental principle underpinning the OHS general duties that these duties are not delegable (see our discussion of this in our response to the first term of reference).

We also note (see further the IAD submission, para 15) that where a non-Commonwealth licensee is contracted to an employer as managing contractor or head contractor, it is unclear exactly as to which OHS regulator has enforcement responsibilities. It is also unclear whether state-based union officials can exercise rights under union entry provisions under state OHS statutes.

Because the implications of sections 4 and 14 are extremely complicated and difficult to understand, we shudder to think of the difficulties they must create for employers, contractors, employees and inspectors. While we were informed that Comcare investigators understand these complexities, and have developed good working relationships and partnerships with state and territory OHS inspectors, this is still a very complicated approach to regulating OHS at a single workplace.

Complexity in applying contractor provisions

Interviews with union, employer and agency representatives as well as workplace visits where we accompanied Comcare investigators demonstrated the significance of the concerns just identified and the importance of finding solutions. During interviews with senior Comcare management it was acknowledged that the management of contractors presented problems even with regard to employers where Comcare had been involved in this issue over a number of years. Examples cited included the Australian Defence Force which a senior manager observed 'can't exist without a multitude of contractors, and has quite often good systems, but the management of those people and businesses on site with the system and the expectation standards to be met is quite often problematic and that's because there are so many layers in Defence' It is also worth noting that in some Defence establishments there may be a dual management/authority structure (due to the presence of both the Department of Defence and the Australian Defence Force) to further complicate control of OHS. The manager just cited went on to identify other organisations that made extensive use of contractors and where problems had occurred as well as the widespread use of contractors by federal agencies.

In over half the workplaces visited, contractors or other duty-holders (such as suppliers) emerged as a relevant issue in the matter being investigated. This is not surprising given that these were large employers often in industries like construction and road transport where extensive chains of subcontracting are the norm. This issue also needs to be viewed in the context where there has been increased use of outsourcing, labour hire and other arrangements more generally that increase the number of potential duty-holders in relation to a particular work-site. In other words, work sites where there are multiple duty-holders are becoming more common across a range of industries. This was certainly our experience when doing workplace visits with state OHS inspectors where they commonly had to address issues involving more than one duty-holder. In most of these situations (exceptions being interstate suppliers or plant or equipment) all these duty-holders were covered by the relevant state OHS legislation and therefore the inspector and agency more generally were able to address the varying levels of responsibility in a cohesive manner. This is not the case with the self-insured Comcare workplaces we visited.

Some examples may serve to illustrate the complexities that arise from this. At one construction site visited a contractor had used a forklift inappropriately for a specific task causing the vehicle to tip – a potentially serious incident. Comcare was investigating this incident but not, as far as we could determine, the state agency responsible for the contractor. At another workplace a contractor was deemed not to have met a number of safety requirements in relation to a diving platform and a notice had been issued by a state OHS inspector in relation to this. At a further transport related site, contractors were involved in several roles, most notably owner-drivers or other transport firms undertaking subcontracted tasks for the firm. In all these sites addressing a number of OHS issues required dealing with both the contractors involved and the principal. In all three the Comcare investigators focused their attention on the principal which was the Comcare self-insurer. In the site where a notice had been issued a joint visit was arranged between the state OHS inspector and the Comcare investigators.

Notwithstanding informal cooperation, this is a far from ideal situation for a number of reasons.

First, as raised in a number of submissions while Comcare coverage may establish a single jurisdictional reference point as far as the principal is concerned but this means at particular workplaces - if not the vast majority of those currently covered via self-insurers and indeed other Comcare-covered workplaces like Australia Post which use labour hire workers and contractors – two bodies of OHS legislation and jurisdictional responsibilities apply. In this regard the expansion of Comcare coverage will actually create a more complex web of OHS regulation at workplace level. This is a significant problem and hardly consistent with claims that expanding Comcare coverage will rationalise OHS regulation in Australia. As noted by the Queensland Government submission, this regulatory duality is conducive to confusion amongst duty holders. Further, even this can understate the level of complexity that may result from the combination of complex corporate structures, joint ventures and subcontracting networks. The submission of the Western Australian government noted that the John Holland Group – three entities of which are self-insured with Comcare – is part of Leighton Holdings (including other construction firms) and that one recent project (the Perth-Mandurah Rail project) involved a joint venture between John Holland, McMahon Holdings and Multiplex with a major subcontractor being O'Donnell Griffin. This represents a complex web of regulation and duty-holders with potential for disputes over legislative responsibilities.

Second, as already noted, there are as yet no formal protocols to guide co-ordinated enforcement activities by Comcare investigators and state OHS inspectors in relation to affected worksites. During the course of the review, Comcare managers and investigators made reference to examples of informal cooperation between themselves and state inspectorates with regard to investigations (including the collection of evidence) and actions. Informal cooperation, while laudable, is not an adequate solution to this problem. The level of complexity in terms of coverage increases the risk that one agency will remain unaware of an incident relevant to their responsibilities and even the possibility that incidents or serious breaches will remain unreported (because for example one agency assumes the other agency is aware of an incident pertaining to it or in areas of complex overlapping coverage at particular work sites). Further, even protocols are unlikely to be effective where there are different OHS standards in place (due to differences in legislation as well as applicable codes and regulations) as is currently the case, or where there is a very different approach to the issuing of notices and other enforcement activity between Comcare and the various state OHS agencies – something this report has already demonstrated to be the case. Finally, even where protocols operate there will still be instances where both Comcare and a state OHS inspectorates need to become involved in investigations arising from a single incident – and we witnessed several instances of this in the course of our workplace visits. As is implicit in a number of submissions from state Governments (such as that of the Justice Department of Tasmania), such a duality adds a layer of administrative coordination and complexity that does not represent an effective use of limited inspectorate resources, especially if it is expanded to entail numerous employers and workplaces. The duality also adds a degree of complexity and additional administrative burdens to both employers and workers in terms of reporting incidents or concerns. In sum, while formal protocols are eminently preferable to the current situation it cannot be presumed that they remedy the jurisdictional and operational complexities that have resulted from the expansion of Comcare's coverage, let alone those that follow further expansion were this to be pursued.

Third, the fragmentation could have potentially deleterious consequences to effective enforcement. Where a particular Act, and the inspector responsible for enforcing it, have complete jurisdiction of a particular worksite they are able to make considered judgements in relation to allocation of responsibility for a breach and most appropriate action to take. In our workplace visits with state OHS inspectors we witnessed inspectors making these often complex decisions based on a judgement of degree of responsibility and what measures would be most likely to address the hazard. This often occurred in a context where multiple duty-holders saw the responsibility as lying with someone else. Where an inspector is only empowered to make orders in relation to one or some of a range of parties their capacities to resolve an issue are inhibited. The same problem is magnified where prosecutions are pursued by an agency. With regard to both subcontracting agencies and labour hire arrangements state OHS agencies have not infrequently taken action against several parties (such as the labour hire firm and the host employer) in relation to an incident because they have judged that both failed to meet their duties under the legislation. They will also seek penalties commensurate with the degree of fault and with consideration as to broader policy objectives with regard to securing compliance. However, where two agencies are involved deciding on the appropriate allocation of responsibility and suitable action becomes more difficult. This is further complicated once it is recognised that where Comcare and a state OHS agency take prosecutorial action in relation to different parties involved in the same incident the proceedings will occur before different courts (unlike the state cases just mentioned where the same court and judge is likely to hear the case) and with a real prospect of decisions that may not send the intended message in terms of deterrence.

Recommendation 16.

Section 14 of the OHS Act should be repealed, and section 17 of the OHS Act should be revised so as to replicate section 23 of the Victorian Act, and a similar duty should be placed on self-employed persons.

There is a need for consistent policies in terms of enforcement if coordinated activities are to be effective (see earlier recommendations).

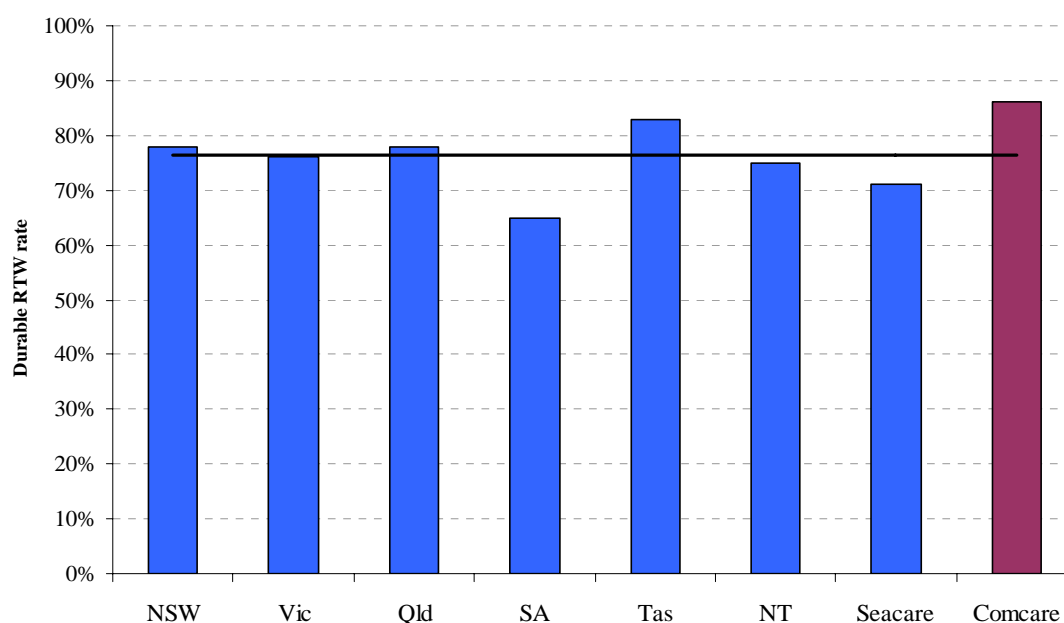
In the existing context it is not recommended that Comcare’s workers’ compensation coverage be expanded to include Labour Hire firms.

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

A number of submissions made reference to the comparatively better record of Comcare with regard to return to work outcomes for injured workers. While some viewed this as evidence of the superiority of the Comcare scheme other submissions (such as that of the Queensland government) argued such comparisons were distorted by the preponderance of public servants within the federal scheme and the failure to take account of performance according to employer size.⁴⁷

The 2006-07 Australia and New Zealand Return to Work Monitor⁴⁸ showed that Comcare had the highest durable rate of return to work among Australian jurisdictions. The monitor showed that 85% of injured workers under the Comcare scheme had achieved a durable return to work⁴⁹ compared with an Australian scheme average of 77%. Figure 2.5 shows the durable return to work rates for each jurisdiction.

Fig 2.5 Durable return to work rates



Data from the SRCC's annual report 2006-07,⁵⁰ shows that in relation to return to work outcomes, the self-insured group of corporations under the Comcare scheme generally perform better than the premium paying agencies. There is a higher proportion of

⁴⁷ A submission from the Law Council of Australia pointed to potential distortions due to different industry mixes while WorkCover Western Australia noted the figures cited did not capture the recent movement of employers in high risk industries like construction into Comcare. Other submissions, such as that of Insurance Australia Group (IAG) presented additional survey data on return to work rates.

⁴⁸ Campbell Research and Consulting, *2006/07 Australia and New Zealand Return to Work Monitor, prepared for The Heads of Workers' Compensation Authorities*, August 2007.

⁴⁹ Defined as still working at the date of interview.

⁵⁰ SRCC Annual Report 2006-7, Table 4, page 22.

clerical or white collar workers among premium payers than self-insurers, so that the SRCC comparison weakens the argument that the preponderance of public servants is responsible for Comcare’s higher return to work rates.

The recent changes to the SRC Act removed journey claims, recess claims and some claims with psychological factors and those caused by reasonable disciplinary action taken by the employer. The numbers of claims affected by these changes are relatively low, so that the changes are unlikely to affect the rehabilitation and return to work of the majority of injured workers.

For the small proportion of injured workers affected by the changes, we note the following points:

- Several self-insurers pointed out in submissions or during consultation that they provide early intervention programs irrespective of whether the injured worker makes a workers’ compensation claim, or not. In some cases they allowed a set level of expenditure and in other cases they provided a set number of medical or physiotherapy visits. Self-insurers generally expressed a desire to rehabilitate injured workers, irrespective of whether the injury was work related or compensable or not;
- Other self-insurers advised in submissions that they provide additional coverage outside the requirements of the SRC Act. This includes all injuries outside working hours, so that it includes journey and recess claims.

The latest Return to Work Monitor was based on two waves⁵¹ of claims from November 2006 and May 2007. These results are too soon after the changes to be able to measure a meaningful impact. This suggests that the results should be monitored to see whether return to work rates have noticeably decreased since the introduction of the changes to the SRC Act.

Conclusion: The recent changes to the Safety, Rehabilitation and Compensation Act 1988 is expected to have had little effect on rehabilitation and return to work of injured workers, but it is too early to reliably measure the effects on return to work rates.

⁵¹ The population surveyed in a wave is injured workers who have had ten days or more compensation paid and the interviews are conducted just over six months (seven to nine months) after a claim has been lodged.

2.2.5 Does the scheme provide appropriate workers’ compensation coverage for workers employed by self–insurers?

Submissions

All of the employers who made submissions to this review believed that the scheme provides workers’ compensation benefits that were more generous than state and territory schemes.

The submissions from lawyers and lawyers’ organisations pointed out that access to common law was insufficient and the effect of the 2006 changes to the 2nd Edition of the Guide to the Assessment of the Degree of Permanent Impairment (‘Permanent Impairment Guide’) had made lump sum benefits for permanent impairment relatively more difficult to access.⁵²

Unions were concerned that the recent amendments to the SRC Act left the definition of disease too narrow and introduced more exclusions under the definition of injury. They also submitted that the Permanent Impairment Guide is overly complicated and extensively restrictive. Unions submitted that journey claims and recess break coverage should be restored, but several considered that weekly payments/benefits were a positive aspect of the scheme.

Death benefits

While the SRC Act restricts access to common law, the dependants of a deceased employee are able to seek damages at common law. Statutory death benefits under the SRC Act include lump sum and ongoing dependants’ benefits.

Figure 2.6 shows details of estimated benefits for a deceased worker, including lump sum death benefits and ongoing dependant childrens’ benefits.⁵³

⁵² Lump sum compensation under the SRC Act is only available in limited circumstances such as permanent impairment, death and redemption of weekly benefits below a very low threshold.

⁵³ Indicator 17 of CPM report 9.

Fig 2.6 Level of Entitlement for Fatality

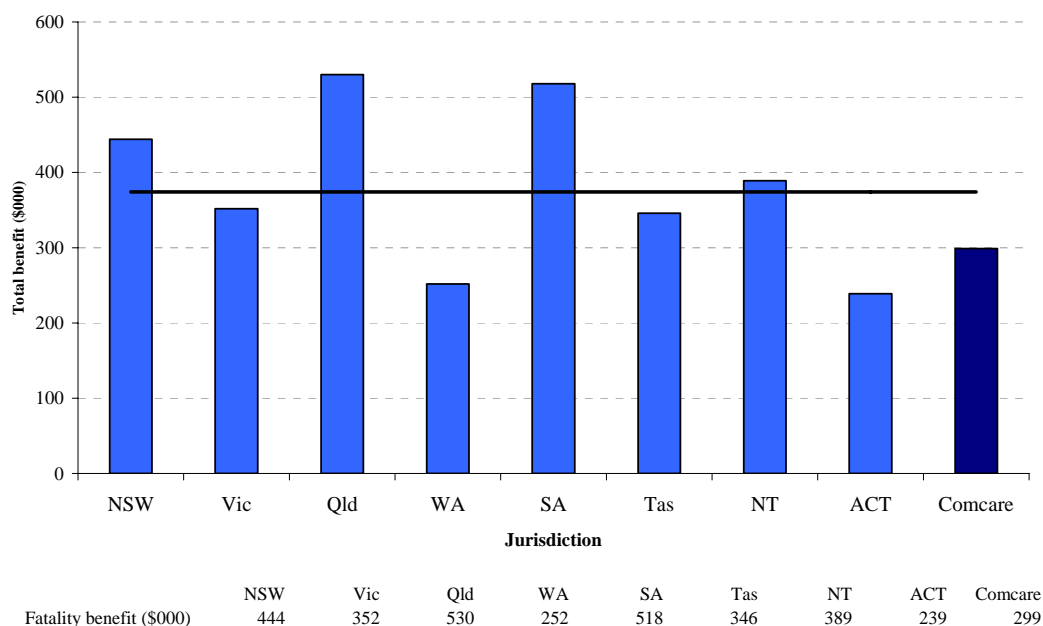


Figure 2.6 shows that Comcare death benefits are lower than six of those from state and territory schemes and higher than two. The bulk of the death benefits in the comparison relate to lump sums. We are aware that at least one scheme has recently announced an increase in the lump sum death benefit, and it appears that the death benefits under the SRC Act have not kept pace with most other jurisdictions.

Permanent Impairment

Access to lump sums either through common law access or statutory benefits is an accepted feature of most Australian schemes. In general terms, the restrictions placed on one of these benefits should be balanced by fewer restrictions on the other. When state or territory schemes have restricted access to common law, as several have done via impairment or other thresholds, they have counterbalanced this with improved statutory permanent impairment and death benefits within their schemes. We accept that the value of common law benefits in the Comcare scheme has been eroded by fixing the maximum payment for general damages at \$110,000 since 1988. We therefore examined the relative size of Comcare permanent impairment benefits relative to those available from state and territory schemes.

Figure 2.7 contain details of estimated permanent impairment benefits for a seriously injured worker, including long-term weekly compensation and lump sum permanent impairment benefits.⁵⁴

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Indicator 17 of CPM report 9.

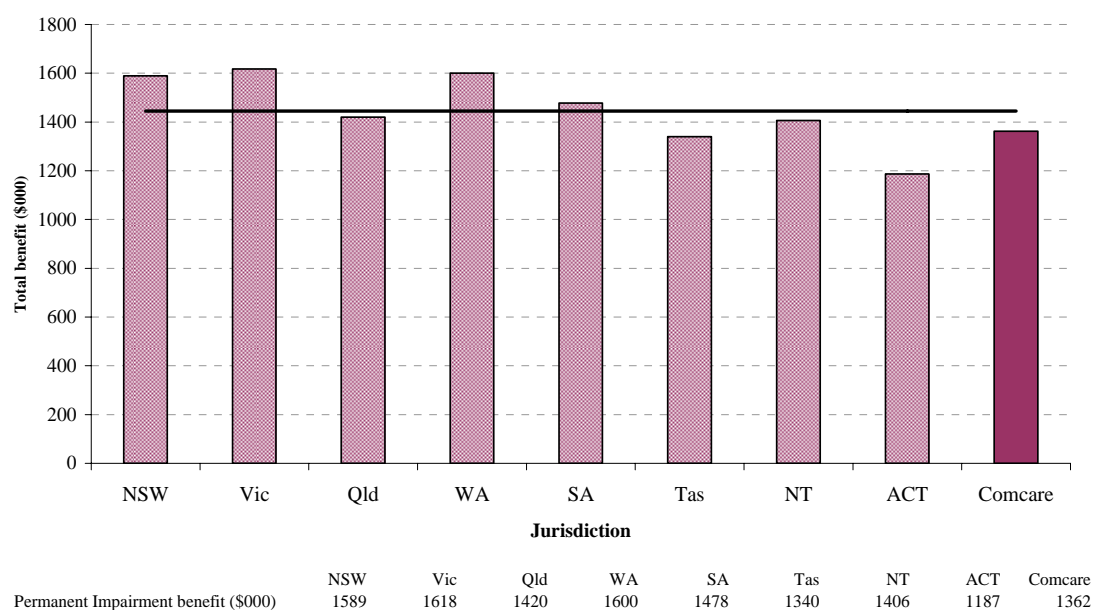
Fig 2.7 Level of Entitlement for Permanent Incapacity – serious injury

Figure 2.7 shows that Comcare permanent impairment benefits for a seriously injured claimant are broadly similar to the average benefits taken across all jurisdictions.

The comparisons in figure 2.7 are relevant to injured workers who suffer a permanent impairment with a long period of incapacity. They are not relevant to injured workers who suffer a permanent impairment but whose incapacity is relatively short-term. For that reason, we have included a second comparison; the lump sum benefits payable for an injury where recovery could be expected within a relatively short time. Figure 2.8 illustrates the permanent impairment lump sum benefits for a worker who suffers the loss of a left hand.

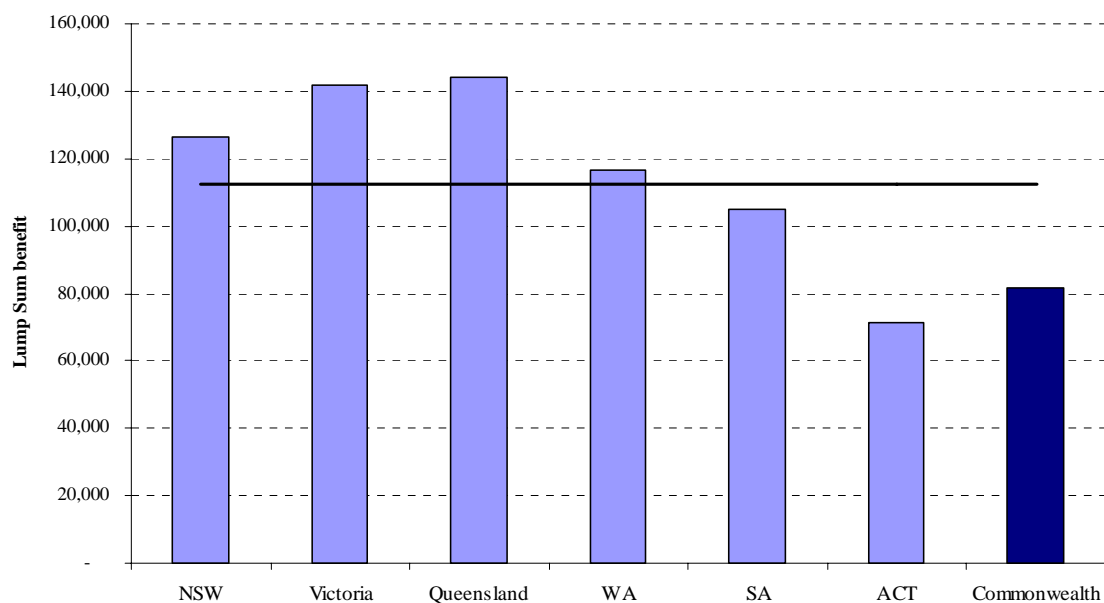
Fig 2.8 Permanent Incapacity Lump sum- loss of left hand

Figure 2.8 shows that the Commonwealth lump sum benefit is considerably (27%) lower than the average lump sum across all the jurisdictions shown. This suggests that lump sum impairment benefits for lower levels of impairment should be increased to a level comparable with those in the states and territories.

The submissions pointed out that the change from the 1st edition to the 2nd edition of the Permanent Impairment Guide had reduced the numbers of claimants receiving Permanent Impairment benefits significantly. Figure 2.9 shows the reduction in numbers of permanent impairment claims determined in two two-year periods: the first from 1 March 2004 to 28 February 2006 (when the 1st Edition of the Permanent Impairment Guide applied) and the second from 1 March 2006 to 29 February 2008 (when the 2nd Edition of the Permanent Impairment Guide applied).⁵⁵

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Data supplied by the ACTU based on information from Comcare. The data relates to claims from the premium paying agencies.

Fig 2.9 Numbers of accepted and rejected permanent impairment claims

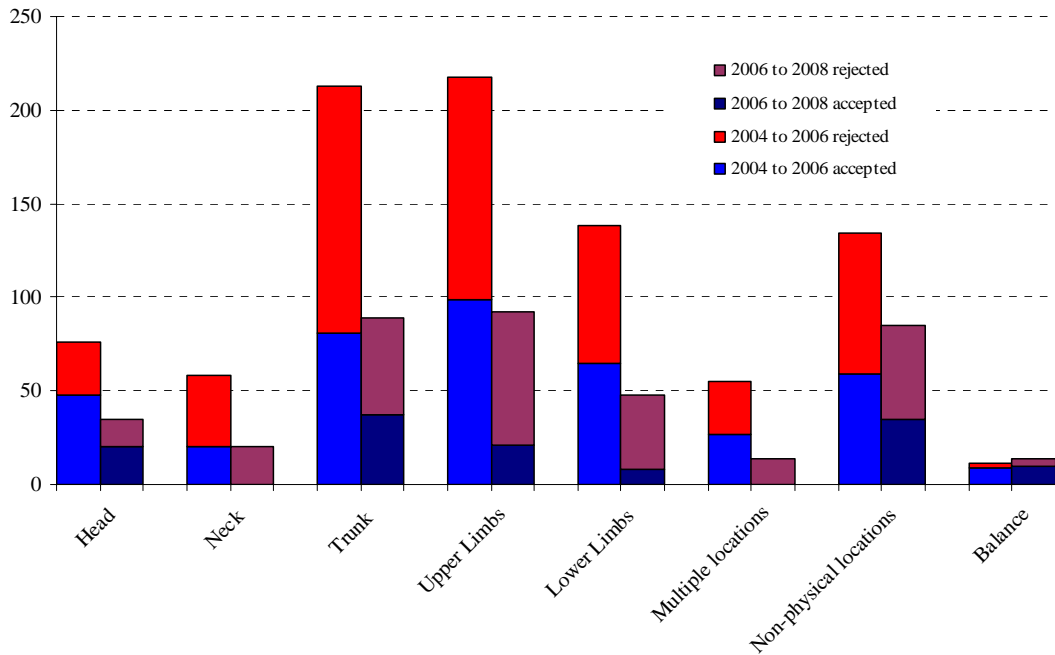


Figure 2.9 shows a decline of approximately 67% in numbers of accepted permanent impairment claims. To put this decrease in context:

- Some caution should be exercised in comparing numbers accepted during the period up to 2006 (when the 1st Edition of the Permanent Impairment Guide had been operating for several years and was well understood by all stakeholders) and the numbers accepted during the initial period of operation of the 2nd edition of the Permanent Impairment Guide, when understanding of its operation may have been developing;
- As a transition arrangement, claims that had been lodged prior to the introduction of the 2nd edition were assessed under the 1st edition. An extended notice of the transitional arrangements period was given. This had the effect of compressing a larger number of claims into the timeframe prior to introduction of the 2nd edition. This artificially inflated the numbers accepted in the prior period;
- Several state and territory schemes have reported decreases in numbers of accepted permanent impairment claims with each change to a later edition of their permanent impairment assessment mechanisms. Decreases in the range 50% to 68% have been reported in the last two years. As a general rule, it appears that a change to a later edition of a guide results in more scientific and more equitable assessments, but that this leads to fewer claimants being assessed as having the same degree of impairment as previously.

The 2nd edition of the Permanent Impairment Guide was also criticised in submissions and during consultation for its apparent complexity, with lack of alignment between the guide and the 10% impairment threshold for compensation to be paid. The trend in Australian workers' compensation jurisdictions has been to adopt later versions of the American Medical Association Guides to the Evaluation of Permanent Impairment ('AMA guides') as each edition is considered to have improved the objectivity of measurement of impairment. The improved objectivity comes at a cost of increased complexity. The 2nd edition of the Permanent Impairment Guide incorporates the latest AMA guide available when it was produced (the 4th and 5th editions).

The practical implications of the lack of alignment between the 2nd edition of the Permanent Impairment Guide and the 10% threshold may lead to delays in reaching a resolution for individual claims, and may be one cause of the large decrease in numbers of accepted claims. Given that the impairment threshold is fixed, it would be desirable for the Permanent Impairment Guide to provide clearer guidance in relation to which claims reach that threshold. We understand that reviews of impairment guidelines typically take years of effort.

The Canute⁵⁶ case has changed accepted practice of combining impairment arising from one incident. It requires the impairment from each injury to be separately assessed. This differs from the previous approach of considering the whole person impairment arising from one incident. The case has changed the application of permanent impairment from what was evidently the legislative intent. Consideration should be given to reversing the post-Canute approach.

The restricted common law benefits, relatively consistent permanent impairment benefit size and reductions caused by moving to the 2nd edition indicate that the Permanent Impairment benefits have become relatively more restrictive than state and territory equivalents.

Because of the inherent complexity in the development of permanent impairment guides generally, there has not been sufficient time to conduct an absolute review of the 2nd edition in the context of this review. To put that in perspective, we note that the review of the 1st edition guide, culminating in the release of the 2nd edition, commenced in 1998, with the 2nd edition released in 2006. We understand that now, in 2008, Comcare believes it has remedied some errata in the 2nd edition which it proposes to incorporate into a third edition.

Recommendation 17.

The lump sum death benefit should be increased to be comparable with those in state and territory schemes.

The lump sum impairment benefit for lower levels of permanent impairment should be increased to be comparable with those in state and territory schemes.

A practical review of the permanent impairment arrangements within the Comcare scheme should be conducted to ensure that it provides reasonable access to and reasonable levels of compensation. The review should address:

- **The possibility of better aligning the guidelines with the 10% threshold**
- **The need for improved understanding by doctors of the guidelines, as increased objectivity results in increased complexity**
- **A realistic and achievable deadline should be set to ensure stakeholders take positive steps to progress this work.**

The arrangements should also be reviewed in light of the Canute decision to ensure that injuries arising from one incident are compensated appropriately.

⁵⁶ Canute v Comcare [2006] HCATrans 246 (19 May 2006)

Journey and recess claims

The removal of journey and recess claims follows the trend in the majority of state and territory schemes. In most cases, they represent a small percentage of total claims (in our experience, around 5-6% of scheme costs).

The vast majority of journey and recess claims involve motor vehicles or public transport vehicles, and in many cases workers' compensation insurers can seek recoveries from the insurers of those vehicles. The payment of journey claims and subsequent recovery action is an inefficient way of recompensing injured workers, and for those claims, removal from workers' compensation area is sensible and promotes efficiency.

There are a small number of claims where the injured worker can not access any form of compensation if he or she is not covered by workers' compensation. These include workers who walk or ride pushbikes, and who have an accident not involving a motor vehicle. Several submissions pointed out that removing journey and recess claims was poor policy, as it discouraged these socially responsible forms of transport. This effect is considered to be very small; firstly, the numbers involved are low, secondly, accident rates are extremely low and thirdly, the level of discouragement will be low as workers' compensation coverage is probably low on people's list of reasons for walking or riding. Overall, the gain in efficiency for most journey and recess claims outweighs the loss suffered by a small number of pedestrians and cyclists.

Form of Compensation

The debate about the most appropriate form of benefits has continued in Australia for many years. The two sides may be characterised as favouring either:

- weekly compensation with statutory impairment and other benefits; or
- weekly compensation with lump sums via common law.

Several of the state schemes with common law place restrictions on the duration or amount of weekly compensation. Some schemes pay statutory lump sum benefits but with alternative access to common law.

In brief, the proponents of long-term weekly compensation consider that lump sums inadequately compensate seriously injured workers. The proponents of common law schemes consider that the individual assessment of loss provides a more accurate benefit.

The submissions fell broadly into the two groups described above. In light of the fairly evenly balance of views, we consider that workers' compensation coverage is appropriate.

Dispute Resolution

Several submissions pointed out that Comcare does not have fixed times for determining disputes, and as a result, are slow at resolving them.

Figure 2.10 shows the number of new disputes as a proportion of new claims lodged each year. Comcare dispute rates are close to the Australian average.

Fig 2.10 Proportion of claims with dispute⁵⁷

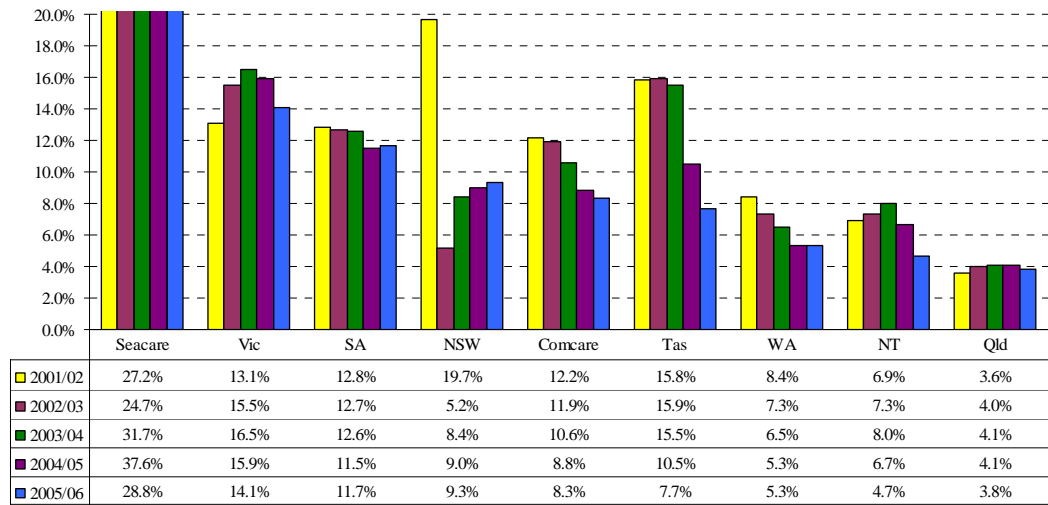


Figure 2.11 indicates the relative delays in dispute resolution. It shows the cumulative percentage of disputes resolved within one month, three months, six months and nine months of the date of lodgement.

Fig 2.11 Percentage of disputes resolved within selected time periods⁵⁸

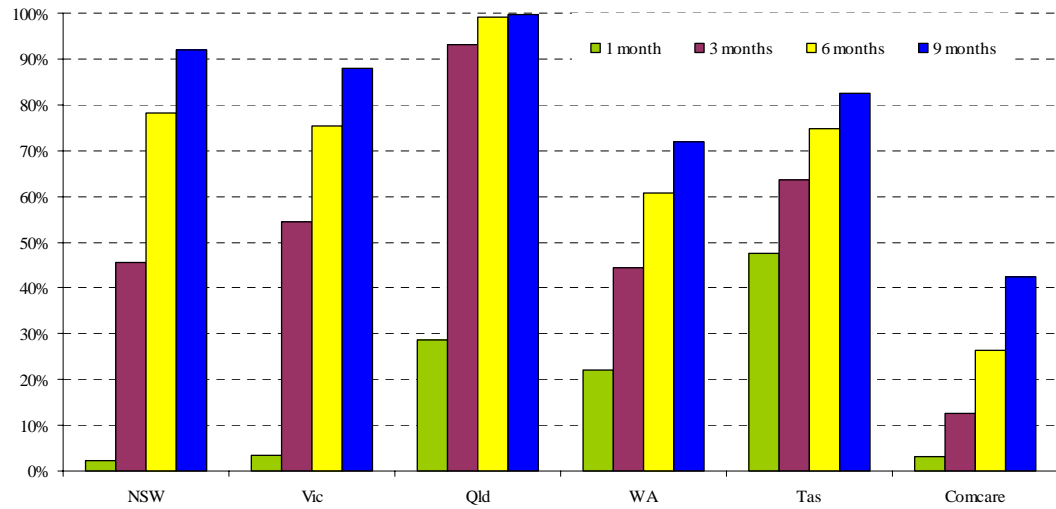


Figure 2.11 indicates that Comcare has resolved just under 50% of disputes within 9 months of lodgement, compared with an average of over 80% for other jurisdictions. This supports the conclusion that some time limits for responding to disputes would be appropriate.

⁵⁷ CPM Indicator 22, page 28, 9th CPM report

⁵⁸ CPM Indicator 23, page 30, 9th CPM report

Recommendation 18.

Consideration should be given to setting time limits within which responses to each stage of a dispute must be provided. Failing a response within that time limit, the response should be deemed to be in favour of the injured worker.

Age provisions

Most schemes continue weekly compensation until retirement age, or if the injured worker is older than 63 at the date of injury, for a maximum of 2 years from injury. Tasmania pays weekly compensation for a maximum of nine years after injury and Queensland for two years unless the injured worker has a permanent impairment of greater than 15%, in which case benefits can extend for five years. The Comcare coverage is appropriate.

Disease

Most jurisdictions have 'deemed' diseases which are considered to be primarily related to or caused by employment, and for which a claimant need only prove the existence of the disease rather than the nature and type of exposure for workers' compensation to be payable. The Comcare provisions in this regard are appropriate.

Exclusions

Most schemes have exclusionary provisions relating to misconduct, self-inflicted injuries or to cases where a worker did not follow prescribed protective requirements. Comcare has an exclusionary clause if the injury results from reasonable administrative action taken by the employer. Several submissions suggested that this clause operates to exclude claims where only a very small portion of an injury may be related to reasonable disciplinary action. This does not appear to be the intention of the Act, and consideration could be given to clarifying this situation.

Nevertheless, overall the exclusionary clauses under the SRC Act are appropriate.

Suspension Provisions under SRC Act

Sections 36(4) and (7) and 37(7) and (8) of the SRC Act provide for the suspension of workers' compensation entitlements should an injured employee fail to participate in reasonable rehabilitation, as per sections 36 and 37 of the Act.

The intention of the rehabilitation provisions of the Act is to provide for assistance to injured workers in recovering from their injury. The intention of the suspension provisions, therefore, is to ensure that workers participate in their own rehabilitation, by virtue of the fact that not to participate in reasonable attempts at rehabilitation could lead to a loss (for the period of the suspension only) of entitlement.

Suspension of entitlements under sections 36 or 37, however, ceases all entitlement for the duration of the suspension provision.

An inadvertent consequence of this is that an employee, for financial reasons, may decide not to undertake any further treatment during the period of suspension. This could lead to a situation where an employee's medical situation deteriorates due to lack of subsequent treatment.

Thus the act of suspension, which was aimed at encouraging the workers to participate in the rehabilitation program, could have the inadvertent consequence of resulting in the deterioration in their condition, and hence a deterioration in their prospects of returning to work.

Recommendation 19.

Two types of suspension should be considered:

- **The first type of suspension would be as the SRC Act currently provides for; suspension of all benefits. This would be used when there is little prospect for the employee ‘coming to the party’ and engaging in a rehabilitation program (for example, they have left the country).**
- **The second type of suspension would be of all benefits except for medical treatment under section 16. This would enable the injured employee to continue to obtain treatment for their injury.**

The choice of which type of suspension to apply would remain a choice for the rehabilitation authority, which is where the suspension delegation currently sits, that is, with the employing agency.

2.2.6 Does the scheme achieve effective return to work outcomes?

Employers/Employer organisations considered that Comcare traditionally has very good return to work outcomes, although one employer considered high weekly benefits were likely to be a disincentive to return to work. They considered that self-insurers tend to perform better when it comes to return to work, regardless of the scheme.

Lawyers/Lawyer organisations suggested that the scheme needs to be altered to provide a better method for resolving claims.

Unions generally thought that Comcare has good return to work rates, however it was suggested this is because the scheme primarily covers the Australian Public Service. They considered that Comcare has slow claims resolution and high disputation rates – there was particular concern regarding process of disputes going to the Administrative Appeals Tribunal. They also considered that restricted common law access and lump sum provisions limit early finalisation of claims and return to work for some claimants.

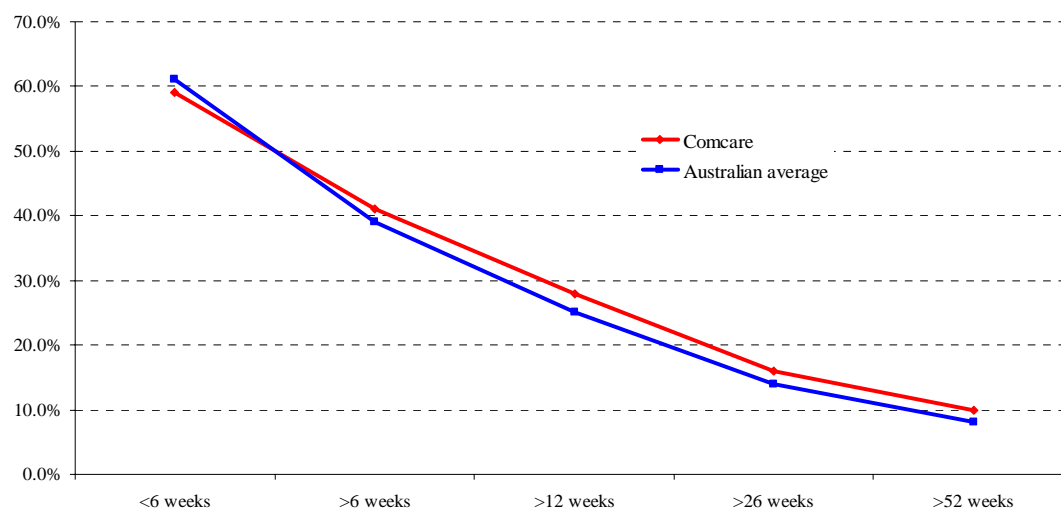
Other organisations generally commented that Comcare has effective return to work processes and outcomes.

The submissions from state and territory Governments suggested that Comcare has high return to work rates, but this is likely because the scheme primarily covers the Australian Public Service. They further suggested that the statistics may change now there are a greater range of industries under self-insurance.

The SRCC considered that Comcare achieves effective return to work outcomes, superior to other schemes.

The following figure compares proportions of claims that reach certain durations of absence. While not all absences cease with a return to work, the relative proportions are indicative of relative return to work rates.

Fig 2.12 Durations of absence⁵⁹



⁵⁹

CPM 9th edition, indicator 9, page 8

The indicator suggests that Comcare achieves similar durations of absence to the Australian average. The Australian average is influenced by some schemes with statutory maxima for weekly compensation, and the preponderance of lump sum settlements. Accordingly, the comparison indicates that the durations for Comcare and the relative return to work rates are comparable.

The conclusion is that Comcare does achieve effective return to work rates, relative to the Australian average.

Implications for labour hire

A consideration of existing federal legislation in connection with return to work requires the recognition of broader issues affecting jurisdictions. One issue relating to return to work is the situation of labour hire workers. There is Australia-wide evidence that labour hire workers who are injured on the job face greater difficulties in relation to securing a return to work because host employers are reluctant to take on injured workers (even where they employed them previously) and because of the temporary nature of labour hire employment.⁶⁰ Workers' compensation agencies have also had to adjust their premium schedule with regard to labour hire workers to prevent risk-shifting (that is, the use of labour hire workers in high risk activities by host employers in order to reduce their overall workers' compensation premium.⁶¹

Thus far state workers' compensation agencies have not taken actions to address the return work problem but it needs to be recognised that for employers covered by Comcare the problem could become more difficult. In the case of an employer covered by state jurisdiction, legislation could be amended to require host employers to take greater responsibility for labour hire workers injured in their workplaces in terms of return to work opportunities (at least during a period of rehabilitation). However, with regard to Comcare covered host employers (both the newly introduced self-insurers and those that have traditionally been covered by Comcare) state authorities would have no power to take such action. In the course of interviews with employers for the review a number were asked whether they tried to provide return to work opportunities for labour hire workers who were injured in their premises. Answers varied with some stating that they did not while others stated that they did in some circumstances.

The disarticulation in terms of worker's compensation coverage and associated return to work opportunities of labour hire workers just described requires consideration even if it is an issue that is still to be addressed by state jurisdictions. It is symptomatic of a range of impacts that changing work arrangements are having on the operation of rehabilitation and return work services (and the provision of workers' compensation) to part and full-time temporary workers (both direct hire and indirect hire) and contract workers.

⁶⁰ M. Quinlan *Developing strategies to address OHS and workers' compensation responsibilities arising from changing employment relationships*, research report prepared for WorkCover Authority of NSW, Sydney, 2002. This report was based on extensive interviews with agency managers and officers in all states as well as employer and union representatives, along with documentary and statistical analysis. Detailed analysis of workers' compensation records in Victoria by Elsa Underhill for her PhD thesis has drawn similar conclusions.

⁶¹ M Quinlan, (2004) "Workers' Compensation and the Challenges Posed by Changing Patterns of Work: Evidence from Australia" *Policy and Practice in Health and Safety*, 2(1): 25-52.

For example, the growth of contracting arrangements (and reclassification of workers from employees to self-employed) has implications for access to workers' compensation and associated services. While some self-employed workers are entitled to workers' compensation (through deeming or voluntary coverage provisions) these definitions vary between different jurisdictions as does the level of information provision and enforcement with regard to such entitlements.

Some jurisdictions have also passed special legislation to protect the entitlements of vulnerable workers such as clothing outworkers (provisions that could be rendered ineffective were principals to secure coverage by Comcare). The use of temporary workers and subcontracting (often to small businesses) has also increased the scope premium avoidance or minimisation as well as raising issues with regard to the determination of injury entitlements.⁶² The present arrangements (and method of expanding Comcare coverage) do not provide a resolution for these issues in terms of equal entitlements to workers' compensation and return to work.

Recommendation 20.

That consideration be given to the implications of changing work arrangements in terms of the provisions of workers' compensation and return to work with a view to providing adequate protection to temporary (both direct and indirect hire) and contractor workers. These measures should be coordinated with a view to establish a consistent approach in this area between jurisdictions.

⁶² M. Quinlan *Developing strategies to address OHS and workers' compensation responsibilities arising from changing employment relationships*, research report prepared for WorkCover Authority of NSW, Sydney, 2002. M Quinlan, (2004) "Workers' Compensation and the Challenges Posed by Changing Patterns of Work: Evidence from Australia" *Policy and Practice in Health and Safety*, 2(1): 25-52.

3 Consultation

3.1 Terms of reference

- (f) 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 a meaningful discussion about OHS and workers' compensation coverage?
- (g) 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?

3.2 Submissions and consultation

Term of reference (f) – Is consultation meaningful?

The submissions from employers and employer organisations, together with subsequent consultation indicated that they considered the current requirements allow for sufficient consultation. Some felt that informing employees was sufficient and did support any requirement that employees must provide agreement for an application to proceed.

The SRCC interpretation confirmed that it does not regard consultation as providing for joint decision-making. The SRCC did not have a formal view on what is an adequate level of consultation, although its clear intent is that it must be genuine. Requirements for consultation could be enhanced through the SRCC issuing guidelines or alternatively, embodying requirements in SRC Regulations.

Unions considered that the legislation is unclear and inadequate regarding the processes that employers should follow when consulting. Their view was that this has resulted in meaningless, if any, consultation.

In several cases we discussed the consultation separately with employers and employees in relation to the same event, and found some consistency:

- The initial notification from the employer was often made at a late stage in the process and was uninformative, providing an announcement that a self-insurance licence was being considered;
- The initial notification generally did not seek comment or feedback;
- The numbers of responses from individuals were generally very low, taken by employers to indicate lack of concern, but equally reflecting the tone of the initial announcement;
- The subsequent notifications of developments was regarded by employers as less important, since the response to the initial notification had been poor;
- Unions found it difficult to gain information;
- Overall, it appeared to us that while the information may be available to interested individuals, the consultation process is considered by employers as being satisfied by dissemination of information. This tends to elicit little response from employees, so that employers regard subsequent consultation as of little importance. Throughout, unions have been largely excluded from consultation;

- Unions have a more comprehensive view of OHS and workers’ compensation issues than individual employees, and were able to present them more effectively;
- Consultation is dependant on the participants’ motivation.

Term of reference (g) – Is consultation ongoing?

In their submissions and consultations, employers and employer associations were satisfied that Comcare and the relevant legislation require ongoing consultation.

The SRCC agreed, but recognised that a specific duty should be included in the OHS Act to require employers to consult.

State and territory governments noted that the OHS Act has removed the right of unions to be consulted on OHS developments. This disadvantages workers as there is evidence that union involvement improves OHS outcomes. State and territory governments considered that the current arrangements are not producing effective consultation.

Unions were concerned that the OHS Act removes the right of unions to be consulted on OHS developments, and contains no union entry provisions. They claim this disadvantages workers as there is evidence that union involvement improves OHS outcomes.

3.3 Analysis

At the level of the workplace, the primary participatory mechanisms provided for under the OHS statutes are HSRs and health and safety committees (HSCs). The powers and functions of HSRs vary from jurisdiction to jurisdiction, but generally include the right to inspect the whole or part of the workplace, the right to be consulted on workplace changes affecting OHS, the right to accompany an inspector visiting the workplace, the right to access certain OHS information, the right to attend interviews between the employer and inspectors and (with the employee’s consent) employees. In some jurisdictions, most notably Comcare, Victoria, South Australia and the Australian Capital Territory, HSRs can issue provisional improvement notices and can direct that work causing an immediate threat to OHS cease. We also note that section 16 of the OHS requires employers to consult employees (and their representatives if this is requested) on the development of health and safety management arrangements. In New South Wales unions have the right to initiate prosecutions under section 106(1)(d) of the *Occupational Health and Safety Act 2000* (NSW) (see also Part 5 Division 3). The *Occupational Health and Safety Act 2004* (Vic) makes provision, in Part 8, for authorised representatives of registered employee organisations (unions) to enter workplaces where the representative reasonably suspects that a contravention of the Act or regulations has occurred or is occurring, and the suspected contravention affects work done by union members, persons subject to a certified agreement to which the union is a party, or persons who are eligible to be members of the union. The authorised representative may enter the workplace for the purpose only of enquiring into the suspected contravention.

As workers bear the brunt of failure to manage OHS, and because they are likely to have first hand knowledge of hazards, and ways of abating them, there are ethical and practical reasons to ensure that workers are engaged in participatory mechanisms. A growing body of evidence demonstrates the positive benefits of worker participation in OHS, including a relationship between objective indicators of OHS performance (such as injury rates or hazard exposures) in workplaces where structures of worker representation are in place (union presence, joint safety committees or worker/union safety representatives). This evidence comes from many countries, including those where participatory mechanisms are not mandated by legislation. Further, evidence suggests participatory mechanisms with higher levels of worker involvement are superior to those where involvement is more circumscribed.

In our review of the OHS Act, we identified some deficiencies in the Act which could undermine the rights of all workers to be consulted on OHS issues. These are considered below in Sections 3.3.1 to 3.3.3.

3.3.1 Workplace participation limited to ‘employees’

A major constraint on participation under the OHS Act lies in the way in which it crafts participatory arrangements for health and safety representatives and committees around the traditional labour law ‘employer-employee’ paradigm, and limits participation to ‘employees’ ‘at the workplace’ in relation to their employer. For example, ‘designated work groups’ under the Act can only be negotiated and constituted by ‘employees’ of the employer. Only ‘employees’ are eligible to stand for election as a HSR and to vote for the HSR. This limitation was identified in a number of submissions including that of the Western Australian government.

Recommendation 21.

The OHS Act should be amended to enable workers who are not employees of the employer (for example, contractors, sub-contractors, and labour hire workers) to be included in arrangements for workplace participation in Part 3 of the Act.

3.3.2 The Role of the Employer in Electing HSRs

The provisions in the OHS Act governing the election of HSRs are problematic, in that, if an ‘election’ is required within a DWG for a HSR, under section 25A ‘the *employer* of the employees in the designated work group must invite nominations from all employees in the group’, and if there is more than one candidate, ‘the *employer* must conduct, or arrange for the conduct of, an election at the employer’s expense. Under the Safety Arrangements Regulations (reg 6), the employer and employees in the group must agree on the organisation (for example, the Australian Electoral Commission) that will conduct the election. The employer may itself conduct the election.

We consider that it is inappropriate for employers to have any role in the election of HSRs. None of the other OHS statutes gives such a role to the employer. The whole point of the HSR provisions is to empower employees and to ensure that they are able to raise OHS issues with employers. In the original 1991 Act, unions could nominate employees for the HSR role, and conduct elections for HSRs when they were necessary. It contradicts the underpinning purpose of HSRs to enable employers to be involved in their process of election.

Historically, unions have provided pivotal logistical support to HSRs (in the form of training, provision of materials, holding forums where HSRs can learn and interact, and protecting HSRs from victimisation) and in our experience, HSRs are almost exclusively confined to workplaces with a union presence. The role of HSRs is to protect the OHS rights of workers on site. In practice, they generally work collaboratively with managers to resolve OHS issues and research has found that their presence (when adequately empowered and trained) enhances the management of OHS.⁶³ On occasion, however, disagreements will arise.

When 'post-Robens OHS legislation' was introduced into Australia in the 1980s the appointment of HSRs, and their powers to issue provisional improvement notices (where they perceived workers faced an imminent and serious risk) aroused considerable concern in parliamentary debates. However, events since this time indicate these concerns were unfounded. For example, in Victoria the power of HSRs to issue provisional notices was retained through a succession of governments of very different persuasions. As noted, research indicates HSRs make a positive contribution to OHS management. In those jurisdictions where HSRs are empowered to issue a provisional improvement notice this can only be done following attempts to resolve the issue with the employer and any HSR found to have abused their powers in this regard can have their appointment terminated. The issuing of such a notice usually leads to a visit by an OHS inspector who evaluates the action taken.

One employer interviewed by the review indicated that they believed HSRs had been pursuing issues at the behest of a union for non-OHS purposes. For its part, the submission of the union claimed that the employer had failed to provide adequate support for HSRs, including delaying their training. We were unable to explore these claims and counter-claims (although we are aware of OHS issues brought before the Australian Industrial Relations Commission). However, in the broader context we are unaware of evidence that provisional improvement notices or other actions to raise OHS issues by HSRs have been used in a generally frivolous manner or to pursue other purposes. There are provisions in the OHS Act (and state OHS Acts) to remove from office HSRs who misuse their powers.⁶⁴ In our extensive research with state OHS inspectorates, reference to incidents relating to the abuse by HSRs of their powers was exceptional and it was not raised as a significant issue.

⁶³ For a review of some Australian research Biggins, D., Phillips, M. and O'Sullivan, P. (1991), 'Benefits of Worker Participation in Health and Safety', *Labour and Industry*, 4(1):138-59.

⁶⁴ The employer representative just referred to indicated that costs and administrative burden had deterred them taking this action.

During the course of several workplace visits undertaken for this review issues relating to the role of HSRs were identified. In one construction site, actions by a union had led to an inspection by a state OHS inspector who issued an improvement notice to a contractor on site in relation to one of the concerns raised. One of the review team attended a follow up visit involving the state OHS inspector and two Comcare investigators. At this visit, discussions were held with the HSR recently elected via the employer to cover both their employees and those of the relevant contractor. Management for the Comcare self-insurer indicated that the issues in connection with the notice had never been raised with them prior to the industrial action (action which the employer judged illegal and was now pursuing the union in connection with). The HSR appeared to have had no contact with the union which begs the question as to whether this issue might have resolved earlier and more amicably had a different electoral process been in operation. At another employer, a HSR had issued a provisional improvement notice in relation to parking place security – an action the employer did not dispute – but the HSR was unhappy with the employer response and so Comcare investigators were following up on this.

Recommendation 22.

In principle, employees and their representatives should take responsibility for initiating processes for the election of HSRs. However, that there may be occasions where these processes are not triggered by employees, in which case the employer should be able to take steps to get the process going. Elections can be conducted by a relevant union, or where there is no union, by the employees in that work group. Employees should have the option of calling in a third party to conduct the election.

3.3.3 Union entry

The OHS statutes in the Australian Capital Territory, New South Wales, Queensland and Victoria each contain union entry provisions. There are no union entry provisions in the OHS Act, nor is there in the Northern Territory, South Australian, Tasmanian or Western Australian Acts. Further, there is an argument that the recent amendments to section 4 can be interpreted to mean that the union entry provisions in the state and territory Acts do not operate.

We consider that the right of an authorised union official for the purposes of investigating any suspected breach of OHS legislation should be included in the OHS Act. The Victorian Maxwell Report (see 215-221) examined this issue (including the New South Wales experience with union right of entry provisions) and concluded that such a right should be included in the Victorian OHS Act. We recommend right of entry provisions in the OHS Act which are based on those to be found in New South Wales, Victoria and Queensland. In relation to the question of whether union representatives should have an enforcement role, we disagree with the Maxwell Report (which recommended at page 219) that ‘the right of entry should not carry an enforcement role’).

Recommendation 23.

The Commonwealth further investigate the possibility of vesting authorised union representatives who discover serious contraventions of the OHS Act during their authorised investigation with some enforcement or referral powers. These powers would only be available where there is no health and safety representative already at the workplace.

A number of submissions to the Review, and not simply those from unions but other bodies including a number of state governments (or their OHS agencies), believed the current federal arrangements inhibited union input into OHS. Reference was also made to other laws granting union or district safety representatives access and special powers in particular industries (notably district check inspectors under Queensland⁶⁵ and NSW mining legislation) that would be affected were Comcare to grant coverage to employers in this industry.⁶⁶ Several submissions (such as that of the ACTU) were especially critical of changes to the OHS Act in 2005 that removed references to unions and placed additional administrative requirements on the capacity of unions to assist workers on OHS matters.

Union right of entry was also raised during in interviews and workplace visits. During interviews employer representatives expressed a range of views. For example, the OHS manager of a large Commonwealth agency expressed the view that his organisation did not see the need for such access because of the elaborate communication mechanisms with workers already in place. By way of contrast, the OHS manager for a transport operator saw union involvement/visits as another source of input that would enhance the OHS management system. One workplace visited by the Review is currently the subject of court proceedings relating to the entry of union officials onto that site.⁶⁷

⁶⁵ *Mining and Quarrying Health and Safety Act 1999* (Qld) and *Coal Mining Safety and Health Act 1999* (Qld).

⁶⁶ In this regard it should be noted that submission from a large mining conglomerate, called for more open admission to the Comcare regime.

⁶⁷ *John Holland Pty Ltd & John Holland Group Pty Ltd and Construction, Forestry, Mining and Energy Union (NSW Branch) & Peter Primmer & Scott Paul Wilcox, Federal Court of Australia, No. NSD 1986 of 2007.*

For their part, unions emphasised the importance of ready right of entry as a critical means of safeguarding the OHS of their members and enhancing OHS more generally. A number of examples were cited to illustrate this. For example, the CFMEU stated that it undertook numerous inspections of construction work-sites while the Communications Electrical Plumbing Union (CEPU) had undertaken member surveys in relation to OHS issues at particular workplaces.⁶⁸ For its part, the Financial Sector Union (FSU) referred to its campaign to have security barriers erected in bank branches to protect staff from violence and emotional trauma associated with robberies. The FSU argued that following unsuccessful approaches to a number of banks the union gained access to bank-sites following robberies to collect information (including photographs) that were then used to launch four successful prosecutions against the banks concerned under the NSW OHS Act.⁶⁹ The FSU believed these actions were instrumental in bringing about a change in response and the adoption of enhanced security measures and a substantial drop in the number of NSW branches subjected to robbery attempts (from 7.9% in 2002 to 1.3% in 2006).⁷⁰

Right of entry also needs to be viewed in the context of the fear of victimisation of workers' who raise an OHS issue referred to elsewhere in this report. The right of entry enables unions to investigate an OHS issue which workers are afraid to raise or pursue directly with an inspectorial agency or to gather evidence when a worker or HSR has been victimised. Employers interviewed by the Review believed that there was no evidence that workers or HSRs had been bullied or victimised with regard to OHS. This is not a view shared by several union submissions⁷¹ or by inspectors in state jurisdictions (see above) and there is evidence of cases relating to this in large and unionised workplaces similar to the new class of self-insurers under Comcare.

Victimisation of a worker for raising an OHS issue is a clear breach of every OHS law, but proving such cases is difficult and the few cases where action has been taken overwhelmingly involve HSRs (but see *Boylan Distribution Services Pty Ltd* (unreported, Sunshine Magistrates Court, Victoria, 29 July 2003, which involved the dismissal of a casual truck driver for refusing to drive an unsafe truck). For example, a HSR at a Victorian factory successfully sought reinstatement from the Federal Court when he was dismissed after complaining to his union that constant surveillance of his activities and discussions with other workers by a manager amounted to bullying and harassment (*Claveria v Pilkington Australia Ltd* [2007] FCA 1692). It cannot be presumed that cases coming before the courts represent the totality of the problem.⁷²

⁶⁸ CEPU Communications Division, Victorian Branch, *Survey & Body-mapping exercise at Dandenong Letters Centre May/June 2007*

⁶⁹ As noted elsewhere, NSW is the only jurisdiction to permit unions to prosecute for breaches of OHS legislation. We are aware of other instances where unions have used this option successfully (such as Maritime Union of Australia and the Nurses Union) and it is seen as important but only in particular circumstances. As unions acknowledged themselves, there have been relatively few cases and the logistical and financial costs associated with pursuing a prosecution means this is unlikely to change.

⁷⁰ The FSU had used workplace visits to identify and record other OHS issues and provided the review with information/records pertaining to the activities just mentioned.

⁷¹ Such as the submission of the CEPU (Victorian Branch) that cited a number of cases in relation to Comcare covered employers it dealt with.

⁷² For their part, inspectors we interviewed indicated it was difficult to establish when a worker had been victimized because workers could be dismissed ostensibly for other reasons. This was illustrated by a case witnessed by researchers accompanying inspectors to a bakery in Tasmania where the inspector noted that while the complaint had been lodged by a family friend of the young

A number of employers have tried to use the *Workplace Relations Act 1996* (C'th) to defeat complaints of victimisation. For example, when a crane driver in NSW, dismissed after he had raised concerns about the OHS risk assessment process in a Job Site Risk Analysis required by his employer sought reinstatement, the employer attempted to defeat the application by arguing that relief from victimisation was excluded by the operation of section 16 of the *Workplace Relations Act*. The bench rejected the challenge, making reference to the Road Transport Mutual Responsibility judgement and endorsing a submission by the NSW Minister for Industrial Relations (who had intervened in the case) regarding the public interest in protecting the freedom of workers to raise health and safety issues in the workplace, and their participation as HSRs or in workplace committees (*CFMEU (NSW) (o/b of Hemsworth) v Brolrik Pty Ltd t/as Botany Cranes & Forklift Services* [2007] NSWIRComm 205, 21 September 2007). The judges stated (at para 71) that establishing 'statutory remedies to prevent and to respond to instances of victimisation which might occur where employees seek to engage in those very processes which are aimed at improving and promoting health, safety and welfare at work is vital...It is clear that consultation with, and participation by, employees is certainly seen as an integral component in ensuring that workplace health and safety objectives, as set out in s3 of the OHS Act, are achieved.'

Recommendation 24.

The current right of entry requirements for unions are unduly restrictive and may, given apparent ambiguities or confusion on the part of some employers, be conducive to litigation rather than to a constructive resolution of OHS problems.

Entry requirements should be revised so they equate to those found in other jurisdictions such as NSW and Victoria.

workers involved the mother of the one of the workers had tried to withdraw the complaint for fear it would result in their losing their jobs. In this case there is no evidence the workers were victimized but the issue is one of climate and perceptions. As state level, unions can lodge complaints or information on sites where they have no members. Researchers accompanied inspectors on a number of such visits, including a major construction site in Perth where the chief contractor was a committed 'non-union' operator. The CFMEU made two complaints - one that the major cranes leased for the project lacked working weight measures (verified upon inspection) and one that steel reinforcing bars protruding vertically from concrete slabs lacked plastic caps to protect workers falling on them (inspection revealed that all but a few bars were capped). The inspector noted that a considerable proportion of the workforce were s457 visa holders from the Philippines and told researchers that unions were concerned these guest workers came from a country with lower OHS standards and were, in any case, unlikely to complain about OHS.

4 Finance

4.1 Terms of reference

- (h) Do the financial arrangements for self-insurers present any risk to premium payers in the scheme or to the Commonwealth?
- (i) What are the likely impacts on state and territory workers' compensation schemes of corporations exiting those schemes to join Comcare?

4.2 Submissions and consultation

Term of reference (h) – Risk to premium payers or the Commonwealth

As with state and territory schemes, Comcare has two distinct groups: premium payers and self-insurers. The two groups are quite separate and distinct as far as financial arrangements are concerned. In other words, a shortfall in the funding of the premium paying scheme would not have a direct impact on self-insurers, and vice-versa.

In the event of the financial failure of a self-insurer, the first call would be made on the self-insurer's bank guarantee held by the scheme administrator - which is independently assessed on an annual basis. The regular assessment of financial viability and independent actuarial reviews of necessary bank guarantees means that the risk of insufficiency is small.

If however, a bank guarantee was inadequate, there would be some moral pressure for injured workers' compensation to be guaranteed by other means, such as a guarantee fund. Such funds have been established following failures in the past, and levies could be raised on premium payers and/or self-insurers. Finally, the Commonwealth may be considered as the last source of such a guarantee.

Indicator 18 in the most recent CPM report⁷³ shows that Comcare's ratio of assets to liabilities has varied between 112% and 119% in the four years to 2005/06. Previous reports show ratios above 120% for earlier years. The ratios indicate that premium paying part of the scheme has been and remains fully funded.

No submissions presented evidence that the financial arrangements for self-insurers present any risk to premium payers in the scheme or to the Commonwealth. However, some claimed that the scheme's financial position is deteriorating, possibly implying that any additional risks could not be easily supported.

The prudential and financial requirements of licensees include reinsurance, bank guarantees and independent actuarial review of liabilities. We consider that these requirements are sufficient to reduce the risk to premium payers or the Commonwealth to minimal levels.

⁷³ Workplace Relations Ministers' Council, Comparative Performance Monitoring Report, Ninth Edition, Canberra, February 2008

Term of reference (i) – Impact on state and territory schemes

The Productivity Commission⁷⁴ concluded that the likely impact on state and Territories workers' compensation schemes was likely to be small. Some state schemes have introduced exit arrangements to reduce the risk that 'tail' claims left behind when an employer exits to join the Comcare scheme. Consultation with several of the state schemes indicated that they had commissioned actuarial advice in relation to the potential for exits to impact on the financial position of the scheme, and that advice was largely consistent with the conclusions in the Productivity Commission report.

Some of the submissions suggested that the exits presented a significant threat to the viability of state and territory schemes, or would impact negatively on the employers and employees that remained in the scheme. We believe that the consistency of the evidence in the Productivity Commission report with the actuarial advice provided to state schemes indicates that these threats are minimal, with the current arrangements.

4.3 Analysis

We note that Indicator 18 of the recent CPM Report shows that most schemes have experienced increasing funding ratios. This has been attributed to improved investment returns and reforms introduced into a number of schemes. The table on page 20 of the Comparison of Workers' Compensation Arrangements in Australia and New Zealand⁷⁵ Report shows average premiums over the last 12 years. Table 4.1 below extracts the last four years' premiums.

Table 4.1 Average premiums for Australian jurisdictions

Jurisdiction	2006/07	2005/06	2004/05	2003/04
Comcare	1.77%	1.77%	1.67%	1.43%
Comcare (ACT Gov)	3.03%	3.08%	3.07%	3.13%
Vic	1.62%	1.80%	1.99%	2.22%
NSW	2.17%	2.51% ¹	2.57%	2.80%
SA	3.00%	3.00%	3.00%	3.00%
WA	2.12%	2.32%	2.25%	2.34%
Qld	1.20%	1.43%	1.55% ²	1.55%
Tas	1.92%	2.19%	2.46%	2.78%
NT	n/a	2.70%	2.95%	3.06%
ACT	n/a	3.32%	3.58%	3.53%

Notes: 1. Average if rates applying in year

2. Definition of wages changed to include superannuation

Table 4.1 shows that average premiums in all states and Territories have either remained unchanged or have decreased over the last four years. Our view is that the reforms introduced into a number of schemes have been the primary cause of these decreases. The decreases show that the financial impacts of exits to the Comcare scheme have been insignificant.

⁷⁴ Productivity Commission 2004, National Workers' Compensation and Occupational Health and Safety Frameworks, Report No. 27, Canberra, March 2004

⁷⁵ Australian Safety & Compensation Council, Comparison of Workers' Compensation Arrangements in Australia and New Zealand, Canberra, October 2006

4.4 Conclusions

- (h) **The prudential and financial requirements of licensees mean that the risk to premium payers or the Commonwealth is minimal.**
- (i) **All the available evidence suggests that the actual impacts on state and territory workers' compensation schemes of corporations exiting those schemes to join Comcare have been insignificant. The likelihood of future impacts being significant is low.**

5 Access

5.1 Terms of reference

- (j) 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 OHS and workers' compensation systems?
- (k) 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?

5.2 Submissions and consultation

Term of Reference (j) – Why do companies self-insure? Alternatives?

The submissions fell into two main groups in their analysis of the reasons that private companies seek self-insurance with Comcare:

1. Employers seek an integrated approach to prevention, rehabilitation and claims managements and Comcare is the only available option; or
2. Employers are seeking a less stringent safety regime and a lower cost, at the expense of employee safety and benefits.

Interestingly, a nearly universal theme in all submissions was that national consistency was preferable to the current arrangements. The debate seems to be around the likelihood of practical effective harmonisation within a realistic timeframe. Employers and employer groups generally considered that the historical experience of harmonisation efforts has been sufficiently poor that they are pessimistic about achieving a practical outcome within any reasonable timeframe. Other submissions considered that the pursuit of a nationally consistent framework was the only sensible approach, and that the likely delay in achieving that goal was worth the wait.

It was equally clear that all participants viewed the expansion of coverage by Comcare to a wider range of employers as a likely outcome if significant progress towards national consistency was not demonstrated quickly. That is, while they concede that the outcome of separate state, territory and Comcare schemes with the existing gaps and shortcomings was “second best”, they regarded its achievement as more likely than the first choice of national consistency.

On balance, we believe that it is preferable to address the perceived weaknesses in the current arrangements, while working towards a nationally consistent framework of OHS that will remove the current gaps and shortcomings.

Term of Reference (k) – Should eligibility rules be changed?

Submissions by employers generally identified a need for large, multi-state corporations to have one workers' compensation regime, whether under Comcare or an alternative scheme. Some of the submissions from states and some unions acknowledged that need, but they generally felt that OHS should remain with the states, particularly given the harmonisation process now underway. Unions felt that self-insurance is a privilege, not a right, and that applicants need to demonstrate superior OHS performance.

Several submissions recommended additional criteria that employers must have a certain number of employees and operate in a minimum number of states before being eligible. Some submissions for other organisations called for the removal of the competition test.

Process for self–insurance licence and historical reasons for eligibility test

There is a two step process in gaining a self insurance licence under Comcare:

- the grant by the Minister of a declaration of eligibility to apply for a licence (section 100 in Division 1 of Part VIII of the SRC Act); and
- the licensing provisions in the Act (Divisions 2 to 6 of Part VIII).

Both steps are linked, but the decisions of the Minister and the Commission are made independently, so that a declaration of eligibility does not automatically lead to the grant of a licence.

Self-insurance arrangements in the Comcare scheme were introduced to provide competitive neutrality for those corporations competing in the marketplace with Commonwealth-owned, or formerly owned, businesses to ensure that the Commonwealth did not have an unfair advantage.

For a number of years, all of the self-insurers under the Comcare scheme were either owned or formerly owned Commonwealth authorities. Following the High Court's decision in *Attorney-General (Vic) v Andrews [2007] HCA 9*, which upheld the validity of the SRC Act's self-insurance provisions, a number of corporations sought to self-insure under the Comcare scheme.

Productivity Commission Report

The 2004 Productivity Commission report⁷⁶ stated:

There was widespread support amongst participants for a national framework for workers' compensation. However, participants differed as to what they considered would constitute a suitable model. Some favoured a model centred on cooperation amongst the jurisdictions.

Some favoured a nationally available scheme which was offered to employers as an alternative to existing state and territory schemes. And some called for a single national workers' compensation scheme which could draw on best practice elements of existing schemes.

As noted in chapter 2, the Commission identified several models of national frameworks for both occupational health and safety (OHS) and workers' compensation. In response to participants' comments and its own analysis, the Commission has confined its assessment of models for workers' compensation to the following four:

- self-insurance under the Australian Government's Comcare scheme (model A);
- an alternative national self-insurance scheme (model B);
- an alternative national insurance scheme (model C); and
- a new national cooperative body (model D).

The 2004 Productivity Commission report recommended that:

⁷⁶ National Workers' Compensation and Occupational Health and Safety Frameworks Productivity Commission Inquiry Report No. 27, 16 March 2004

In essence, the proposed strategy is for the Australian Government to introduce model A immediately, and commence drafting appropriate legislation for the alternative national self-insurance scheme under model B. The appropriateness and timing of implementing model C could be assessed at a later date. These schemes would operate in parallel to existing state and territory schemes. The expectation from model D would be for an increasing level of consistency of schemes across Australia.

The primary criteria for self-insurance should be that employers have good OHS arrangements, a sound financial base and the ability to manage the self-insurance process. Additional criteria identified in submissions were that employers should be of a minimum size (number of employees) and have operations in a minimum number of states. The current eligibility test does not contribute to any of these desirable attributes, and exists for historical reasons. On objective grounds, it is difficult to justify maintaining this as a best practice policy.

We acknowledge that removal of the competition test will potentially open the scheme to all industries and large corporations. This will have consequences in terms of public policy, government reform, relations between federal and state government and the economy. Nonetheless, removal is consistent with the strategy recommended in the 2004 Productivity Commission report.

A second improvement is that group licences, common in other jurisdictions, should be introduced. An unintended consequence of the competition test under s100 is that Minister has to assess eligibility of only one corporation at a time, even for entities within the same corporate structure. Group licences provide administrative simplicity by reducing duplication and would have the further advantage in broadening the risk pool thus adding to the prudential safety of the scheme.

5.3 Conclusions

We believe that it is preferable to address the perceived weaknesses in the current arrangements, while working towards a nationally consistent framework of OHS that will remove the current gaps and shortcomings.

We suggest that DEEWR consider:

- **replacement of the competition test with stringent rules to ensure that potential self-insurers have best practice OHS arrangements, a sound financial base and the ability to manage the self-insurance process and introducing group licences.**

Appendix A Submissions

The following submissions were received. For ease of cross-referencing, each submission has been given a unique identifying number. Confidential submissions have been de-identified.

A.1 List of submissions

Reference	Submission
1	Comcare
2	K&S Freighters
3	John Holland
4	South Australian Government
5	Australian Postal Corporation
6	Institute of Public Affairs
7	Neil Morris
8	Infrastructure Asset Development Branch of the Department of Defence
9	Adecco
10	Ramsay Health
11	Individual Person
12	Construction Forestry Mining Energy Union - Mining and Energy Division
13	National Australia Bank
14	Australian Workers' Union Queensland
15	Vedior
16	Queensland Government
17	National Seniors Association
18	Worksafe Western Australia
19	Law Society New South Wales
20	Communications Electrical Plumbing Union - Combined Unions
21	Commonwealth Bank of Australia
22	Police Federation of Australia
23	Corporation
24	Australian Rehabilitation Providers Association
25	Aon Consulting Pty Ltd
26	Australian Manufacturing Workers Union
27	Insurance Council of Australia
28	Shop, Distributive & Allied Employees' Association
29	Rail, Tram and Bus Union
30	Australian Lawyers Alliance
31	Insurance Australia Group
32	Maritime Union of Australia
33	Communications Electrical Plumbing Union - Communications Division
34	Australian Chamber of Commerce and Industry
35	Rio Tinto
36	New South Wales Government
37	Linfox

Reference	Submission
38	Johnson Withers solicitors
39	Housing Industry Association Ltd
40	Queensland Law Society
41	Harley Dennett
42	Community and Public Sector Union
43	Telstra
44	Individual Person
45	Australian Council of Trade Unions
46	Australian Industry Group
47	National Council of Self Insurers Inc
48	Association of Consulting Engineers Australia
49	Safety, Rehabilitation and Compensation Commission
50	Maurice Blackburn Lawyers
51	Australian Bankers Association
52	Union
53	Union
54	Construction Forestry Mining and Energy Union Joint Union submission.
55	Recruitment & Consulting Services Association
56	Individual Corporation
57	Bourne Lawyers
58	Law Council of Australia
59	Tasmanian Government
60	Mellor Olsson Lawyers
61	Queensland Council of Unions
62	Ian Emery
63	Moloney and Partners
64	Finance Sector Union
65	Communications Electrical Plumbing Union - Post and Telecommunications Division Victorian Branch
66	Transport Workers Union of Australia
67	Individual Corporation
68	Individual Person
69	Woolworths
70	Visy
71	Bis
72	WorkCover Western Australia
73	QWCSIA
74	Worksafe Victoria
75	Andersons Solicitors
76	Superannuated Commonwealth Officers' Association
77	Scales & Partners
78	Individual
79	Unions ACT
80	Individual

Appendix B Consultation

The following consultation was undertaken. For ease of cross-referencing, each consultation meeting has been referenced to the appropriate submission.

B.1 List of consultation meetings

Ref	Submission	Date
1	Comcare	28/02/08
1	Comcare investigators	4/03/08
1	Comcare investigators	5/03/08
1	Comcare investigators	6/03/08
1	Comcare investigators	7/03/08
1	Comcare investigators	11/03/08
1	Comcare	13/03/08
1	Comcare investigators	26/03/08
2	K&S Freighters	4/04/08
5	Australian Postal Corporation	4/04/08
6	Institute of Public Affairs	27/03/08
12	CFMEU – Mining and Energy Division	11/03/08
16	Queensland Government.	14/03/08
26	Australian Manufacturing Workers' Union	20/03/08
30	Australian Lawyers Alliance	20/03/08
37	Linfox	4/04/08
42	Community and Public Sector Union	15/04/08
43	Telstra	10/04/08
45	Australian Council of Trade Unions	11/03/08
46	Australian Industry Group	4/04/08
47	National Council of Self Insurers Inc	19/03/08
49	Safety, Rehabilitation and Compensation Commission	20/03/08
59	Department of Justice Tasmania	18/03/08
64	Finance Sector Union	20/03/08
65	CEPU Post and Telecommunications Vic	13/03/08
65	CEPU Post and Telecommunications Vic	14/03/08
70	Visy	23/04/08
74	Vic Worksafe	10/04/08

Appendix C Benchmarking of Inspections

Interviews with senior Comcare management, including those responsible for enforcement, indicated that the agency was less disposed to enforcement than ‘some’ state jurisdictions (and prior to 2004 had no power to prosecute). Over a number of years Comcare has pursued a compliance strategy that placed more emphasis on OHS management systems than their state counterparts (although it would be wrong to infer that states have not pursued systems – see for example SafetyMAP in Victoria and Worksafe Plan in Western Australia). According to its management, Comcare preferred voluntary compliance and enforceable undertakings based on cooperation and corporations willingly subjecting themselves to strict compliance regimes.

Some caution needs to be taken with regard to comparison between Comcare and the state jurisdictions that typifies the latter (or some of them) as relying largely on punitive enforcement to the exclusion of education/information provision. This is based on misconceptions that education can be neatly separated from other measures and that the issuing of verbal directions and notices is punitive and has no educative role. State agencies with which we familiar spend a considerable amount of funds on education activities (both at workplace and community level) and also integrate education into specific campaigns in a strategic fashion. They have actively developed new sanctions such as enforceable undertakings - a number pioneered moves in this direction prior to the Commonwealth. Further, in the more than 100 workplace visits we conducted with state OHS inspectors we noted that they spent considerable time imparting information and discussing OHS hazards and control measures (including systems) more generally with managers (an observation independently confirmed by a Swedish researcher who also took part in a number of these visits). In practice enforcement agencies must use both persuasion and punishment and the real issue is the balance struck between these activities (along with the recognition that strategic enforcement can help to ‘educate’). Further, assessing the level of compliance is difficult as a low number of enforcement actions may be more a reflection of enforcement policy than the actual number of breaches and neither can workers’ compensation claims rates be equated with compliance. The observations made below should be read in this context.

In seeking to assess the activities of Comcare investigators relative to state and federal inspectorates the review drew on information derived from a recently completed large Australian Research Council research project on the implementation of OHS standards (2004-2006 with ongoing contact has been maintained since this time). This project covered four jurisdictions seen to be reasonably representative because they entailed both small and large inspectorates in terms of population and geographic size (namely Queensland, Tasmania, Victoria and Western Australia). As it entailed a detailed examination of inspectorate activities it provided a basis from which to benchmark those of Comcare, notwithstanding some differences in scope and role that will be addressed. Apart from analysis of agency documents and statistics, detailed interviews were undertaken with 170 agency staff, including 29 senior managers, 21 ex inspectors and 105 current inspectors using a semi-structure questionnaire that addressed matters of resourcing, selection/training, standards, enforcement and distribution of tasks. In addition to this, we undertook two rounds (2004 and 2006) of participant observation, spending a day as an observer with a total of 42 inspectors, including accompanying them on at least one visit to a workplace where the nature of the inspection, issues raised and actions taken were duly recorded in a notebook. The total number of workplaces visited with inspectors was 118 (see Table C.1).

For this review interviews were conducted with seven Comcare managers and at least 15 investigators (a number of these interviews occurred in groups). This roughly matched the interview profile for each of the other jurisdictions with which we had conducted research and interviews covered similar terrain (recruitment/selection, training, resourcing, standards and systems used, data sources, enforcement policies and practices). With regard to the workplace visits with Comcare investigators detailed notes were taken using the same protocols that had been used with state agency inspectors (size and location of workplace, why the visit had been made, who was spoken to, issues raised and actions taken).

As can be seen from Table C.1 below, workplace visits accompanying state inspectors covered a range of industry sectors (matched as far as possible to similar types of workplaces in each round), including construction sites, factories, shops, warehouses, schools, childcare centres, farms, forestry co-operatives and prisons. Visits also included an array of small and large workplaces and both unionised and non-unionised sites. The visits undertaken were a normal part of the inspectors' task and were not influenced by the presence of researchers. For the purposes of the Comcare review we asked to be taken on routine visits (that is, visits that would be undertaken as part of normal activities). Given Comcare's more restricted coverage the industries could not match all those undertaken with state agencies. Further, the majority of workplaces visited with state inspectors were small (that is, fewer than 50 employers). However, it needs to be stressed that not all workplaces covered by Comcare are large (and one visit conducted matched the profile of being small workplace) that state visits included a significant number of large workplaces and large employers comparable in size to those currently self-insured with Comcare and also operating in the same industries (such as construction and warehousing/transport). Indeed, a number were major competitors to self-insurers.

Table C.1: Accompanied workplace visits by inspectors/investigators by industry/sector¹

	State jurisdiction visits ²			Comcare visits	
	2004	2006	Total (%)	2008	Total (%)
Construction	15	8	23 (19.8%)	5	50%
Manufacturing	17	17	34 (29.3%)	0	0
Transport & Warehouses	6	6	12 (10.3%)	3	30%
Retail & Wholesale	7	5	12 (10.3%)	0	0
Education, personal and administrative services	18	17	35 (30.2%)	2	20%

Notes: 1. Includes multiple visits in one day

2. Over 40% of visits regional (that is, outside a capital city)

Appendix D Regulation of contractors

The provisions in the OHS Act which govern the regulation of contractors are (as the following attempt to explain their operations shows) extremely complex, and in their current form may have unintended consequences. Apart from the provisions (sections 16 and 17) discussed above in response to the first term of reference, the key provisions in the OHS Act are sections 4 and 14.

Section 4 of the OHS Act provides that:

- (1) Subject to subsection (2), this Act is intended to apply to the exclusion of any law of a state or territory (other than a law prescribed under subsection (3)) to the extent that the law of the state or territory relates to occupational health and safety and would otherwise apply in relation to employers, employees or the employment of employees.
- (2) If, because of section 14 or 15, provisions of this Act do not apply in relation to a particular situation, subsection (1) is not intended to affect the application of state or territory laws to that situation.

Section 4 excludes state and territory OHS legislation from applying to employment covered by the OHS Act except where those state and territory laws are specifically prescribed by Commonwealth regulations (see section 4(3)). Only the Commonwealth, a Commonwealth Authority or a non-Commonwealth Authority can be an ‘employer’ under the Act (section 5). Under the Act an ‘employee’ is a Commonwealth employee, a Commonwealth authority employee, or a non-Commonwealth licensee employee (see section 9). It would appear that for the purposes of section 4(1), an ‘employee’ would not include a deemed employee under section 16(4).

Section 14 specifies that

- (1) Despite anything in this Act, if a workplace is controlled by a contractor for construction or maintenance purposes:
 - (a) this Act, other than section 20 [the duties of a person erecting or installing plant in a workplace], does not apply to that workplace while it is so controlled; and
 - (b) this Act, other than section 20, does not apply to work performed by contractors at that workplace while it is so controlled; and
 - (c) this Act, other than Parts 1 [the Preliminary provisions, including sections 4, 9, 9A and 14] and 2 [the general and specific OHS duties] and section 82 [the power to make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient for giving effect to the Act], applies to work performed by employees at that workplace while it is so controlled:
 - (i) only if the regulations so provide [regulation 39 of the Occupational Health and Safety (Safety Arrangements) Regulations 1991 do so provide in relations to Parts 3 (workplace arrangements), 4 (investigations) and 5 (miscellaneous) of the Act and Schedule 2 (civil and criminal proceedings)]; and
 - (j) subject to such modifications and adaptations (if any) as are set out in the regulations.

Subsection 14(2) provides that for the purposes of subsection 91), a workplace is not controlled by the contractor ‘simply because of the presence at the workplace of an employee of the employer for which the contractor is performing work if that employee has no right to direct the work of the persons working for the contractor.’

Section 9A defines a ‘contractor’ to be

- (a) a Commonwealth contractor – that is, a natural person (other than a Commonwealth employee or a Commonwealth authority employee) who performs work on Commonwealth premises in connection with a contract between the Commonwealth and that person or another person which is in connection with an undertaking being carried out by the Commonwealth;
- (b) a Commonwealth authority contractor – that is, a natural person (other than a Commonwealth employee or a Commonwealth authority employee) who performs work on Commonwealth premises in connection with a contract between the authority and that person or another person which is in connection with an undertaking being carried out by the authority; or
- (c) a non-Commonwealth licensee contractor – that is, a natural person (other than a Commonwealth employee or a Commonwealth authority employee) who performs work on non-Commonwealth licensee premises of the licensee in connection with a contract between the licensee and that person or another person which is in connection with an undertaking being carried out by the licensee.

Where the workplace is not the site of construction or maintenance activities, section 4 will apply, so that the OHS Act will oust state and territory OHS provisions, but only to the extent that they apply to employers (as defined under the OHS Act), employees (as defined under the OHS Act), or the employment of employees. In other words, state and territory OHS statutory provisions relating to contractors and their duties will apply.

In sum, section 4 provides that to the extent that the OHS Act applies in relation to employers, employees or the employment of employees, it overrides state and territory OHS legislation except where section 14 applies. Thus, when ‘an employer’ (including a non-Commonwealth licensee) under the OHS Act engages a ‘contractor’ who is in control of the workplace for construction or maintenance purposes:

- the employer will not have any significant obligations at that workplace under the OHS Act (including obligations to its own employees, ‘contractors’ (to whom it might otherwise owe an obligation as a result of section 16(4)), and duties to persons other than employees and contractors to whom it might otherwise owe obligations under section 17);
- the contractor and sub-contractors will be governed by state and territory OHS laws, and
- the OHS Act will only apply to the extent that the exceptions outlined in section 14 are applicable.

As one submission [Infrastructure Asset Development Branch of the Department of Defence (IAD) submission, para 10] to the review observed:

‘[t]he benefit of this approach is that parties involved in ... construction projects operate under a single and seamless OHS regime at the construction site. The parties operate under the basis that state OHS laws and state OHS enforcement procedures apply and this promotes clear lines of responsibility and arguably superior OHS outcomes.’

We note, however, that it also effectively enables the employer to contract out of its OHS obligations to the parties at the construction (or maintenance) workplace controlled by the contractor (including its own employees at that workplace!) – a situation which goes against the fundamental principle underpinning the OHS general duties that these duties are not delegable (see again our discussion of this in our response to the first term of reference).

We also note (see further the IAD submission, para 15) that where a non-Commonwealth licensee is contracted to an employer as managing contractor or head contractor, it is unclear exactly as to which OHS regulator has enforcement responsibilities. It is also unclear whether state-based union officials can exercise rights under union entry provisions under the state OHS Acts (see *John Holland v CFMEU (NSW Branch)* NSD 1986/2007, Federal Court, part heard, and discussed further below).

Of course, a crucial issue in the operation of section 14 is when is a workplace controlled by a contractor for construction and maintenance purposes? Tribunals seem to be taking a broad approach to finding that the employer has retained sufficient control to prevent section 14 from applying to a workplace. For example, in *Telstra Corporation v Comcare Australia Pty Ltd* [2007] AIRC 136, and *Re Telstra Corporation Limited* [2007] AIRC 438 it was held both at first instance and on appeal that a number of clauses in the contract between Telstra and the contractor indicated that Telstra, and not the contractor, had ultimate control over the site. In coming to this conclusion, the Commission relied, in particular, on (i) clauses giving Telstra a right to suspend work, and access the site and (ii) a non-exclusivity clause allowing Telstra to appoint other contractors to perform the work. Consequently, section 14 did not apply, and Telstra had obligations to the contractor, its own employees, and to others at the workplace.

In summary, where an employer is in control of the premises and engages a non-Commonwealth licensee as a head or principal contractor, the employer owes duties under the OHS Act (principally as a result of sections 16 (including the operation and section 16(4)) and 17) to the contractor and its employees, as well as to subcontractors and to its own employees. The head or principal contractor will owe duties under the OHS Act to its employees and to subcontractors and their employees. Subcontractors themselves will owe duties under the relevant state or territory OHS statute. This will lead to the difficult situation that the employer (and head contractor) will be seeking to ensure that the sub-contractor fulfils the employer's (and head contractor's) obligations under the OHS Act, while the sub-contractor is also required to comply with the relevant state or territory OHS Act provisions. The state and territory provisions may include obligations on project managers or principal contractors (see the *Workplace Health and Safety Act 1995* (Qld) sections 30C and 31) which would affect sub-contractors – but there would be no principal contractor or project manager subject to such an obligation.

If the head or principal contractor is a not a non-Commonwealth licensee (or the Commonwealth or a Commonwealth authority), then the employer is required to ensure that its obligations to employees, contractors and others (including sub-contractors) are complied with, in a situation where the contractors and sub-contractors will owe duties under state and territory OHS statutes only. This gives rise to considerable complexity.

The situation is even more complex if the workplace has multiple activities, some of which involve construction or maintenance activities, and some of which do not, and some of which involve contractors who are non-Commonwealth licenses and some of which do not (see IAD submission paras 38-40). As IAD ask (in their submission at para 38): 'What laws apply at that particular physical location?'

Section 14 was inserted into the Act to ensure that state OHS statutory provisions continued to apply to contractors. But it is clear that the addition of non-Commonwealth licensees to the Comcare OHS regulatory framework, the situation has become complex and confusing. All three of these scenarios (which were outlined in ADI's submission at paras 33-40), as many submissions to this review pointed out, undermine one of the aims of the Commonwealth's OHS regulatory regime in relation to non-Commonwealth self-insurers – the harmonisation of OHS statutory provisions. Self-insurers do not have to deal with only one set of OHS statutory provisions. As IAD commented in its submission (at para 40):

Under each of the scenarios identified above, there are substantial resourcing implications for [the employer]. At this stage the cost of these resources cannot be quantified but are considered to be significant as there would be a need to engage OHS experts, put in place complex reporting arrangements, carry out inductions of subcontractor personnel and monitor on an ongoing basis compliance at each construction site noting that at any one time there can be numerous active construction sites on any [of the employer's premises].