INSTITUTE OF PUBLIC AFFAIRS

Submission to the review into Comcare

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Background to this submission

The IPA is pleased to have the opportunity to make a submission to the review of the extension of the Comcare scheme to self-insurers who are in competition with Commonwealth or ex-Commonwealth entities.

Our comments relate to specific aspects of the review, with a particular focus on Occupational Health and Safety. The IPA has been an active participant in the OHS debate for some years, taking a close interest in, and voicing significant criticism of, the NSW OHS regime. The IPA believes that national harmonization of OHS laws, broadly based around the Victorian OHS model, is urgently needed and that the NSW model should be rejected.

The following IPA reports, amongst others, are available on the IPA website at http://www.ipa.org.au/units/worksafe.html. They provide background information if required.

- 'Politics of a Tragedy', October 2006
  http://ipa.org.au/publications/publisting_detail.asp?pubid=608
- 'Submission to the 2005 NSW OHS Review', August 2005
  http://ipa.org.au/publications/publisting_detail.asp?pubid=445
- 'NSW Workplace Deaths Bill. An Unsafe Act', June 2005
  http://ipa.org.au/publications/publisting_detail.asp?pubid=419

Why self-insurer interest in Comcare is strong: the national interest

Self-insurers seek to access Comcare for two broad sets of reasons:

- To access a nationally consistent workers' compensation regime.
- To access nationally consistent OHS laws.

Private-sector interest in Comcare is a direct outcome of the failure to achieve national consistency in both of these critical areas. Truth is, the long-stated, inter-governmental objective of working toward national consistency is politically gridlocked. This is against the national interest. Lack of national consistency not only works against the objective of safe work, but significantly raises business costs and hampers economic development and growth.

Enabling the private sector to access Comcare is an important national reform process that contributes to safer work. It makes possible a better allocation of resources to improve work safety, thereby contributing to improved economic efficiency. It would be against the national interest if the review made recommendations that hindered or nullified the ability of the private sector to access Comcare. Indeed, the review should consider ways in which access to Comcare could be made simpler and be expanded—especially while national inconsistency in both areas remains.

Further, the experience of the IPA is that *the lack of nationally harmonized OHS laws, combined with the extreme injustice of the NSW OHS laws and their incompetent enforcement, have been significant considerations for self-insurers seeking access to Comcare—particularly for national businesses operating in NSW.*

Workers' compensation

Australia's workers' compensation schemes are in effect state-based monopolies supplying a compulsory but contorted form of injury insurance where, unlike most insurance arrangements, the individual making a workers' compensation claim is not the holder of the insurance policy and does not pay the premiums. Unlike most normal insurance, a third party—the employer business—is the policyholder and premium payer.

This structure creates circumstances in which the administration of the workers' compensation schemes is potentially subject to significant and illogical commercial distortion. In fact this is typically the outcome in most jurisdictions although the extent to which this occurs varies. However, because the schemes are state-based, government-imposed monopolies, they are not subjected to the discipline of competition. Even though the schemes have cross-jurisdictional processes for creating some measure of harmonization and improvement, any success achieved in this respect has been small when comparison with what could be achieved were the schemes subjected to at least some measure of competition.

As a result, significant efficiency distortions within and between state schemes in their standards of performance, administration, corporate ethics and effectiveness have developed over many years.

These distortions impose significant risks and unnecessary costs on the private sector. For businesses which operate in two or more jurisdictions, the risks and costs escalate massively as a consequence of differences between the states and constitute a drag on efficiency and a burden on the Australian economy. They are also a waste of money—money that should be available to assist injured workers in their rehabilitation.

The opening up of Comcare to private-sector self-insurers has for the first time subjected the states' workers' compensation schemes to a form of competition through which consumers are able to exercise a measure of choice. By mounting legal objections and seeking to block private-sector access to Comcare, the states have predictably behaved like monopolists seeking to protect their monopoly positions. Submissions to the review by the states should be considered within this context.

Comcare has had a reputation of being one of the better managed workers' compensation schemes in Australia. Consequently, private-sector self-insurers have been quick to make applications to join, even though the process of joining is complex and the transition to the scheme involves significant reorganisation of business systems. However, it would appear that private-sector self-insurers believe that there are large efficiency gains to be had by joining Comcare:

a) Comcare appears to have a more efficient commercial structure than the state schemes through which workers' compensation obligations can be met.
b) Having to comply with one regime is vastly more efficient for multi-state companies than having to comply with multiple regimes which have significant inconsistencies between them.

Occupational Health and Safety

By joining Comcare, self-insurers also access the Commonwealth's OHS laws. This is a significant reason to join Comcare—particularly for national businesses that operate in NSW.

The IPA has completed extensive studies of the design and application of OHS laws in NSW, particularly those in place since 2000. The IPA finds that the laws are a distortion rather than an application of internationally accepted OHS principles, and that the enforcement of the laws is a corruption rather than an application of normal principles of justice in relation to criminal law. The reasons have been extensively documented in the IPA reports cited above. As a consequence, the level of community and business trust in the NSW OHS laws is low. The laws expose managers in NSW to unfair and unjust levels of criminal liability and criminal legal risk to which they would not be exposed in other jurisdictions. The NSW Government has repeatedly promised to change the laws but has consistently found excuses to renege on such undertakings.

The consequence of this is that national companies that operate in NSW and which could be eligible to access Comcare have strong incentives to join Comcare in order to remove themselves and

their managers from the reach of NSW's unjust and distorted OHS laws. The IPA believes that this has been a significant factor in the movement of companies to Comcare.

In targeting ever better work safety practices and outcomes, everyone in the community needs a consistent set of clear guidelines by and through which they know they will be held accountable. In OHS law, the legislatively expressed 'duty of care' is the core description of accountability from which all aspects of OHS practice are judged. The accompanying table compares the wordings of the duties of care in each Australian jurisdiction. NSW and Queensland are significantly out-of-step with the rest of Australia. Queensland, however, does not conduct the practice of unjust prosecution that is evident in NSW.

When companies access Comcare they access the Commonwealth's OHS laws. These are consistent with the bulk of jurisdictions in Australia and with international standards and Australia's obligations under International Labour Organisation Conventions. Moreover, they override the inconsistencies that are evident in NSW and Queensland and remove the risks of unjust prosecution that are all too possible in NSW.

When considering the suitability of the private sector's accessing Comcare, the review should be mindful of the OHS injustices in NSW and how the Commonwealth scheme offers a superior OHS environment in line with most other jurisdictions. In this respect, it would be against the national OHS interest if the review made recommendations that hindered or nullified the ability of the private sector to access Comcare. In fact, the review would enhance work safety if it were to consider ways in which access to Comcare could be made simpler and be expanded.

Wording of Duty of Care, Australian jurisdictions

	Wording of duty of care for employer	**Wording of duty of care for employee**	**Observations on consistency or not *within* each jurisdiction**
NSW	'An employer *must ensure* the health, safety and welfare at work of all the employees…'	'…employee must, while at work, take *reasonable* care for the health and safety of people …'	Stark differences exist. Employer has total obligation to safety. Employee has to take reasonable care.
Vic	'An employer must, so far as is *reasonably practicable*, provide and maintain…a working environment that is safe.'	'…an employee must take *reasonable care* for his or her own health and safety' (and) 'take reasonable care for the health and safety of persons…'	Duties of care are similar.
Qld	'An employer has an obligation *to ensure* the workplace health and safety…'	'A worker…has the following obligations…to comply with the instructions…by the employer…'	Stark differences exist. Employer has total obligation to safety. Employee only has obligation to do as told.
Tas	'An employer must…ensure so far as is *reasonably practicable*…safe from injury and risk to health…'	'…an employee must…take *reasonable* care for the employee's own health…' (and) 'comply with any direction…'	Duties of care are similar.

ACT	'An employer shall take all *reasonably, practicable* steps to protect the health and safety…'	'An employee shall…take all *reasonably practicable* steps…to ensure…the health and safety…'	Duties of care are similar.
SA	'An employer must…ensure so far as is *reasonably practicable* that the employee…is safe from injury…'	'An employee must take *reasonable* care to protect the employee's own health…' (and) '…reasonable care to avoid adversely affecting …any other person…'	Duties of care are similar.
WA	'An employer shall, as *far as is practicable*, provide and maintain a working environment …are not exposed to hazards…'	'An employee shall take reasonable care…to ensure his or her own safety…' (and) '…avoid adversely affecting the safety…'	Duties of care are similar.
NT	'A employer shall, so far as is *practicable*…provide and maintain a working environment that is safe….'	'A worker shall …take *appropriate* care of his or her own health and safety…' (and) '…as *far as practicable*, follow all reasonable directions…'	Duties of care are similar.
Commonwealth	'An employer must take all reasonably practicable steps to protect the health and safety…'	'An employee must…take all reasonably practicable steps…'	Duties of care are similar.
Observations on consistency or not *between* jurisdictions	Significant differences between Qld and NSW on the one hand and the other jurisdictions on the other. Marginal differences between the other jurisdictions.	General consistency between jurisdictions except for Queensland.	

[*Sources*: Business Council of Australia, *Making Work Safe,* http://www.bca.com.au/Content.aspx?ContentID=101074 *Page 31.]*

Answers to specific review questions

The review is asked to address several questions. Below are the IPA's specific responses to some of the questions and should be read in conjunction with the information provided above.

Question a) Does the scheme (Comcare) provide appropriate OHS and workers' compensation coverage for workers employed by self-insurers?

Yes: The scheme provides coverage that is at least as good as most jurisdictions and significantly superior to NSW.

Question b) Does the scheme regulator now have the enforcement policy and operational capacity to ensure self-insurers provide safe workplaces?

There is no publicly available evidence to suggest that enforcement is not adequate.

Question 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?

The arrangements in this respect for self-insurers are the same as for all work situations: that is, to ensure that every person involved in work has responsibilities and liabilities toward safety appropriate to the level of control they have over work.

Question i) What are the likely impacts on state and territory workers' compensation schemes of corporations exiting those schemes to join Comcare?

The most likely impact is the continuing exposure of the State and Territory schemes to competition and, therefore, to focus them on the needs of customers. The schemes can resist, reject and complain about competition or they can use the opportunity to find ways to improve and make their schemes individually and collectively attractive to users. The exiting of corporations from the schemes should act as a significant encouragement to the states and territories to harmonize their schemes in order to stem the flow of corporations from their own schemes.

Question 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 occupational health and safety and workers compensation systems?

See our comments above. The inconsistencies and complexities of the multiple systems do harm to the objective of work safety. The problems can be addressed through harmonisation—something which is long overdue.

Question 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?

Yes. Access to Comcare should be made easier to achieve. The eligibility should be extended to self-insurers who are not in competition with Commonwealth entities.