



Australian Government
Safety, Rehabilitation and
Compensation Commission

Submission to Comcare scheme review

29 FEBRUARY 2008

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Introduction

1. On 23 January 2008, the Hon Julia Gillard MP, Deputy Prime Minister and Minister for Employment and Workplace Relations, announced a review of the Comcare OHS, rehabilitation and workers' compensation scheme (the Comcare scheme). The *Terms of Reference* for the review cover safety and compensation, consultation, finance and access to the scheme.
2. The Safety, Rehabilitation and Compensation Commission (the Commission) is responsible under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and the *Occupational Health and Safety Act 1991* (the OHS Act) for regulating OHS and workers' compensation arrangements in the Commonwealth jurisdiction. Under the SRC Act (s.89B(b)), the Commission has a function to advise the Minister on anything relating to the operations of the Act or to the Commission's functions and powers. Under the OHS Act (s.12(e)(i)), the Commission has a function to advise the Minister on the most effective means of giving effect to the objectives of the Act.
3. The Commission has made this submission to the review in both its capacity as the regulator for the scheme and by virtue of its statutory responsibilities to advise the Minister.
4. This submission provides a background to the Commission and the Comcare scheme, an explanation of the features of the scheme, an analysis of the operations of the scheme with reference to each of the Terms of Reference, and some possible options to be considered to enhance specific aspects of the scheme.
5. The views expressed in this submission are the views of the Commission agreed to by the Commission in February 2008.
6. It is the Commission's contention that overall the Comcare scheme achieves its goal of creating Australia's safest workplaces. However, the Commission has taken the opportunity of this submission to offer a number of suggestions where improvements could be considered to further enhance the scheme.

Background

The Commission

7. The Commission is an unincorporated body established by s.89A of the SRC Act, comprising the members appointed from time to time by the Governor-General. The Commission has no staff and no budget. Under s.72A(1) of the SRC Act, Comcare is obligated to provide secretariat and other assistance to the Commission to assist the Commission in the performance of its functions and powers.
8. The Commission is a tripartite body with members representing the interests of the Commonwealth Government, employers and unions. The Commission has an independent Chairperson and also includes members appointed on the basis of their experience and qualifications. The Comcare CEO is an ex-officio member of the Commission.
9. The Commission is subject to directions from the Minister and the Chairperson must provide an annual report on the Commission's operations to the Minister.
10. The Commission in its current guise can be traced back to 1992 when amendments to the SRC Act established both the Commission and Comcare as separate but linked bodies. The amendments implemented recommendations of a review of the Commonwealth's workers' compensation arrangements by a management consultant, Mr Ron Brown. Under the new arrangements the Commission was to be responsible for setting regulatory policies and functions including determining and setting workers' compensation premiums, occupational health and safety and licensing of self-insurers. Comcare was to be responsible for service delivery and regulatory administrative functions.

11. In order to bring greater clarity to the respective functions of the Commission and Comcare, the Commission undertook a review of its governance arrangements in 2007. A copy of the review was forwarded to the Minister in August 2007.
12. The review concluded that the existing corporate governance arrangements referred to as the 'ring fencing' model are working well and position the Commission and Comcare favourably to face any current or future challenges. Under the 'ring fencing' model, the Commission is responsible for regulatory and policy advising functions while Comcare is responsible for service delivery and administrative functions. The model is enhanced by the provision of policy and legal advice to the Commission by the Comcare Deputy CEO and the provision of secretariat functions to the Commission by a dedicated resource.
13. The Commission is ascribed a number of functions and powers under the SRC Act, the OHS Act and the *Occupational Health and Safety (Safety Standards) Regulations 1991* (OHS Regulations).
14. Under the SRC Act (s.89B), the Commission has the following general functions:
 - to ensure that, as far as practicable, there is equity of outcomes resulting from administrative practices and procedures used by Comcare and a licensee in the performance of their respective functions
 - to advise the Minister about anything relating to the operation of the SRC Act or to the Commission's functions and powers
 - such other functions that are conferred on the Commission by the SRC Act and other legislation.

The Commission has the power to do all things necessary or convenient to be done, or in connection with, the performance of its functions (SRC Act s.89C).

15. In addition to the general functions and powers above, the Commission has a number of specific functions conferred on it by the SRC Act in relation to the issuing of general policy guidelines to Comcare and licensees, setting regulatory contributions and issuing licenses to eligible corporations to self-insure their workers' compensation liabilities under the SRC Act.
16. The Commission also has a wide range of functions and powers under the OHS Act and Regulations in relation to health, safety and welfare of workers covered by the legislation. The Commission's functions under the OHS Act (s.12) are:
 - to ensure that the OHS Act is complied with
 - to advise employers, employees and contractors on OHS matters affecting them
 - to collect and report information relating to the OHS of employees
 - to formulate policies and strategies relating to OHS
 - to advise the Minister on the most effective means of giving effect to the objects of the OHS Act, and the making of regulations and codes of practice
 - to accredit OHS training courses
 - to liaise with other bodies concerning OHS
 - to issue directions on the conduct of elections for health and safety representatives.
17. The OHS Regulations also ascribe a number of specific functions in relation to plant licensing (OHS Regulations part 4), dangerous goods (OHS Regulations part 8) and major hazard facilities (OHS Regulations part 9).
18. Consistent with the 'ring fencing' model the Commission has delegated a number of its functions and powers to the Comcare CEO.

The scheme

19. The Commonwealth's OHS, rehabilitation and workers' compensation scheme (the Comcare scheme) has evolved considerably since the passage of the first Commonwealth Government employees' compensation legislation in 1912. The 1988 SRC Act established a premium funded workers' compensation and rehabilitation scheme for Commonwealth government employees with the capacity for certain statutory authorities to self-administer their workers' compensation responsibilities. The SRC Act was further amended in 1992 to allow certain corporations to apply to the Commission for a licence to self-insure and/or manage their workers' compensation liabilities within the framework of the Commonwealth scheme. Access to the self-insurance arrangements is limited to Commonwealth authorities, former Commonwealth authorities and corporations in competition with a Commonwealth authority or a former Commonwealth authority.
20. From 1992 to 2004, the scheme only comprised Commonwealth authorities and former Commonwealth authorities. In 2004 the first licence was granted to a private sector corporation in competition with a Commonwealth authority when Optus was admitted to the scheme. Since 2004, the number of self-insurers has grown steadily. Currently, 19 corporations hold a licence to self-insure under the SRC Act. Two of the corporations are Commonwealth authorities, six are former Commonwealth authorities and the remainder are private sector corporations. In addition, a number of corporations have been declared eligible to apply for a licence by the Minister but are yet to have their application for a licence considered by the Commission. A list of current self-insurers and corporations declared eligible by the Minister is at Attachment A.
21. Amendments to the OHS Act in March 2007 had the effect of placing self-insurers under the one workers' compensation and OHS regime. Prior to the amendments, only a small number of self-insurers in the scheme were covered by the Commonwealth OHS legislation, the other self-insurers were covered by respective state and territory OHS legislation¹. The amendments extended Commonwealth OHS coverage to all self-insurers. Hence, all employees of self-insurers in the scheme are now covered by the Commonwealth's OHS legislation regardless of their location.
22. Although amendments to the OHS Act in 2007 extended coverage of the OHS Act to all self-insurers, there remain some differences between the coverage of the OHS and SRC Acts. For instance, members of the Australian Defence Forces are covered by the OHS Act but not by the SRC Act and ACT public sector employees are covered by the SRC Act but not the OHS Act. The differences in coverage between the two Acts give rise to differences in the number of employees covered by the scheme. The following table shows the estimated number of employees (measured in terms of full time equivalent employees) covered by the two Acts at January 2008.

	OHS Act	SRC Act
Commonwealth government employees	185030	185423
ACT government employees		17210
Australian Defence Forces*	51504	
Licensees employees	120265	120265
Total	356799	322898

* Excludes cadets and reserve

23. The Comcare scheme covers a diverse range of industries and occupations with a concomitant range of risk profiles. Industries covered by the scheme include public sector administration, banking and finance, education and health services, law enforcement, postal services and telecommunications, road and rail transport, building and construction and defence industries. Occupations covered include clerical administrative occupations, research scientists, transport workers, technicians and manual workers. Recent expansion of the coverage of the scheme has resulted in white collar public sector employees being a minority of employees covered by the scheme.

¹ Prior to March 2007, only four licensees were covered by the Commonwealth OHS legislation. The licensees were: Australia Post, Australian air Express, Telstra and the Reserve Bank.

Scheme features

24. The Comcare scheme is an integrated scheme designed to prevent injury to workers but in the event of injury to provide adequate and fair compensation with an emphasis on rehabilitation and return to work. The regulatory approach and benefits structure of the Comcare scheme are a consequence of this design. A good example of scheme design driving benefits structure is fact that, under the Comcare scheme, incapacity benefits at 75 per cent of the injured workers pre-injury income are payable until the injured worker is rehabilitated and returns to work and that limits are placed on common law compensation payments. It is important to understand that, when comparing different OHS and workers' compensation schemes, the fundamentals of scheme design often drive specific differences in the regulatory approach and injury benefits.
25. The significant features of the Comcare scheme include the integration of OHS, rehabilitation and workers' compensation regulation and administration in the one body, a regulatory framework based on the Robens principles, the scheme entry requirements, the type of benefits available and the performance outcomes of the scheme.

Integrated approach

26. The Comcare scheme follows what might be referred to as an integrated approach to the regulation and administration of OHS, rehabilitation and workers' compensation. Under this approach, all aspects of OHS and workers' compensation regulation and administration are administered within the one organisation. This approach sees all aspects of injury prevention, education, regulatory compliance and enforcement, workers' compensation claims management and rehabilitation and return to work as part of the one continuum. Any one component can influence and be influenced by any other component of the system.
27. The advantages of this approach can be seen in consistency of approach in dealing with workplace health and safety issues, the ability of one component of the system being able to inform others of emerging trends and issues, cost-effective administration and lower compliance costs for employers. The end result is considered to be safer workplaces, better outcomes for injured employees, lower costs and efficiencies.

Regulatory framework

28. The Comcare scheme is a good example of the Robens model for the regulation of workplace health and safety. The two main objectives of the Robens model² are: a unified and integrated system of legislation covering all parties and imposing a 'duty of care' on all employers, employees, manufacturers and suppliers; and the creation of an effectively self-regulating system involving employers and employees working together to achieve safety standards. These objectives are clearly visible in the Comcare scheme. While the Robens model can be seen as a self-regulation approach, this should not be confused with deregulation or non-effective regulation, as the model includes provisions for sanctions for breaches of legislative requirements.
29. The Comcare scheme takes an outcomes-based approach to OHS regulation that embodies the following principles:
 - OHS legislation encompassed in one umbrella statute
 - Duties of care imposed on employers, employees, manufacturers and suppliers of equipment and plant
 - Higher level statutory duties underpinned by more detailed regulations and codes of practice and guidance material
 - An emphasis on education and encouragement
 - Regular audits of licensees' prevention systems and practices together with assessments of compliance with safety laws and comprehensive performance and incident reporting requirements
 - A range of sanctions, from improvement and prohibition notices, enforceable undertakings, and civil and criminal prosecutions, available for possible breaches of legislation

² National Research Centre for OHS Regulation, *About occupational health and safety regulation in Australia*, web page <http://www.ohs.anu.edu.au/ohs/> accessed 24 January 2008.

- Requirements on employers to develop written health and safety arrangements in consultation with employees
- Employees to select health and safety representatives to represent them at the workplace. Health and safety representatives have powers to intervene in the interests of workplace safety.

Scheme entry

30. The Comcare scheme covers a relatively small number of large organisations that often operate Australia wide. In addition to 180 Commonwealth public sector agencies automatically covered by the scheme, the scheme covers 19 self-insured organisations. Licensees in the Comcare scheme are typically large, mature employers who have well developed OHS systems in place.
31. Entry to the scheme for a non-Commonwealth corporation is a two stage process. Firstly, the corporation has to be assessed as being eligible to apply for a licence by the Minister. The Minister bases this assessment on the competition test in the SRC Act (s100) and other criteria outlined in Ministerial Guidelines³. The previous Minister's guidelines included consideration of the size of the corporation, with a minimum threshold of 500 employees, and the scope of the corporation's operations across jurisdictions, based on a minimum threshold of two jurisdictions.
32. Once declared eligible by the Minister, corporations can apply to the Commission for a licence. Eligible corporations can only join the Comcare scheme if their safety systems and performance meet the scheme's statutory requirements. The Commission will only grant a licence if the applicant meets a number of statutory tests. These include prudential and financial requirements and the capacity to meet the Commission's standards on injury prevention, rehabilitation and claims management. The Commission must also be satisfied that the grant of the licence will not be contrary to the interest of the applicant's employees.⁴
33. The Commission has the final say on whether a licence should be granted to an eligible corporation. The Commission has the power to reject an application or delay entry if it is not satisfied that the corporation has the capacity to meet the statutory requirements or the regulatory framework is not in place. Continued compliance by the self-insurer with the scheme's high standards is measured through regular and detailed audits as well as investigations.
34. To a certain extent, entry to the Comcare scheme is self-limiting. Irrespective of a corporation's ability to satisfy the competition test embodied in s.100 of the SRC Act and the Ministerial Guidelines, the scheme is only attractive to corporations that have the resources and willingness to invest in the safety standards required for entry and who also desire to self-insure their workers' compensation liability. Small corporations and entities might not find the scheme attractive given the emphasis on health and safety systems and self-insurance requirements.
35. The regulatory approach of the scheme is entirely compatible with the type of entities in the scheme. The systems based approach to regulation may not be suitable for regulating a jurisdiction comprising large numbers of small businesses but small businesses are not part of the Comcare scheme's jurisdiction.

³ Comcare, *Australian Government's Workers' Compensation Scheme: Eligibility for Coverage for Non-Commonwealth Corporations*, web page, http://www.comcare.gov.au/self_insurance/australian_governments_workers_compensation_scheme accessed 1 February 2008.

⁴ An application for a licence will be assessed by the Commission from information provided in a written licence application, together with information collected in the application evaluation process. The factors considered by the Commission in assessing whether an applicant should be granted a licence to self-insure under the SRC Act include Ministerial Directions (Safety, Rehabilitation and Compensation Directions 2002) and Safety, Rehabilitation and Compensation Regulations 2002 as they relate to the granting of a licence under the SRC Act; statutory criteria as specified in s104 of the SRC Act; the ability of the applicant to meet the conditions of licence as specified by the Commission pursuant to s108D of the SRC Act; the ability of the applicant to perform the functions prescribed by s108E of the SRC Act; and the past performance of the applicant in complying with and conforming to applicable laws or statutory guidelines in relation to the health and safety of employees, rehabilitation of employees, premium payment and claims management obligations.

Benefits structure

36. The compensation element of the Comcare scheme is a no-fault scheme with legislative requirements that claims are determined accurately and quickly without regard to technicalities. The scheme provides for employees to seek a review of determinations by internal and external appeal mechanisms.
37. The benefits structure of the Comcare scheme is designed to ensure the rehabilitation and return to work of injured employees. The scheme has an emphasis on rehabilitation in the event of injury by requiring the employer to take responsibility for the rehabilitation of injured employees. The emphasis on rehabilitation is further reinforced by a benefits structure that provides for on-going payment of benefits until retirement age if necessary. Medical and associated treatment costs are fully covered by the scheme for the life of a claim.
38. The main compensation benefits payable under the Comcare scheme are:
 - Incapacity payments at 100 per cent of pre-injury earnings for 45 weeks, after which they are paid at 75 per cent
 - Payment of incapacity benefits until retirement age
 - Payment of lump sum to dependent partner in event of death
 - Payment of weekly benefit for dependent children in event of death
 - On-going access to medical and other treatment for the life of the claim
 - Provision for housekeeper assistance
 - Payment of lump sum benefit for non-economic loss associated with permanent impairment in addition to weekly incapacity benefits
 - Liability for compensation for disease claims can be accepted on the basis of the incidence of the disease in specific workplaces (clusters) without the need to establish a connection between the workplace and the disease.
39. A comparison of the main benefits payable under the Comcare scheme with other Australian workers' compensation schemes is at Attachment B.

Performance outcomes

40. The Comcare scheme has the best injury prevention and return to work outcomes of any scheme in Australia. A comparison of the performance of the Comcare scheme with other Australian schemes is at Attachment C.
41. In terms of injury prevention, the Comcare scheme has the lowest incidence rate for serious injury and disease claims reaching five days incapacity (the standard measure used to compare injury rates across Australian jurisdictions) of any Australian scheme. The Comcare scheme has achieved the lowest rate for the past five years. In terms of rehabilitation, the Comcare scheme has the lowest incidence rate of long term injury and disease claims involving 12 weeks or more compensation. In return to work outcomes, the Comcare scheme continues to achieve better outcomes than any other scheme in Australia.
42. The Comcare scheme has shown continuous improvement in injury prevention and rehabilitation and return to work performance in recent years. The incidence of all claims accepted by the scheme has decreased from 42.5 per 1000 FTE in 2002-03 to 32.9 per 1000 FTE in 2006-07. The incidence of claims reaching five days incapacity has also decreased from 15.2 per 1000 FTE in 2002-03 to 13.1 per 1000 FTE in 2006-07 while the incidence of claims reaching twelve weeks incapacity has decreased from 4.1 per 1000 FTE in 2002-03 to 3.8 per 1000 FTE in 2006-07.
43. In return to work outcomes, the scheme recorded a return to work rate in 2006-07 of 93 per cent, higher than the national average of 85 per cent and higher than any other Australian jurisdiction.

Terms of reference

44. The following section of the submission addresses each of the terms of reference of the review in turn. Where possible, comments have been made on the operation of the scheme against the terms of reference and some possible suggestions have been made where enhancements to the scheme could be considered. Although it is the Commission's contention that, taken as a whole, the scheme is working well in ensuring healthy and safe workplaces and provides comparable and fair compensation, there is always room for improvement. Suggestions for improvements to the scheme outlined below should be seen in this light.

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

45. The Comcare scheme provides a comprehensive OHS, rehabilitation and workers' compensation framework for all workers covered by the scheme. The framework is the same regardless of whether the worker is employed by a premium payer in the scheme or by a licensed self-insurer.
46. Consistent with the Robens principles, the Comcare scheme adopts a tiered OHS regulatory framework. The OHS Act sets out the objects and core elements of the framework and imposes mandatory obligations on duty holders to comply with the general duties. Supporting the legislation and providing greater detail of specific obligations are Legislative Instruments in the form of Regulations and Codes of Practice.
47. The OHS (Safety Arrangements) Regulations 1991 cover the election of Health and Safety Representatives (HSR) investigators and statutory notices and incident notifications. The OHS (Safety Standards) Regulations 1994 cover twelve hazards or types of work that are considered high risk such as operation of plant, electrical safety and construction work. Approved Codes of Practice provide practical guidance to duty holders on their obligations under the OHS Act and Regulations. Codes are designed to ensure compliance with accepted health and safety standards and at the same time allow duty holders the flexibility to cope with invention and technological changes without reducing health and safety standards. A comprehensive review of the Codes of Practice resulting in a consolidation of new and existing codes is close to completion. The consolidated set currently incorporates sixteen codes that have been revised and five new codes covering: risk management, diving work, spray painting, abrasive blasting and cash in transit. A final round of consultation is underway before the codes are submitted to the Minister for approval.
48. To further assist duty holders in exercising their responsibilities, a range of guidance material is also made available. Guidance material does not have any legal status but is designed to assist duty holders to meet the requirements provided for in legislation.
49. Regardless of the level and status of documents that form part of the OHS regulatory framework, all are consistent with national frameworks and documents such as national standards where they exist. The framework is constantly reviewed to ensure emerging hazards and risks are regulated appropriately.
50. The legislation provides for a consultative framework consisting of: health and safety management arrangements (HSMAs), designated work groups (DWGs), HSRs, and health and safety committees (HSCs). This comprehensive set of consultative arrangements is designed to ensure that appropriate and meaningful consultation occurs between employers and employees regarding health and safety in the workplace.
51. HSRs play an important role in the Comcare scheme by their ongoing presence at workplaces, their expertise and training and their extensive powers. By the nature of their election, HSRs represent all employees at a workplace. The role of HSRs in the Comcare scheme is similar to the role played in OHS matters by HSRs in some other schemes. While there is no statutory role explicitly provided for unions in the Comcare scheme, provision is made for a role for employee representatives to represent employees at the request of the employee.

52. In terms of workers' compensation coverage, the Comcare scheme by design has a primary focus on rehabilitation and return to work. This scheme design results in a benefits structure designed to provide ongoing incapacity benefits and coverage of medical and treatment expenses for injured workers. Under this scheme design, there is a reduced role for common law remedies and lump sum payouts. While common law remedies may seem attractive at first glance, they can often involve the injured worker in costly and prolonged litigation with an uncertain outcome. In the vast majority of cases, ongoing incapacity payments and defined benefit payments for non-economic loss provide a superior overall benefit to the injured worker. In addition, it could be argued that common law remedies with an emphasis on one large payment after a long and protracted period of litigation do little to encourage the injured worker to return to work.
53. The range and quantum of benefits payable to injured workers under the Comcare scheme is comparable or higher than those payable under state and territory schemes. While it is possible to cherry pick when comparing the level of benefits under various schemes by pointing to higher levels of payments for particular types of benefits, overall there appears to be little difference between the benefits payable under the Comcare scheme and those available under the state and territory schemes. Indeed, a recent actuarial study suggests that the Comcare scheme entitlements would result in higher direct workers' compensation costs for an employer moving to the Comcare scheme⁵.
54. Organisations that self-insure under the Comcare scheme are obliged to comply with an additional layer of regulatory oversight to that imposed generally by the OHS regulatory regime outlined above. Before joining the scheme, potential self-insurers have to convince the Commission that they have the necessary health and safety management systems in place to meet the Commission's standards. The Commission is under no obligation to grant a licence to an applicant if it is not satisfied that the applicant can meet the requirements under the Act or the Commission's requirements.
55. Once in the scheme, the Commission requires self-insurers to continuously improve their OHS management performance and to meet performance standards of licence. The performance standards require the self-insurer to develop and implement effective management systems for injury prevention, rehabilitation and claims management. Self-insurers are audited on an ongoing basis to ensure compliance with the Commission's requirements and their performance is assessed by a series of outcome focused performance indicators. The Commission reviews performance against performance indicators and targets twice yearly and conducts a formal review of each self-insurance licensee's performance against a 'Licensee Improvement Program' model.
56. The Commission has a range of options available to it to ensure compliance with regulatory obligations and to encourage performance improvement. These options range from the ultimate sanction of revoking a self-insurer's licence, to changing the degree of regulatory oversight and to a series of moral suasion options. The Commission is required to report on the performance of each self-insurer in the scheme in its Annual Report. This requirement is unique among Australian regulators and ensures that the performance of self-insurers in the Comcare scheme is open to public scrutiny.
57. In summary, the Commission believes that the scheme generally provides appropriate OHS and workers' compensation coverage for existing workers employed by current self-insurers. However, some improvements may need to be considered.
58. The Commission notes, that with the passage of the Coverage Bill in March 2007, there is now somewhat of a legislative disconnect between the SRC Act and the OHS Act. The licensing requirements in the SRC Act were developed at a time when the OHS Act did not apply to private corporations licensed under the SRC Act. While the legislative entry provisions under the SRC Act (s104(2)(d)) include requirements for applicants to have the capacity to meet OHS standards set by the Commission, there is a disproportionate concentration on workers' compensation considerations. The Commission believes that, while the existing provisions are adequate to ensure that prospective corporations have appropriate OHS systems in place before a licence is issued, the provisions are not best practice. The Commission believes that consideration could be given to enhancing the entry requirements in the legislation to better ensure that applicants meet this requirement by changing the threshold test in s104(2)(d) of the SRC Act from 'capacity' to a higher test.

⁵ Watson B, McInnes R and Hurst M, 'The Comcare Self-Insurance Option', *Conference Paper*, Institute of Actuaries of Australia Xlth Accident Compensation Seminar, 1-4 April 2007,

59. An issue of some concern to the Commission is the possible impact that mergers and acquisitions can have on the scheme's regulatory capacity. Where a licensee is involved in a merger or acquisition, there is currently an obligation on the licensee to inform the Commission. While the Commission has no part to play in the normal commercial decisions of corporations in regard to mergers and acquisitions, there are nevertheless implications for the Commission's regulatory oversight of such events. For instance, a licensee may acquire an entity with a new and high risk area of operations which has implications for the Commission and Comcare in terms of the regulatory framework and operational capacity.
60. A possible approach to this issue in the case of new licensees would be for the Commission to limit the scope of the licence to those employees undertaking activities that are consistent with the terms of the Minister's original declaration. If a licensee subsequently seeks to extend the scope following a restructure, the Commission could then require it to provide an implementation plan so that the Commission can be satisfied that the licensee will continue to meet its licence conditions and comply with the legislative requirements. Further, the Commission could also consider the adequacy of the regulatory framework and operational capacity to deal with any new hazards or risks before extending the scope. To apply this approach to existing licensees, the Commission could vary the conditions of licence. These requirements could be included in a Ministerial direction issued under s.89D and s.101 of the SRC Act.
61. The Commission believes that, to remove any possible doubts as to the level of benefits available under the Comcare scheme, consideration should be given to raising the level of death benefits payable under the SRC Act. Although death benefits under the Act are indexed for cost of living increases, a number of state jurisdictions have made policy decisions to increase the level of death benefits. This has resulted in the level of death benefits payable under the SRC Act being below the level of a number of state jurisdictions. The Commission believes that, to maintain comparability for this benefit, an increase be made to the level of death benefit payable under the SRC Act and a more appropriate indexation mechanism be adopted. The level of permanent impairment benefits payable under the SRC Act could also be reviewed. The Commission notes that the removal of journey claims from coverage under the SRC Act has raised a number of operational issues, particularly in relation to the degree of employer control over the journey. The Commission considers that a review of the impact of the changes, particularly in relation to emergency and call out journeys or other journeys where there is a degree of employer control, should be undertaken.
62. A possible enhancement to the OHS Act would be to include duties on designers. This is a common feature of OHS legislation in other jurisdictions.
63. The Commission notes that the absence of a right of entry for union officials under the OHS Act has been the subject of a number of objections to the granting of self-insurance licences by the Commission. The objections go to a perception that there is a lower standard of regulatory oversight in the Comcare scheme due to the absence of a statutory right of entry.

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

64. Under the Commission/Comcare governance model, the Commission has responsibility for setting the policy framework for OHS regulation and Comcare has the responsibility for putting that policy into practice by undertaking a range of operational actions. The Comcare scheme's regulatory approach sees enforcement action as part of a comprehensive set of possible enforcement interventions. The intervention actions are designed on one hand to ensure that duty holders have access to the information and education, training and assistance they need to properly exercise their duties and on the other to ensure that appropriate and commensurate enforcement action is undertaken for any breaches of those obligations.

65. The Comcare scheme enforcement policy is publicly available on the Comcare internet site.
66. The Commission considers that Comcare has the appropriate enforcement policy and operational capacity to ensure all employers, including self-insurers, provide safe workplaces. Comcare's approach to regulatory interventions for self-insurers includes audits of performance against licence conditions, proactive investigations to assess specific areas of regulatory compliance and reactive investigations in response to an accident or dangerous occurrence.
67. In terms of operational capacity, the Commission believes that Comcare has sufficient resources in the number, geographic spread, technical expertise and experience of investigators to ensure that employees of licensees are provided with safe and healthy workplaces. The ratio of inspectors to employees in the Comcare scheme is comparable with the ratios of state and territory OHS jurisdictions. Comcare's investigator capacity is capable of being enhanced, when required, by the engagement of external experts.
68. The Commission is mindful of the impact on the scheme's capacity to respond to OHS risks of new licensees joining the scheme. Before a licence is granted to an eligible applicant, the Commission assures itself that Comcare has the capacity to provide appropriate regulatory oversight to the new licensee in view of the number of employees and the nature of risks that are involved. The Commission notes that there is potential under the current entry provisions for a corporation to be declared eligible, even though some of its activities are in industries new to the jurisdiction. In this scenario, the Commission can delay the granting of a licence until the scheme has the appropriate regulatory framework and operational capacity in place. In any event, employers in the scheme have an overriding duty of care obligation under s.16 of the OHS Act.
69. The Commission believes that Comcare has the enforcement policy and operational capacity to ensure self-insurers provide safe workplaces. However, consideration could be given in any future examination of the OHS Act to enhancing the enforcement provisions in the Act. Areas for consideration could include implementation of more flexible enforcement powers, including 'on the spot' fines and a review of the penalty regime. It would be desirable to ensure that the penalty regime is consistent with comparable breaches in other jurisdictions.

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?

70. The OHS Act imposes obligations on employers to ensure that the same duty of care towards employees is extended to contractors in relation to matters over which the employer has control. The extension of coverage of the Commonwealth OHS Act to all licensees in March 2007 did not change this obligation. The Comcare scheme has always covered situations where employees work alongside contractors in workplaces of employers covered by the OHS Act. What changed in March 2007 was that the number of employers increased to include all licensees.
71. This situation could be more appropriately considered as an overlap in coverage between the Comcare scheme and the respective state and territory schemes rather than a gap in coverage. The effective management of this overlap is a matter for Comcare and the state and territory regulators. The Commission notes that the Workplace Relations Ministers' Council supports further collaboration on OHS investigations. This can be achieved through MOUs between Comcare and the state and territory regulators which could focus on provision of investigation services and protocols for cooperative working arrangements, particularly relating to investigations at sites of shared jurisdiction.
72. In order to bring greater clarity to the issue and to remove any possible doubt as to the application of the OHS Act to contractors, the Commission believes that consideration should be given to making the objects of the OHS Act more explicitly include references to contractors as well as employees. As the OHS Act is currently drafted, only employees are referred to in the long title and objects of the Act (s3) despite references to contractors in other sections of the Act.

73. Further, the OHS Act should provide for the sharing of information with state and territory OHS regulators and other relevant agencies. The OHS Act, like the legislation in some other jurisdictions, limits the sharing of information and therefore makes cooperation more difficult.

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?

74. In April 2007, a number of legislative amendments to the SRC Act came into effect. While the Commission was not involved in the development of these amendments, the key changes were:
- the definition of injury was changed to exclude from the definition a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of employment
 - the definition of disease was amended to strengthen the connection between the disease and the employment contribution from 'material' to 'significant'
 - removal of coverage for journeys between home and usual workplace
 - removal of coverage for work breaks away from the workplace
 - the definition of suitable employment was amended to allow consideration of an employee's capacity to work outside the Commonwealth or a licensee when calculating their weekly incapacity benefits, where the employee is no longer employed by the Commonwealth or the licensee.
75. It is worth noting that three state and territory workers' compensation schemes (NSW, Qld and ACT, which cover approximately half of the employees covered by workers' compensation in Australia) include coverage for journey to work claims and all states and the ACT use an employment contribution test considered to be stronger than 'material' (NSW and the ACT use 'substantial' while the other states use 'significant'). In regard to these two issues, the Comcare scheme is consistent with the majority of state and territory schemes. The Productivity Commission considered a number of factors in relation to journey and recess claims in its review of workers' compensation frameworks and concluded that it did not support the inclusion of journey to work and recess claims where there was a lack of employer control.⁶
76. The effect of the changes was to remove certain types of claims (journey and recess) from the scheme and to make a higher acceptance threshold for other claims (disease and work related stress). As a result of the changes, certain injured employees will no longer have access to scheme funded medical and rehabilitation services. These injured employees will have to rely on their own resources or on the public health system for treatment. The fact that an injured employee no longer has access to scheme funded medical and rehabilitation services may have some impact on their rehabilitation and return to work.
77. As the changes have only been in effect for less than a year, the Commission believes that it is too early to objectively assess the impact of these legislative changes on the rehabilitation and return to work outcomes of injured workers. However, the Commission believes that the impact of the changes in relation to journey and recess claims should be kept under review to ascertain whether the changes result in adverse outcomes in relation to the rehabilitation and return to work of injured employees.

⁶ Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Inquiry Report No. 27 6 March 2004. pp183-187.

Does the scheme achieve effective return to work outcomes?

78. One of the main features of the Comcare scheme is its emphasis on rehabilitation and return to work. Injured workers are entitled to ongoing benefits and medical and rehabilitation services for the duration of their injury. It would be expected that a benefits regime based on ongoing benefits payments for the duration of an injury without punitive reductions in the level of payments over time would result in poor return to work outcomes. However, the Comcare scheme avoids this outcome placing the duty of care for the rehabilitation and return to work on the employer. The SRC Act places a duty on employers to provide an injured worker with suitable employment as well as providing direct powers to employers to assist and work with the employee to achieve a return to work outcome through appropriate rehabilitation programs.
79. The return to work outcomes achieved by the Comcare scheme are consistently high and better than the outcomes achieved by any other Australian workers' compensation scheme. Return to work outcomes can be measured by the incidence of long term claims (the lower incidence the better outcome) or by the percentage of injured workers returning to work (the higher rate the better outcome). On both measures, the Comcare scheme outperforms all other Australian schemes.
80. In terms of long term claims, the Comcare scheme recorded the lowest incidence rate of any Australian scheme for the latest period that comparable data is available⁷. In 2005-06, the Comcare scheme recorded an incidence rate of 2.6 claims per 1000 FTE for serious claims reaching twelve weeks duration compared with the Australian average of 3.4. The Comcare scheme rate was lower than the rate for any other jurisdiction.
81. The Return to Work Monitor measures return to work outcomes for most Australian jurisdictions by means of a sample survey of injured workers⁸. For 2006-07, the Comcare scheme recorded a return to work rate of 93 per cent, higher than the national average of 85 per cent and higher than any other Australian jurisdiction. In terms of durable return to work (where the injured worker is still at work at the time of the survey), the Comcare scheme recorded a rate of 86 per cent, higher than the Australian average of 77 per cent and again higher than any other Australian jurisdiction. Emphasizing the employer's role in the return to work process in the scheme, the Comcare scheme also has the highest rate of injured employees who return to work with the same employer. The Comcare scheme recorded a rate of 94 per cent, higher than the Australian average of 84 per cent and the highest rate of any Australian jurisdiction.
82. In the three return to work measures from the Return to Work Monitor outlined above, licensees in the Comcare scheme have a better outcome than premium payers in the scheme:
- The return to work rate for licensees is 96 per cent compared to 92 per cent for premium payers
 - the durable return to work rate for licensees is 87 per cent compared to 85 per cent for premium payers
 - the rate of injured workers who return to work with the same employer is 97 per cent compared to 93 per cent for premium payers.
83. The Commission believes that the Comcare scheme has effective return to work outcomes and that these outcomes are as good or better than any other state or territory scheme.

⁷ Workplace Relations Ministers' Council, *Comparative Performance Monitoring Report*, Ninth Edition October 2007, Office of the Australian Safety and Compensation Council, Canberra, forthcoming, p7.

⁸ Heads of Workers' Compensation Authorities, *2006-07 Australian and New Zealand Return to Work Monitor*, HWCA web page <http://www.hwca.org.au/>, accessed 1 February 2008.

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

84. The SRC Regulations require organisations applying to the Commission for a licence to provide evidence of consultation with employees about the applicant's intention to apply for a licence. The SRC Regulations are silent on the form and extent of this consultation but do provide examples of evidence of consultation that could be taken into account by the Commission. Examples of evidence noted in the SRC Regulations are:
- Any written notice to employees and employee representatives of the intention
 - Any written responses to the notice
 - Any minutes of any consultative meetings.
85. Typically, applicants for a self-insurance licence provide the Commission with details of consultation undertaken according to the above processes. Evidence provided includes; newsletters and information issued directly to staff, information provided via email and on intranet sites, staff meetings and brief sessions held, comments posted on blogs and received through dedicated email mailboxes, and responses provided to comments received.
86. In assessing whether consultation has taken place, the Commission relies on evidence supplied by the applicant and any other information that may be made available to it. In 2007, the Commission put in place arrangements designed to make the licence application process more open and accountable and to provide interested parties with an opportunity to make their views on the licence application known to the Commission. This process requires a minimum time period between the lodgment of the licence application and the consideration of the application by the Commission. Applications are notified on the Commission's Internet site as soon as they are received. This process provides interested parties with knowledge that licence applications have been received and invites comments on the granting of a licence to the applicant.
87. Similar requirements for employee consultation are also in place for varying a licence. A licensee must apply to the Commission requesting the variation. The request must set out certain relevant information including consultation with affected employees. The degree of consultation depends on the nature of the licence variation. In 2007, the Commission put in place arrangements to ensure certain minimum levels of employee consultation in the event of a licence variation application. The arrangements form part of the Conditions of Licence and require the licensee to provide an information pack to affected employees. The Commission is finalising guidelines for the contents of the pack, but it is expected that the pack would contain information on the OHS and SRC Acts, the duties of employees under the OHS Act, entitlements and benefits under the SRC Act and what is not covered under the Act.
88. The Commission does not have a formal view on what constitutes an adequate level of consultation with employees. It has expressed a view at meetings that consultation must be meaningful and not perfunctory advice on what is about to happen. The consultation should provide a genuine opportunity for employees to provide input into the decision making process and to influence the decision. However, the Commission does not regard consultation as providing for joint decision-making.
89. In order to enhance the level and comprehensiveness of consultation required of prospective licence applicants (and licensees requesting a variation to their licence conditions) the Commission could consider the issuing of guidelines setting out the minimum requirements expected. The requirements could cover such issues as the type of information to be provided, possible consultation mechanisms, timeframes for consultation, provisions for feedback and comments from employees and publication of employees' comments and management responses. As an alternative to the Commission issuing guidelines in respect of consultation requirements, consideration could be given to embodying consultation requirements in the SRC Regulations.

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?

90. The legislation provides for a series of consultative mechanisms consisting of health and safety management arrangements (HSMAs), designated work groups (DWGs), health and safety representatives (HSRs) and health and safety committees (HSCs). This framework is designed to ensure that appropriate and meaningful consultation occurs between employers and employees regarding health and safety in the workplace.
91. To assist employers to meet their obligations under these provisions, Comcare has issued a number of publications outlining legislative requirements and practical guidance material in relation to consultative and representational structures and arrangements.
92. Under amendments to the OHS Act that came into force on 14 March 2007, all employers covered by the OHS Act have until 15 September 2008 to develop their HSMAs.
93. The Commission will be ensuring that Comcare assesses compliance of licensees with mandatory requirements of HSMAs as part of its annual investigation program.
94. With the current legislative framework in place and backed up by an appropriate compliance assessment process, the Commission believes that the scheme provides for consultation with, and the involvement of, employees and their representatives (at the request of employees) in relation workplace safety arrangements at the workplaces of self-insurers.
95. However, the Commission believes that consultation at the workplace would be enhanced by the addition of a specific duty in the OHS Act on employers to consult with employees. The legislation currently establishes mechanisms for consultation but does not specify a duty to consult with employees. HSRs can also play a key role in ongoing consultation between employers and employees at the workplace level, and the Commission will work with Comcare to ensure that the network of HSRs is fully supported. Some Commissioners propose that, noting the cooperative intent of the OHS Act, consideration should be given to requiring HSMAs to be agreed to by employees and/or their unions.

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

96. The nature of self-insurance in workers' compensation is that the employer is responsible for paying for all workers' compensation claims rather than paying a premium to an insurer to take on those responsibilities. The Australian Industry Group argues that 'it [Self-insurance] provides a strong incentive to employers to provide safe workplaces, since a greater proportion of the costs are borne internally'⁹. The Heads of Workers' Compensation Authorities estimate that at January 2008, there were over 280 self-insurers licenced with Australian workers' compensation regulators.¹⁰
97. Self-insurance is not without its risks and Australian workers' compensation jurisdictions have developed a series of regulatory requirements to mitigate against those risks to employees, the self-insurer and to the regulator. Risks involve the inability of the employer to meet its workers' compensation liability, claims management capability and OHS performance. The Comcare scheme involves a range of regulatory requirements to address these risks.

⁹ Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Inquiry Report No. 27 6 March 2004, Australian Industry Group submission, p345.

¹⁰ Heads of Workers' Compensation Authorities, *The nation on a Page – Summary of key workers' compensation indicators*, HWCA, unpublished.

98. The Commission has endorsed a range of prudential conditions designed to ensure that licensees in the scheme have sufficient financial resources to meet their current and potential claims liabilities. The prudential conditions form part of the Conditions of Licence and apply to all licensees in the scheme. The prudential conditions include:
- An annual actuarial assessment of current and projected outstanding workers' compensation liabilities
 - The provision of a bank guarantee based on the 95th percentile of outstanding workers' compensation liabilities, subject to a minimum of \$2.5m
 - The provision of a reinsurance policy for any single event with a reinsurance amount as approved by the Commission
 - Annual certificate by the principal officer of the licensee that the actuarial assessment has been made in accordance with the licence conditions, provision has been made in the accounts for meeting the estimated liabilities and the licensee has the capacity to meet any single claim up to the reinsurance amount.
99. The central plank of the prudential conditions is the bank guarantee. The bank guarantee is essentially a bond that the self-insurer lodges and which the scheme can draw on if the self-insurer fails to pay its claims liability.¹¹ Under the terms of the bank guarantee, the Commission has access on demand to a specified amount of money which can be used to meet the licensee's obligations. The licensee is not party to any decision to call in the guarantee.
100. In addition to the generic prudential conditions outlined above, the Commission has also required some licensees to have in place cross or parent guarantees. These guarantees provide additional security, above that provided by the bank guarantee, in that the parent and/or sibling company undertakes to guarantee the debt of the licensee.
101. No circumstances have yet arisen where the Commission and Comcare have sought to call in a bank guarantee, or cross or parent guarantee.
102. While a licensee is able to meet its workers' compensation liabilities from within its balance sheet, there is no financial exposure to the Commission, Comcare or the Commonwealth. Exposure would only occur when a licensee is unable to meet its workers' compensation liabilities. The Commission has in place processes to monitor and access the financial health of licensees. This monitoring is designed to provide the earliest warning of any potential financial difficulties.
103. The design of the Comcare scheme is such that the liabilities of licensees are quarantined from premium payers in the scheme. The premium payer component of the scheme operates as a separate fully funded insurance pool. Annual premiums payable by premium payers are calculated to meet the cost of current and future liabilities of the premium payers. If a licensee was unable to meet its workers' compensation liabilities, no additional charges can be passed on to premium payers due to legislative limits.
104. There is a small potential exposure to Comcare of licensee failure. If a licensee were to fail, its workers' compensation liabilities, together with funds from the bank guarantee would be passed onto Comcare. Comcare would then undertake the management of the remaining workers' compensation claims. The risk to Comcare arises from the small but potentially real actuarial risk that the funds from the bank guarantee are insufficient to meet liabilities in the long term. If that were to happen, then Comcare would have to manage the shortfall. This in turn creates a small risk to the Commonwealth as the risk could transfer to the Commonwealth as the owner of Comcare.
105. The Commission believes that, although there is a potential risk to the Commonwealth, its likelihood of occurring is extremely unlikely. For the Commonwealth to be exposed to this risk, a series of unlikely events would have to occur. Firstly, a large private sector corporation would have to fail, secondly, bank and other guarantees would have to be insufficient to cover the potential liability, and thirdly Comcare resources would have to be insufficient to cover this risk internally. Any potential exposure would be for a small amount in the long term as the bank guarantee or other guarantees would be sufficient to cover the vast majority of claims for a substantial number of years.

¹¹ Productivity Commission, op cit, p346.

106. The Productivity Commission considered a number of instruments to deal with any residual risk to the Commonwealth of any licensee failure.¹² The instruments considered included a scheme reinsurance policy, a security fund, a post-event levy or a combination of all three. The Productivity Commission considered that the post-event levy was the most suitable approach. Under the post-event levy any shortfall in the funding of a failed self-insurer's liabilities would be recouped by way of a levy on the remaining self-insurers. Thus, the self-insured sector would be responsible for any funding shortfall.
107. The Commission believes that further consideration should be given to the possible introduction of a post-event levy provision in the legislation to remove any potential exposure to risk to Comcare and the Commonwealth of any licensee failure.

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

108. In its 2004 report, the Productivity Commission commissioned independent actuaries to assess the likely impacts on state and territory workers' compensation schemes of corporations exiting those schemes and joining the Comcare scheme. The actuaries modeled a range of scenarios based on the likely number of corporations exiting state schemes for the Comcare scheme. Depending on the assumptions used, the impact on state scheme premium rates (measured in terms of percentage increase in premiums) was assessed as being between 0.3 per cent to just over 3.0 per cent.¹³ It should be noted that the higher estimate is based on large numbers of corporations exiting state and territory schemes for the Comcare scheme. A more recent estimate, by a group of independent actuaries, on the impact on state premium rates shows an increase of 2.4 per cent increase in state premium rates if 10 per cent of employers in the state schemes exited.¹⁴
109. If the exiting corporation was a self-insurer, then there was likely to be minimal direct financial impact on the state or territory scheme. There may be some impact on remaining self-insurers in the state schemes as the fixed costs in regulating self-insurers are spread over fewer self-insurers. As self-insurers in the Comcare scheme are now covered by Commonwealth OHS legislation, there may also be some impact in spreading the fixed costs for OHS regulation over fewer entities. The policy of the state or territory scheme to the exiting corporation's tail claims may also have some impact. If the exiting corporation is allowed to take its tail claims then there should be no impact, but if the corporation is required to leave its tail claims in the state scheme there may be an impact depending on the levy imposed on the corporation by the scheme to cover the liability for those claims.
110. If the exiting corporation was a premium payer in the state or territory scheme, then the impact on the scheme would be dependent upon the degree of cross subsidisation prevalent in the state or territory scheme. If the premium regime in the state or territory scheme involved cross subsidisation from exiting corporations to other entities remaining in the scheme then there would be some impact on the state scheme. However, the extent of this impact was within the control of the state or territory scheme. Schemes that engaged in cross subsidisation would be impacted to some degree as the subsidy supplied by the exiting corporation was removed from the premium pool. The liability for tail claims may also have an impact on the state or territory scheme. If the scheme has underestimated the liability of the exiting corporation's tail claims in its premium calculations, or fails to manage those tail claims effectively, then the scheme may have a shortfall between premiums and liability for those claims.

¹² Ibid, p351-356.

¹³ Ibid, p128. Assuming a 2.0 per cent premium rate, a 0.3 per cent increase in premium rates will result in a premium rate of 2.006 per cent, while a 3.0 per cent increase in premium rates will result in a premium rate of 2.06 per cent.

¹⁴ Watson B, op cit.

111. Any assessment on the impact on state or territory schemes of corporations exiting and joining the Comcare scheme would depend upon the assumptions made in the analysis. Factors such as the number of corporations exiting, the nature of the exiting corporation's insurance arrangements, the degree of cross subsidisation inherent in the respective state or territory scheme, any exit fees imposed and the arrangements for tail claims will all have an affect on the likely impact. It should be noted that state and territory premium rates and charges are the function of a myriad of factors and influences and that in recent years there has been a downward trend in premium rates evidenced in most states and territories. A sustained flow of large corporations from the state and territory schemes to the Comcare scheme could lead to some upward pressure on state and territory premium rates and regulatory charges. Whether this pressure would be sufficient to result in an overall increase in premiums given the influence of other premium rate drivers is problematic.
112. Despite the possibility of some upward pressure on premium rates due to corporations exiting state and territory schemes for the Comcare scheme, the Commission is not aware of any empirical evidence to suggest that the impact would be severe or threaten the long term viability of state and territory schemes.

Why do private companies seek self-insurance with Comcare? Are there any 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?

113. The Commission is not necessarily made aware of why individual corporations would seek to self-insure under the Comcare scheme when applications for a licence are submitted. The reason for seeking a licence is not part of the licence application requirements. However, on occasion individual corporations volunteer reasons as part of the background information supplied to the Commission with their licence application.
114. The reasons cited are consistent with those identified in the Productivity Commission report as to why an employer would consider applying for a licence in the Comcare scheme¹⁵. The reasons can be summarised as:
- The cost savings and administrative efficiencies to be gained from operating under one OHS regulatory and workers' compensation regime as opposed to the costs and difficulties of operating under multiple jurisdictions with differing regulatory and compliance requirements
 - To improve competitiveness by placing the corporation on the same level playing field as competitors that are already operating under the Comcare scheme
 - To ensure consistency in safety preventative measures and equity in workers' compensation benefits for employees regardless of the location of the employee
 - To introduce one corporate OHS and workers' compensation culture and practice
 - To achieve more direct responsibility over the claims management and return to work process of the injured worker by operating as a self-insurer in the Comcare framework.
115. Various media comment and statements from licensees would seem to confirm the above as among the reasons why a corporation would seek a licence to self-insure under the Comcare scheme. A comment from the CEO of Self Insured Services Australia, Mr Rex Bashford, would appear to sum up the reasons. Speaking at a conference in 2007, Mr Bashford said 'self-insured employers not only save at least 30 per cent of their pre self-insurance costs, but they also benefit from a better integrated OHS and general risk management system. Injury management and rehabilitation and claims management are also more effective'.¹⁶
116. The Commission notes the agreement reached between the Commonwealth, states and territories at the Workplace Relations Ministers' Council meeting of 1 February 2008 to harmonise OHS laws through the use of model legislation. The Commission is fully supportive of this approach and will play its part in achieving this outcome. The Commission believes that harmonisation of OHS legislation will contribute to reducing the costs and red tape for employers with operations across jurisdictions.

¹⁵ Ibid, p116.

¹⁶ 'Comcare scheme offers uniformity' *Workplace OHS*, 26 November 2007.

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?

117. The current rules for corporations seeking a declaration of eligibility to apply for a licence under the Comcare scheme limit access to the scheme to private sector corporations in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority.
118. The rationale for allowing private sector corporations access to the Comcare scheme remains the same now as when the provision was first inserted into the SRC Act in 1992. In introducing amendments to the Act, the then Minister for Finance, the Hon Ralph Willis, stated that 'so that these former Commonwealth authorities are not advantaged by their access to the scheme, the Bill will also allow the Act to apply to those private sector corporations which are in competition with a privatised Commonwealth authority. For very similar reasons, the Government has decided to extend the option of cover under the Act to private sector corporations which are in competition with any Commonwealth authority, regardless of whether the authority has been, or is to be, privatised'.¹⁷
119. Despite the insertion of the 'competition test' into the Act in 1992, it was not until 2004, when Optus applied, that the first private sector corporation entered the scheme. Since 2004, the number of private sector corporations gaining access to the scheme has increased steadily. Currently, at February 2008, eleven private sector corporations hold a licence to self-insure under the SRC Act and 15 have been declared eligible to apply for a licence by the Minister but are either yet to apply to the Commission for a licence or have applied and are waiting consideration of their application by the Commission.
120. The existing competition test places a natural limit on the type and number of corporations who are theoretically eligible to apply for a licence. An actuarial study commissioned for the Productivity Commission report found that of 53 industry groups only 11 could be identified where the competition test would apply¹⁸. The natural boundaries of the scheme are evidenced by the narrow range of industries of the corporations who have been declared eligible to apply for a licence by the Minister. Declarations of eligibility have been confined to the following industries: transport and logistics, banking and finance, communications, business services (particularly cash-in-transit) and building and construction.
121. One of the perhaps unintended consequences of the competition test under s.100 of the SRC Act as it currently stands is the fact that when the minister is assessing the eligibility of a corporation he/she is only able to make an assessment for one corporation at a time. Thus a number of entities within the same corporate structure have to be assessed separately. Each entity then has to apply for a licence separately. Examples of this situation are the three John Holland licences, the two National Australia Bank licences and the six separate applications from the Commonwealth Bank group. A number of licensees have expressed a desire for the provision of the SRC Act to be changed to enable group licences to be granted. Group licences are common in a number of state and territory jurisdictions. Group licences have a further advantage in that they broaden the risk pool and thus add to the prudential safety of the scheme as a group licence more directly brings all of the group's resources into play and thus cannot escape capture. The Commission considers that the concept of group licences has merit and any review of the eligibility criteria in the SRC Act should recognise the possibility for group licences to be issued.

¹⁷ The Hon R Willis, MP 'Second reading speech: Commonwealth Employees' Rehabilitation and Compensation Bill 1992', House of Representatives, *Debates*, 4 November 1992, p. 2596.

¹⁸ Productivity Commission, *op cit*, p 438-439.

Conclusion

122. The Commission believes that the Comcare scheme does have appropriate OHS and workers' compensation frameworks in place to ensure safe and healthy workplaces for all employees covered by the scheme. The OHS regulatory approach is consistent with well established and accepted principles and is broadly consistent with the approach adopted by state and territory regulators. The range and level of benefits available to injured workers is comparable with those available under other workers' compensation schemes in Australia. The scheme consistently achieves injury prevention, rehabilitation and return to work outcomes superior to any other Australian OHS and workers' compensation scheme. Comcare has the operational capacity to properly ensure compliance with legislative requirements now and into the future should the scheme continue to grow. Mechanisms are in place to ensure meaningful consultation with employees covered by the scheme. The continued entry of private sector corporations as self-insurers does not represent an unacceptable risk to the Commonwealth nor to the continued viability to state or territory schemes.
123. Although the Commission contends that the scheme is working well it has nevertheless made a number of suggestions where improvements could be made to further enhance the scheme. These suggestions go towards raising the level of benefits payable under the SRC Act, clarifying the coverage of the OHS Act in relation to contractors, enhancing the consultative mechanisms and making provision to remove any residual risk to the Commonwealth in the unlikely event of a licensee failure.

Licensees at February 2008

Licence type	Licensee
Commonwealth authorities	Australian Postal Corporation Reserve Bank of Australia
Eligible Corporations	ADI Limited Australian air Express Pty Ltd Border Express Pty Ltd CSL Limited Chubb Security Services Limited John Holland Group Pty Ltd John Holland Pty Ltd John Holland Rail Pty Ltd K&S Freighters Pty Ltd Linfox Australia Pty Ltd Linfox Armaguard Pty Ltd National Australia Bank Limited National Wealth Management Services Limited Optus Administration Pty Ltd Pacific National (ACT) Limited Telstra Corporation Limited Visionstream Pty Ltd

Applications before the Commission at February 2008

Applicant	Commission Meeting
Commonwealth Bank of Australia Limited	19 March 2008
Commonwealth Insurance Ltd	19 March 2008
Commonwealth Securities Ltd	19 March 2008
Colonial Services Ltd	19 March 2008
Colonial First State Property Management Pty Ltd	19 March 2008
Avanteos Pty Ltd	19 March 2008
BIS Industries Ltd	19 March 2008
TNT Australia Pty Ltd	18 June 2008
Transpacific Industries Pty Ltd	18 June 2008

Corporations declared eligible but not yet applied for a licence at February 2008

Medibank Private (notified intention not to proceed with licence application)

Snowy Hydro Limited (notified intention not to proceed with licence application)

Lindsay Brothers Management Pty Ltd

Fleetmaster Services Pty Ltd

Toll IPEC Pty Ltd

Toll North Pty Ltd

Toll Transport Pty Ltd

Comparison of workers' compensation entitlements, January 2008

	South Australia	NSW	Victoria	Queensland	Tasmania	WA	NT	ACT	Corncare
Journey claims	No	Yes	No	Yes	No	No	No	Yes	No
Common law	No	Yes	Yes – limited	Yes	Yes	Yes	No	Yes	Yes - limited
Income 0 -13 wks (total incapacity)	100% AWE	Award CWMR 100% (excl O/T) else 80% AWE	95% (AWE to 75% Stat max \$1210	1-26wks: 85% NWE /award or 85%/NWE or 80% of QOTE **	100%	100% (including all allowances) (Max 2 x AWE)	100%	100% AWE	100%
Income 13-52 wks (total incapacity)	100% AWE	13-26 wks - Award CWMR – 100% (excl O/T) else 80% AWE. 27-52 wks - < stat rate (+ pay for dep'd spouse /child) or 90% AWE	75% Stat max \$1210	27-52wks – 75% NWE or 70% QOTE	85%	14-26 wks -100% Award wks, 85% for non-Award wks. 27-52 weeks – 85% (Max 2 x AWE)	14-26 weeks - 100% 27-52 weeks - 75%	14-26 weeks – 100% 27-52 weeks Avg pre-incap wkly earning, down to 65% (or less, depending on capacity to earn)	14-45 weeks – 100% 46-52 weeks – 75% After 45 weeks maximum of \$1655.40
Income 52-104 wks (total incapacity)	80% AWE	52-104 wks - Same as 27-52 wks	75% Stat max \$1210	65% NWE or 60% QOTE	85% 52-79wks 80% 79-104wks	85% (Max 2 x AWE)	75%	25-104 weeks – same as 27-52 weeks	75%
Income 104+ wks (total incapacity)	80% AWE subject to capacity review	104+ wks - Same as 27-52 wks.	75% Stat max \$1210	104wks - 5 yrs 65% NEW or 60% QOTE or single pension	80%	85%+ up to \$50,000 in special circumst's) (Max 2 x AWE)	75%	104 weeks – same as 27-52 weeks	75%
Lump Sums – Maximum	\$136,000 + additional entitlements available in some circumstances	\$281,000 max permanent impairment (1 Oct 07)	\$384,180	\$209,555 + \$191,345 >50% impairment + \$237,380 grat. care	\$222,267.15 (2008)	\$159,191 2007-08	\$220,147.20	\$174,150.28	\$146,016 + \$54,756 non-economic loss (Nov 07)
Limits – medical + hosp.	No limit	\$50,000 or > amount prescribed or directed by WCC or approved by the WCA (1 Oct 07)	No limits – benefits cease 52 weeks from cessation of weekly payments	No limit	No limits but entitlements cease after 10 years	\$47,727 + up to \$50,000 in spec circs, & up to \$250,000 if > 15%.	No limit	No limit	No limit
Death benefits (all jurisdictions pay funeral expenses to differing amounts)	\$227,800 + \$625 pw total dependant spouse + \$156.25 pw dependant child	\$331,250 + \$104.10 for each dependant child (1 Oct 07)	\$257,210 - shared (spouse/child) + 95% PIAWE - max \$1210 pw 13 wks spouse /orphan, 50%PIAWE spouse + 25% PIAWE shared dep't child (75% for orphans)	\$409,090 + \$10,480 dep. spouse, 8% QOTE each dep. child <6, \$20,960 each dep. child <16 or a student.	\$222,267.15 + 100% wkly paymt for 13 weeks, 85% wky paymt to 78 wks, 80% wky paymt to 2 years for dep. spouse, + \$56,47 pw child <16 or <21 if full time student	\$218,095 + \$41,70 pw for child <16 + max of \$47,727 for medical expenses. Funeral expenses up to \$7,813	\$275,184 + \$105,84 pw for each child (up to max of 10 child) < 16yrs Funeral expenses up to \$5503.68	\$174,150.28 + \$58.05pw each dependant child + \$644.01 funeral benefit	\$219,024 + \$72.98 pw for each dependant child Funeral expenses up to \$9297 (Nov 07)
Redemptions / settlements etc	Yes	Yes	Yes (limited)	Yes	Yes	Yes	Yes	Yes	Yes (limited)

Source: Heads of Workers' Compensation Authorities, unpublished

Comparison of injury prevention and rehabilitation performance

Injury prevention ¹	NSW	Victoria	Queensland	WA	SA	Tasmania	NT	ACT	Australian Government	Australian Average	
Progress against National OHS Strategy injury target (% improvement)	2001-02 to 2005-06	22.6	8.3	4.1	3.1	13.8	1.8	0.0	-3.6	14.7	12.7
Incidence of serious (1 week or more compensation) injury and disease claims (claims per 1000 employees)	2004-05	20.0	12.2	17.9	14.8	20.8	18.2	15.3	15.9	11.7	16.8
	2005-06	16.9	12.8	18.0	13.3	18.0	17.7	14.9	15.2	9.7	15.6
Frequency of serious (1 week or more compensation) injury and disease claims (claims per million hours worked)	2004-05	11.8	7.5	10.8	8.8	12.9	11.5	8.9	9.7	6.4	10.1
	2005-06	10.1	7.9	11.0	8.0	11.2	11.5	8.8	9.5	5.2	9.4
Rehabilitation¹											
Incidence of long term (12 weeks or more compensation) injury and disease claims (claims per 1000 employees)	2004-05	4.1	3.8	4.0	3.7	5.5	3.4	4.1	5.3	3.2	4.0
	2005-06	3.0	3.2	3.9	3.2	4.6	3.3	3.7	4.5	2.6	3.4
Frequency of long term (12 weeks or more compensation) injury and disease claims (claims per million hours worked)	2004-05	2.4	2.3	2.4	2.2	3.4	2.1	2.4	3.3	1.7	2.4
	2005-06	1.8	1.9	2.4	1.9	2.8	2.1	2.2	2.8	1.4	2.0
Return to Work Monitor²											
RTW rate (employees who returned to work for some period since injury) (%)	2005-06	87	85	88	n/a	78	89	91	n/a	93	87
	2006-07	86	85	85	n/a	77	91	90	n/a	93	85
Durable RTW rate (employees who were still working six to nine months after injury) (%)	2005-06	81	77	81	n/a	67	81	88	n/a	88	80
	2006-07	78	76	78	n/a	65	83	75	n/a	86	77
Rate of return to same employer (employees who returned to work with their original employer) (%)	2005-06	81	88	80	n/a	88	85	82	n/a	95	83
	2006-07	86	86	79	n/a	83	86	72	n/a	94	84

¹ Source: *Comparative Performance Monitoring Report, 2005-06*

² Source: *National Return to Work Monitor, 2005-06 and 2006-07 and Comcare Licensees Return to Work Monitor, 2005-06 and 2006-07*