



Australian Government

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Senate References Committee on Environment, Communications and the Arts

Inquiry into Australia Post's treatment of injured and ill workers

Submission by Comcare

4 December 2009

Introduction

Comcare welcomes the opportunity to make a written submission to the Senate References Committee on Environment, Communications and the Arts Inquiry into Australia Post's treatment of injured and ill workers.

This submission provides background to the Comcare scheme, an explanation of the features of the scheme and an analysis of the operation of the scheme with reference to applicable Terms of Reference.

The Scheme

Comcare is a statutory authority established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

With the Safety, Rehabilitation and Compensation Commission (the Commission), it administers both the Commonwealth's statutory framework for rehabilitation and workers' compensation under the SRC Act, and its occupational health and safety (OHS) framework under the *Occupational Health and Safety 1991* (OHS Act).

These arrangements are referred to as the 'Comcare scheme'.

The Commission

The Commission, established under the SRC Act, is responsible for the scheme's regulatory framework (OHS and certain aspects of workers' compensation). It also directly regulates licensees under their SRC Act conditions of licence.

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.

Scheme features

The Comcare scheme is an integrated scheme designed to prevent injury and illness to workers. In the event of injury or illness, the scheme provides 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 scheme design.

Benefits structure

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 any determination firstly by internal reconsideration and then to an external appeal mechanism.

The benefits structure of the Comcare scheme is designed to complement its emphasis on the rehabilitation and return to work of injured employees. The scheme has an emphasis on rehabilitation in the event of injury. Under the SRC Act, employers are responsible and accountable for the safe and early return to work of their injured employees. Employers have direct statutory powers and obligations to initiate assessments of injured employees' capability of benefiting from a rehabilitation program and if indicated to provide for the rehabilitation of injured employees either by itself or using an approved rehabilitation provider. The emphasis on rehabilitation is further reinforced by giving the employer a duty to provide an employee who has

undertaken a rehabilitation program with suitable duties. However, if a return to work is not successful, the scheme provides for on-going payment of weekly income replacement benefits until retirement age if necessary. Medical and associated treatment costs are fully covered by the scheme for the life of the claim.

Licensees in the Comcare Scheme

The SRC Act was amended in 1992 to allow Commonwealth authorities and 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.

Currently, 29 corporations hold a licence to self-insure under the SRC Act. Each licensee is a 'determining authority' for the purposes of the SRC Act. A determining authority is responsible for processing and managing workers' compensation claims under the Commonwealth legislation. Each licensee is also a 'rehabilitation authority', ie have the authority to make decisions under the rehabilitation provisions of the SRC Act.

Since 2007, all licensees have also been covered by the Commonwealth OHS Act to the exclusion of state/territory coverage.

Australia Post – relationship with the Comcare Scheme

The Australian Postal Corporation (Australia Post), a Commonwealth authority, was granted a licence to self-insure under the SRC Act on 30 June 1992 when licences were introduced. It was previously a self administrator prior to and following the commencement of the SRC Act in 1988. Licences are generally issued for four-year periods. Australia Post's licence is current until 30 June 2010. Australia Post has applied for a renewal of its licence and its licence extension is scheduled to be considered at the March 2010 meeting of the Commission.

Regulatory roles – Comcare and the Commission

The Commission has regulatory functions under the SRC Act and OHS Act. Under the SRC Act, it has powers to issue licences and to regulate licensees under their prudential, financial, safety, rehabilitation and claims management conditions of licence. This enables the Commission to attach conditions to a licence including:

- that a licensee such as Australia Post complies with the SRC Act requirements;
- performance of its functions (eg setting performance standards); and
- conditions concerning the provision of information.

Consequently, the Commission monitors conformance of licensees with their conditions of licence including compliance with the SRC Act and performance against statutory functions. The statutory functions of licensees are set out at section 108E of the SRC Act.

The Commission has a function to ensure that there is equity of outcomes from the administrative practices and procedures used by Comcare and the licensees (including Australia Post). The Commission also has the function to advise the Minister on the SRC Act and the OHS Act and on the Commission's functions.

The Commission does not have its own staff and relies on Comcare staff to assist it in carrying out its functions. Section 72A of the SRC Act requires Comcare to assist the Commission in the proper performance of its functions and regulatory powers. The Commission has also

delegated certain of its powers and functions to Comcare as the most effective way of discharging its functions and responsibilities.

Evaluating licensee compliance and performance

The Commission's approach to evaluating licence compliance is through its annual Licensee Improvement Program (LIP). The LIP involves the annual evaluation of licensees with respect to:

- compliance with prudential and financial conditions of licence
- reporting against Commission indicators
- audit outcomes in prevention, rehabilitation, claims management and data integrity
- results of any OHS investigations, and
- provision of an annual performance report by each licensee which provides an overview of key activities undertaken by the licensee in the previous 12 months, outcomes achieved in that period, and objectives for the next 12 months.

The Commission has developed a set of key performance indicators (Commission indicators) to encourage continuous improvement in injury prevention, rehabilitation and efficient management of workers' compensation claims. The Commission sets annual targets against each of the Commission indicators for the scheme and for each determining authority. Performance outcomes, including for individual licensees, are published in the Commission's Annual Report.

Licence compliance results and performance outcomes are then assessed in the context of its tier model. The tier model is the lever for continuous improvement as it identifies the level of regulatory oversight to be applied in the following year through the assignment of a tier status in each of prevention, rehabilitation and claims management.

The tier status that is applied to each of prevention, rehabilitation and claims management functions is based on the self-insurer's capacity to meet the Commission's requirements and capacity to effectively self-manage the function(s).

Under the tier model, licensees with a function(s) in the first tier are subject to external audit by Comcare, on behalf of the Commission. Licensees with a function(s) in the second tier are subject to a desktop review by Comcare of their own audits. Licensees with a function(s) in the third tier must provide executive summaries of their own audits to Comcare. All licensees are subject to external audit by independent experts in the last year of licence regardless of the tier status. Claims and rehabilitation audits are undertaken by Comcare auditors and prevention audits are undertaken by external OHS auditors.

The audits follow Commission endorsed audit tools that are based on relevant national standards. The claims management and rehabilitation audit tools are based on AS/NZS 4801: 2001 and AS/NZS 4804: 2001.

Australia Post's position in the LIP and its status under the Tier model

Australia Post's LIP Report for 2008-09 was consistent with a large organisation that has mature and integrated prevention, rehabilitation and claims management systems operating within effective corporate governance and reporting frameworks.

Prevention

Australia Post had been at Tier 3 for the past three reporting periods and maintained this tier for 2009-10. With the exception of fatalities (the target is set at zero), the organisation achieved or bettered all of its Commission Indicator target ranges for prevention in 2008-09.

Rehabilitation

Australia Post had been at Tier 3 for rehabilitation during the past two reporting periods, having moved from Tier 2 in 2006-07. During this period it met, or exceeded the Commission's indicators. Australia Post demonstrated commitment to rehabilitation and retained Tier 3 status in 2009-10.

Claims Management

Australia Post had been at Tier 3 for claims management during the past two reporting periods, having moved from Tier 2 in 2006-07. It met or exceeded all the Commission indicators, with a significant improvement in reconsideration processing time and implemented a rigorous internal audit program which concluded that claims administration was operating at a satisfactory level. Australia Post retained its Tier 3 status in claims management for 2009-10.

More detailed information about Australia Post's recent performance against Commission indicators is at Attachment A.

Australia Post is in its final year of licence and, as such, has been subject to the normal external audits by Comcare across all three functions during the latter half of 2009. These audits demonstrated a high level of conformance with the Commission's endorsed audit criteria (with indicative results of 95%, 97% and 98% conformance respectively).

CEPU concerns

The CEPU has raised general concerns about Australia Post's Injury Management (Early Intervention) Program (IMP), including the use of facility nominated doctors (FND), with Comcare over the past year. Comcare has reviewed these issues with the union and the employer. In October 2009, the CEPU provided more specific information about individual cases to Comcare.

Against that background, Australia Post has consented to Comcare undertaking a supplementary audit addressing the aspects of the Senate Committee's Inquiry that fall within Comcare's regulatory responsibility. This work will be finalised shortly and the results can be reported back to the Senate Committee. Comcare's comments against the Terms of Reference below reflect the information available at this point of time.

Terms of Reference

The following section of the submission addresses the Senate Committee's Inquiry terms of reference where Comcare is in a position to provide comments.

1. Allegations that injured staff have been forced back to work in inappropriate duties before they have recovered from workplace injuries.

Early intervention is widely accepted as one of the better practice principles of rehabilitation.

For example, the Heads of Workers' Compensation Authorities state that "commencing injury management as soon as practicable after an injury demonstrates a commitment to an injured worker and enables early support and assistance to be provided".¹

¹ *Biopsychosocial Injury Management*, Heads of Workers' Compensation Authorities, <http://www.hwca.org.au/documents/Biopsychosocial%20Injury%20Management.pdf>

Comcare encourages scheme employers, including Australia Post, to adopt early intervention strategies for their injured workers as soon as the injury occurs. In some cases, this may be before liability has been determined under section 14 of the SRC Act. Early intervention and effective ongoing injury management can have the following benefits:

- providing a productive and supportive workplace
- demonstrating management commitment to the employee
- preventing long term absence from the workplace and the development of chronic illness
- reducing the adverse effects on co-workers of the injured employee
- improving staff confidence and morale
- increasing management involvement in the injury management process
- increasing the probability of return to work
- containing the cost of incapacity, and
- reducing the indirect costs to employers such as lost productivity, recruitment and training costs for replacement staff.

Of course, a key factor in successfully getting workers back to work and good health is the systems put in place by the employer. Comcare has provided guidance to employers about early intervention and effective management of injury and diseases.²

For example, Comcare recommends that organisations develop clear policies and guidelines for early intervention. This should cover monitoring and managing absence and risk factors, involvement of professionals, organisational resources and funding available and flexible work adjustments to ensure that employees are treated fairly, and consistently. Employers should also provide training to develop people management skills and resources to support line managers and case managers to carry out their responsibilities in prevention and early intervention. Also, employers should focus on strategies to improve leadership and work team climate to build a healthier workplace.

Comcare has been familiar with Australia Post's early intervention management system – the IMP, including the use of facility nominated doctors – since 2000 when it was examined in the context of a Commission licensing audit. That audit made recommendations to Australia Post to more clearly delineate the role of treating and assessing FNDs and to more clearly document for its employees the distinctions between the IMP, SRC Act workers' compensation and rehabilitation and fitness for duties processes under the Australia Post award.

Comcare has also recognised Australia Post's commitment to invest in a widely dispersed and well resourced network of in-house professional rehabilitation expertise as contributing to the success of its early intervention and SRC Act rehabilitation capability to provide early and expert advice to employees and their managers with the aim of maintaining injured employees at work/or returning them to work on suitable duties – whether prior to or following the lodgement or determination of a workers' compensation claim.

Comcare understands that Australia Post adopts a philosophical approach to early intervention which starts with the proposition that most injured employees can be provided with suitable duties following injury. This means that the majority of injured employees, particularly those

² *Leadership Commitment, Early Rehabilitation Assistance to Employees*, Comcare, December 2007
http://www.comcare.gov.au/forms_and_publications/publications/injury_management/?a=41137
Recognition, Resolution And Recovery: Early Intervention To Support Psychological Health And Wellbeing, Comcare, March 2008
http://www.comcare.gov.au/forms_and_publications/publications/injury_management/?a=41352

with sprain or strain injuries, will be either maintained at work or returned to work almost immediately following an injury – but on suitable duties that are within their medical restrictions, and with in-house rehabilitation input, to improve the ability for injured employees' post injury capacities to be well matched to available duties.

A more traditional approach would have such injured employees who are not capable of carrying out the duties of their usual job to stay at home to 'fully recover from their injuries' and not participate in a managed rehabilitation program involving suitable duties. However, rehabilitation theory and practice is clear that such an approach (separation of the employee from the workplace for extended periods) can contain great risks the longer that separation lasts.

2. The desirability of salary bonus policies that reward managers based on Lost Time Injury Management and the extent to which this policy may impact on return to work recommendations of managers to achieve bonus targets.

Comcare has no specific comment on this element of the Committee's Inquiry. However, a number of general comments can be made on the significance of management accountability and return to work initiatives.

The Comcare scheme has a model of rehabilitation which is focused on being workplace based and aimed at maintaining an injured employee within the workplace or returning them to appropriate employment in a timely, safe, durable and cost efficient manner. The SRC Act provides the employer, as a 'rehabilitation authority' under the Act, with direct powers to assess the capacity of injured employees to benefit from rehabilitation, and if warranted, to provide a managed rehabilitation program for the injured worker.

The key to achieving early and successful maintenance at work or return to work lies in the employer's willingness, ability and commitment to provide work within the assessed capacities of the injured worker, and in the worker's willingness to undertake such work.

Consequently, the SRC Act provides that the employer has a duty to take all reasonable steps to provide suitable employment for an injured worker or to assist them to find such employment (section 40).

It is Comcare's view that an employer that seeks to maximise timeliness and to minimise cost in a return to work case at the expense of safety and durability is short sighted and would ultimately prove more expensive in terms of cost and lost time. An employer who required its employees to return to work without medical clearance or on duties which conflicted with medical advice – to achieve a short term reduction in a lost time indicator or to secure a bonus – may also have breached its duty of care under the OHS Act.

Further, Comcare recognises that leadership commitment is integral to successful injury management regimes. Comcare recommends that organisations hold managers accountable for people management outcomes and establish clear expectations through performance management frameworks and workplace agreements.³

³ *Recognition, Resolution And Recovery: Early Intervention To Support Psychological Health And Wellbeing*, Comcare, March 2008
http://www.comcare.gov.au/forms_and_publications/publications/injury_management/?a=41352

A range of strategies are needed for translating leadership commitment into action. These strategies include activities that make both the organisation and the people who work in it accountable. A better practice accountability measure can include clearly specifying management OHS and injury management responsibilities in organisational OHS and injury management policies and procedures. Employers can consider using performance development frameworks and job descriptions to improve management's accountability for OHS and injury management. Organisations can introduce financial accountabilities for workplace injury to business units (including for example through premium devolution).⁴

3. The commercial arrangements that exist between Australia Post and InjuryNet and the quality of the service provided by the organisation.

This issue is outside the regulatory responsibilities of Comcare and the Commission.

4. Allegations of Compensation Delegates using fitness for duty assessments from Facility Nominated doctors to justify refusal of compensation claims and whether the practice is in breach of the Privacy Act 1988 and Comcare policies.

Australia Post's claim form, like all determining authority's claims forms meets SRC Act requirements and has been approved by Comcare. The SRC Act requires an injured employee to furnish a medical certificate with the workers' compensation claim.

The claim form also provides for the employee to provide the determining authority (Australia Post's compensation section in this case) with a signed release authorising the determining authority to contact the employee's treating doctors regarding their injury and related conditions in order to clarify information on the certificate for the purpose of determining liability on the claim (section 14), determining reasonable medical and therapeutic treatment (section 16 benefits) and need for time off work (section 19 benefits).

Comcare understands that the medical certificate provided to injured employees who seek primary treatment from one of Australia Post's facility nominated doctors is entitled 'fitness for duty assessment'. It would be usual for an employee to furnish this 'assessment' certificate with their workers' compensation claim and to provide a signed release enabling Australia Post's workers' compensation section to contact this treating doctor. As such, this 'fitness for duty assessment' is a workers' compensation medical certificate by another name.

However, if under Australia Post's principle determination, an injured employee is required to be assessed for his or her fitness for duty, a fitness for duty report is completed by the assessing doctor. Comcare understands that it is only Australia Post's senior human resources (HR) managers who have the delegation to require such assessments under Australia Post's principle determination. If such a report is furnished to Australia Post's HR manager, the employee may agree to release such a report for workers' compensation purposes. In the circumstances where an employee does not provide a release, a workers compensation delegate's access to such a report would be governed by the privacy principles.

The Commission and Comcare examined this issue following its September 2000 external audit of Australia Post and decided that information which Australia Post collects under its fitness for duty provisions of its principle determination, eg to determine whether an employee is capable

⁴ *Government Leaders Safety Leaders*, Comcare and Australian Safety and Compensation Council,

of working and/or capable of rehabilitation, can be used for assessing the same issues under the SRC Act, provided the employee has consented to the use of that information, whether via the signed medical release on the claim from or by other means.

5. Allegations that Australia Post has no legal authority to demand medical assessments of injured workers when they are clearly workers' compensation matters.

Comcare understands, through recent discussions with Australia Post, that injured employees are no longer directed to medical assessments under its IMP. Instead, as described by Australia Post, an employee would attend an FND voluntarily to seek medical treatment and the employee his/herself would request the treating doctor to furnish an assessment report as part of an initial workers' compensation claim. If the injured employee elects to continue being treated by the FND outside the bounds of the IMP, the injured employee would continue to furnish such medical certification or reports as part of their ongoing workers' compensation claim.

Comcare also understands that Australia Post employees may also attend an FND for a medical assessment at the request of Australia Post, but they may decline such a request. The SRC Act provides determining authorities, including Australia Post, with the power under section 57 to 'reasonably' require an employee to attend a medical assessment. The Commission has issued guidelines on what would be reasonable in terms of frequency and numbers of assessors.

Australia Post also has the power to refer its employees to attend fitness for duty assessments. This would be governed by the terms of its principle determination.

6. The frequency of referrals to Injury Net doctors and the policies and circumstances behind the practices.

As set out at term of reference No 4 above, an employee is required to furnish a medical certificate as part of an initial workers' compensation claim and would be required to furnish further certificates or reports in order to satisfy the workers' compensation delegate to continue to pay ongoing benefits under sections 16 and 19 of the SRC Act.

The need for an employee to furnish certificates or reports and the frequency with which the employee needs to visit their treating doctor to enable that doctor to provide up to date certificates or reports is determined by the individual circumstances of the case, the principle of 'evidence based' medicine, and consistent with prudent medical management.

Compensation delegates must be satisfied there is an ongoing medical connection to the workplace injury to support ongoing treatment and incapacity. To confirm this, delegates may ask the injured employee to submit medical certification reports. In addition, the SRC Act provides determining authorities, including Australia Post, with the power under section 57 to 'reasonably' require an employee to attend a medical assessment.

7. The comparison of outcomes arising from circumstances when an injured worker attends a facility nominated doctor, their own doctor and when an employee attends both, the practices in place to manage conflicting medical recommendations in the workplace.

In the course of monitoring Australia Post's license arrangements, Comcare has noted its practice of using FNDs. Australia Post has stated that FNDs have been inducted into its philosophy and practice of early intervention injury management, starting with the proposition

that most injured employees can be provided with suitable duties following injury. This enables the majority of injured employees to be either maintained at work or returned to work following an injury – but on suitable duties that are within their medical restrictions. Comcare also notes that the FNDs are expected to work closely with Australia Post’s in-house rehabilitation professionals, to improve the capacity for injured employees’ post injury capacities to be well matched to available duties.

Comcare’ supplementary audit will provide further information in respect of Australia Post’s compliance with its obligations under the SRC Act and licence conditions and may be relevant to this element of the Committee’s Terms of Reference.

Australia Post – Performance against Commission indicators

Indicator			2007–08	2008–09	Target range 2008–09		Performance within target range
					Upper	Lower	
PI.1	Claims with one week lost time (incidence rate)	Non-commuting	15.5	18.0	19.2	12.8	✓
		Commuting	0.0	0.1	N/A	N/A	N/A
PI.2	Death claims	Injury	3.0	3.1	Set at Zero	Set at Zero	✗
		Disease	0.0	0.0	N/A	N/A	N/A
		Commuting	0.0	0.0	N/A	N/A	N/A
PI.3	Claims with one day lost time (frequency rate)	Non-commuting	12.7	13.4	17.3	11.5	✓
		Commuting	0.0	0.1	N/A	N/A	N/A
CI.1	New claims processing time (days)	Injury	11	10	20	10	✓
		Disease	18	21	35	25	☆
CI.2	New claims processed		94%	95%	100%	90%	✓
CI.3	Reconsiderations processing time (days)	Injury	22	11	35	25	☆
		Disease	19	7	35	25	☆
RI.2	Claims with RTW plans		88%	88%	90%	80%	✓
RI.3	Claims with 6 weeks lost time (incidence rate)		5.8	6.9	9.4	6.3	✓
RI.4	Claims with 12 weeks lost time (incidence rate)		2.8	4.3	6.1	4.1	✓

PI.1 – PI.3 are injury prevention indicators. CI.1 – CI.3 are claims management indicators. RI.2 – RI.4 are rehabilitation indicators

Source: Safety, Rehabilitation and Compensation Commission, *Annual Report 2008-09*