



**SAFETY, REHABILITATION AND
COMPENSATION AND OTHER
LEGISLATION AMENDMENT BILL 2006**

SENATE SUBMISSION

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WHO WE ARE



Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

The Australian Lawyers Alliance is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2005. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

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SUBMISSION TO THE SENATE
EMPLOYMENT, WORKPLACE RELATIONS & EDUCATION COMMITTEE

**RE: THE SAFETY REHABILITATION, COMPENSATION AND OTHER
LEGISLATION AMENDMENT BILL 2006**

INTRODUCTION

The Australian Lawyers Alliance approaches this Submission through its National Workers Compensation Special Interest Group and Comcare. The Special Interest Groups have a particular interest and expertise in the issue of workers compensation schemes in this country and notably the emerging issue surrounding nationally consistent compensation.

This inquiry comes at an appropriate time given the interest surrounding *Attorney-General for the State of Victoria v Andrews, Minister for Employment & Workplace Relations and Ors [M83/2005]* otherwise known as “the Optus case”, heard in the High Court on 1st & 2nd August 2006 with judgement reserved.

Given the recommendations of the Productivity Commission in 2004 and in anticipation of the Optus decision coming down, attention will be focused on the issues of national compensation.

Comcare as the current Commonwealth compensation scheme needs to be examined in terms of its structural ability, given the issue of an increasing number of applications pursuant to Section 100 of the Safety Rehabilitation & Compensation Act 1998.

The submission proposes to explore generally, problems in the Comcare Scheme which the Alliance believes contributed to the current bill before the Parliament.

In essence as is evidenced by parts of the Minister’s Second Reading speech, concerns about the viability of the scheme have led to the proposal to impose restrictions on the scheme.

The view of the Alliance is that whilst it is uncontested that the restrictions sought will harshly affect workers subjected to this scheme, the better solution involves a proper examination of the scheme’s structure so that on a sustained basis the scheme can be viable.

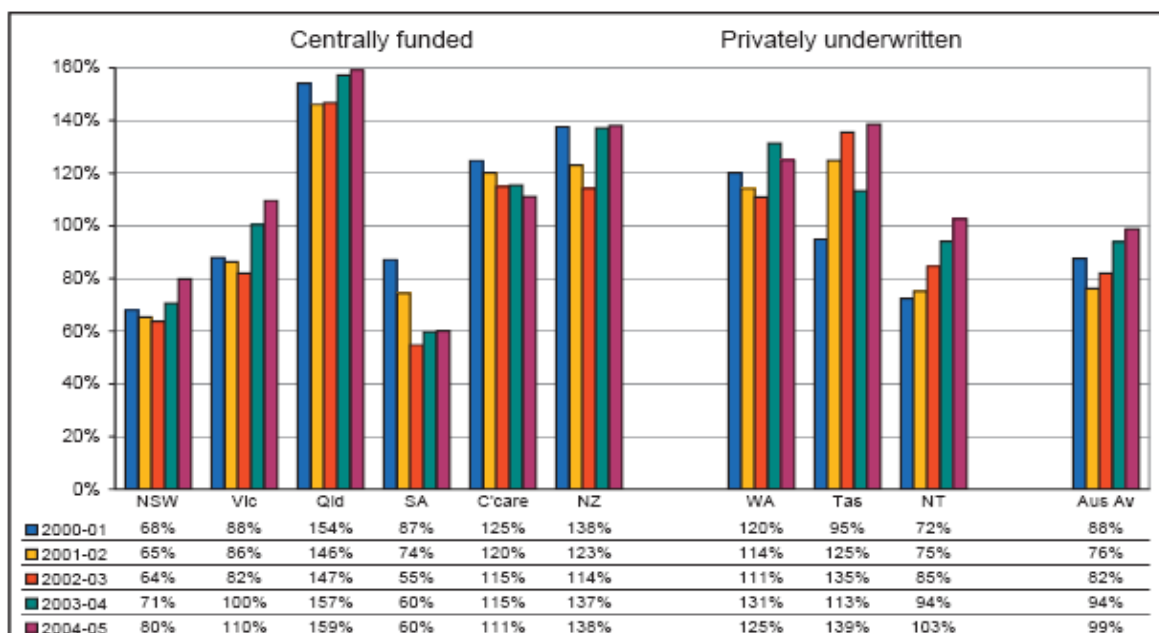
It is evident to the Alliance that the proposed amendments to the legislation are likely to be the first of many restrictive amendments that will follow for years to come if close attention is not paid to reviewing the structure of the Comcare scheme.

Particular regard in this submission is paid to the Comparative Performance Monitoring (“CPM”) data to enable the Senate Committee to properly view Comcare in its true context in comparison to other state schemes.

THE COMPARATIVE VIABILITY – AUSTRALIAN WORKERS COMPENSATION SCHEMES

Funding Ratio

Indicator 18 – Standardised ratio of assets to net outstanding claim liabilities



1

The standardised ratio of assets to net outstanding claim liabilities is one of the key indicators to determine the viability of a workers compensation scheme. In short it measures assets as a percentage of net claim liabilities. In a perfect insurance environment a reasonable margin should operate between the level of assets and level of liabilities.

Now that data has been available for some 5 years it is possible to observe trends that are occurring in schemes.

There are some interesting observations regarding the funding ratio of schemes around the country. Firstly, the Australian average at 99% has been on the rise since 2002. Most schemes have followed this trend with Comcare being the notable exception along with South Australia.

Queensland enjoys the highest funding ratio at 159%.

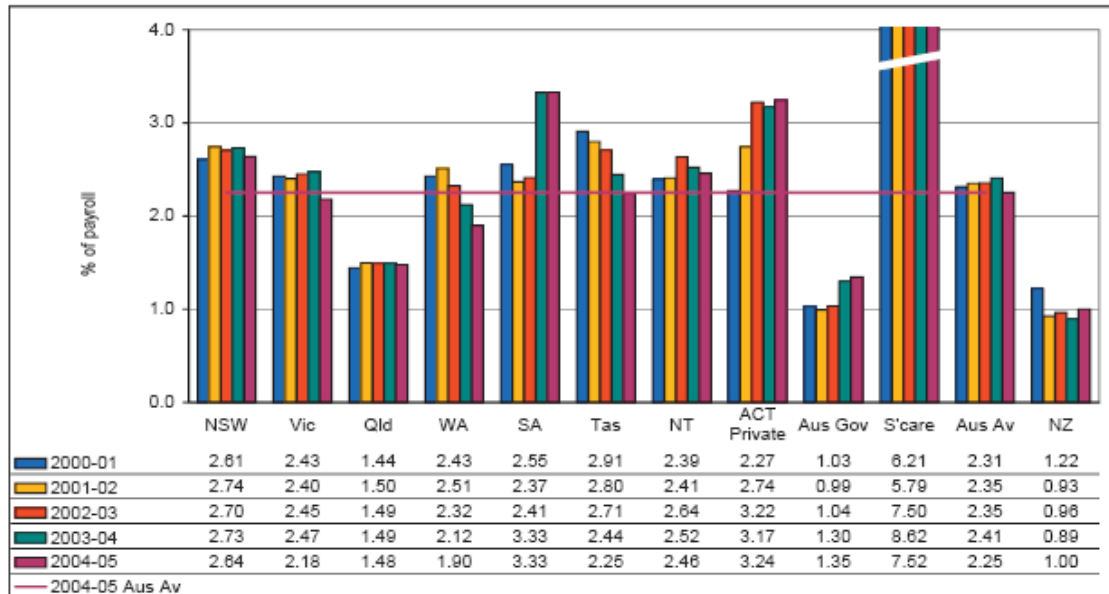
In the view of the Alliance a number of elements of the Queensland scheme structurally result in it enjoying such a healthy financial position.

Of concern to the Alliance is that for Comcare's funding ratio to continue to deteriorate, moves to "broaden the base" with different industries seeking to join the scheme in one form or another, will only serve to compound the problem.

¹ *Indicator 18 – Standardised ration of assets to net outstanding claim liabilities – Comparative Performance Monitoring Report 8th Edition 2004-05*

PREMIUM RATES

Indicator 15 – Standardised average premium rates (insured and self insured sectors)



2

Politically, premium rates are of significant importance in examining schemes around the country.

Those schemes that can enjoy low premium levels which can be sustained can often attract business to the state within which the scheme is operating, to the exclusion of states that have much higher premium rates.

The general trend nationally has been relatively stagnant although there has been a tendency for better performing schemes to reduce premiums.

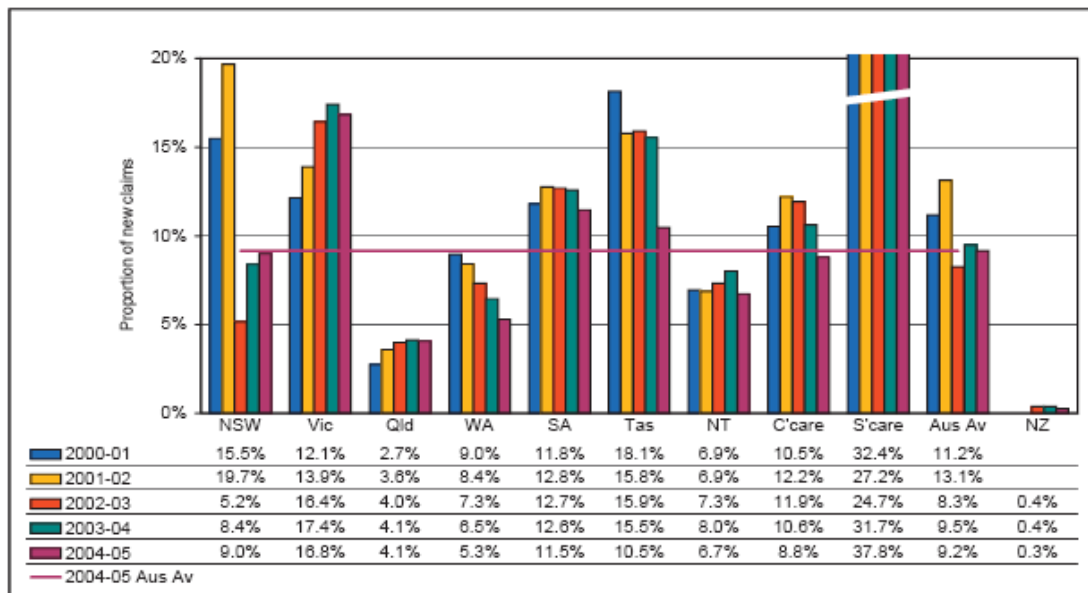
With the exception of South Australia and ACT Private, Comcare as compared nationally has increased its premium levels by not insignificant margins.

The Alliance is concerned that structurally the scheme is likely to be headed for more premium increases given its deteriorating financial position.

² Indicator 15 – Standardised average premium rates (insured and self insured sectors) – Comparative Performance Monitoring Report 8th Edition

DISPUTATION RATE

Indicator 22 – Proportion of claims with dispute



3

Ostensibly, a high dispute rate tends to carry with it high scheme costs.

It is to be noted in the data that Comcare has now stripped out internal reconsiderations from its data.

By way of illustration the 2003-2004 dispute levels in the Comcare scheme register in the 8th Edition of CPM at 10.6% but with internal disputes factored in that figure becomes 25.1%.

In is the view of the Alliance it is not an accurate depiction of dispute within a scheme to extract out internal dispute data .

It is the Alliance's view that Comcare's scheme structure and level of internal and external dispute is a significant contributor to its deteriorating viability as a scheme.

³ *Indicator 22 – Proportion of claims with dispute* – Comparative Performance Monitoring Report 8th Edition

SCHEME STATISTICS

TABLE 2: SCHEME LEVEL STATISTICS 2005-2006

Determining authority /group	Full-time equivalent employees (FTE)	Claims received	Claims accepted	Claims accepted per 1000 FTE	Reconsiderations decided	AAT appeals received	Paid to claimant (\$m)	Medical & rehabilitation (\$m)	Legal, administration and regulatory costs (\$m)	Total (\$m)
Comcare / premium paying agencies*	185,475	6,308	5,306	28.6	1,374	512	141.28	62.21	65.34	268.82
Telstra	33,344	1,297	1,186	35.6	308	202	17.91	8.51	10.92	37.34
Aust Post	31,217	3,031	2,508	80.3	851	360	16.82	8.27	12.08	37.17
Optus	9,733	181	157	16.1	15	3	0.50	0.40	1.60	2.51
ADI	2,584	155	153	59.2	12	8	0.31	0.33	0.90	1.53
Pacific National	1,741	184	172	98.8	11	5	1.30	0.85	0.98	3.12
CSL	1,477	36	30	20.3	6	1	0.24	0.22	0.50	0.96
AaE	1,360	67	56	41.2	11	5	0.59	0.43	1.31	2.33
Reserve Bank	857	17	17	19.8	1	0	0.01	0.02	0.31	0.34
Visionstream	378	5	4	10.6	3	3	0.35	0.03	0.29	0.67
Totals	268,164	11,281	9,589	35.8	2,592	1,099	179.31	81.27	94.21	354.79
2004-2005 Totals	251,896	11,819	10,245	40.7	2,800	1,177	182.18	71.93	86.94	341.05
% change 2004-2005 to 2005-2006	6%	-5%	-6%	-12%	-7%	-7%	-2%	13%	8%	4%

*Includes ACT Government data

4

This table provides a breakdown in relation to claims data both in number, and distribution of payments.

It provides comparison between the 2005/06 and 2004/05 years.

According to the table in the more recent period there was a reduction of claims received of 5%, a reduction of claims accepted of 6% and a reduction of claims accepted per 1000 FTE of 12%.

Of concern, at the same time payments to claimants reduced by 2%, medical and rehab costs rose by 13% and legal administration regulatory costs rose by 8%.

⁴ SRCC Annual Report 2005-2006

RECOMMENDATION

It is the view of the Australian Lawyers Alliance that serious consideration needs to be given to examining the structure of the scheme generally as compared to other schemes around the country in order to provide a financially viable structure that can sustain the scheme in the long term.

Band aid solutions in the form of amendment bills restricting benefits are just that, namely band aids that provide temporary relief for the difficulties the scheme experiences.

The Alliance encourages the Commonwealth Government to take initiative and re-examine the structural elements of the scheme generally.

SCHEME STRUCTURE

Historically the Comcare Scheme was developed for the benefit of white collar workers. In more recent times higher impact industries eg military have been spun out of the scheme.

The Alliance observes, in its opinion, that structurally the scheme has some significant flaws in it

1. “Pension Syndrome”

The scheme operates on a relatively long tail and it is the Alliance’s view that in the modern era workers compensation schemes need to turn their attention to being able to shorten the tail but still provide proper compensation for workers.

2. Disputation

It is the view of the Alliance that changes to the CPM reporting to give the appearance of lower disputation levels simply conceal the fact that Comcare’s disputation system is laborious, lengthy, complex and expensive. As evidenced earlier in the Submission, schemes with lower disputation levels generally have lower administration and claims costs. It is incumbent upon the scheme to consider how to process its claims without such an intense level of disputation.

3. Common Law

The common law as an ingredient in workers compensation schemes provides three major advantages:

- i. Finality – the best way to shorten a tail in a pension scheme is to provide an ability to bring a claim to completion. (This has always been a strength common law holds over longer tail statutory schemes.) Queensland is a perfect example of how to combine a well structured common law scheme with a shortened tail to still provide good outcomes for workers. Comcare by largely abolishing common law has lost the ability in this respect.

- ii. Flexibility – A major strength of the common law is that all issues can be brought to the table without the need to go through “hoops and reviews” that tend to exist in no fault statutory schemes. It is respectfully submitted that one of the major reasons why the disputation level is so high in Comcare is that the provision of many hoop and review processes only serves to lengthen the claim and add to the cost.
- iii. Deterrent – A major issue in any workers compensation scheme must be to deter employer conduct that leads to injury in the first place. The common law provides an unparalleled deterrent system.

The Alliance will not submit to particular sections in the Bill but provide the following observations.

1. Alterations to definition of disease and injury

The general ambit of the proposed amendment is to restrict access to the scheme. It is the Submission of the Alliance that statistical data through Comcare and the CPM Reports does not support the need based on number and frequency of claims.

In essence, the Alliance submits that these amendments are simply sought as one way to stem the bleeding occurring in the scheme from its poor structure.

Moreover, seeking to reduce more numbers of workers from the scheme via these amendments does not solve the greater problem which is why the scheme is not operating efficiently in the first place.

For years scheme operators sought to restrict access through injury definitions etc in an attempt to curb either spiralling costs or falling profits in schemes. We urge upon this Committee to think about the wider problems confronting the Comcare scheme before approving amendments surrounding definitions to disease and injury.

2. Journey Claims

Some States offer statutory protection in journey claims whilst others don't.

Historically the rationale behind allowing statutory payments on journey claims was to compensate for the risk placed upon the worker travelling to and from the workplace.

The cost to the scheme currently will simply be shifted from “Peter to Paul” via either State based schemes or through private insurance or CTP insurance.

The Alliance has not seen public evidence to support any justification for restricting journey claims per se within the Comcare scheme. The Alliance again reiterates its earlier submission that the amendment sought is simply another measure to stem the flow from an otherwise ailing scheme. The real solution as submitted earlier lies in examining the entire structure of the scheme so that it can operate efficiently and profitably whilst still delivering proper compensation to workers.

3. Superannuation

The Alliance opposes any amendment sought that deteriorates the level of super cover afforded to workers.

The reason for introducing superannuation on a compulsory basis in Australia had nothing to do with entitlements to compensation and as such ought to be treated separately.

4. Funeral Benefits

The Alliance congratulates the Government on this initiative and welcomes the amendment.

SUMMARY

In the current climate where workers compensation schemes on average in Australia are improving, we consider it is a perfect opportunity for the Commonwealth Government to more closely examine the Comcare scheme. This is particularly so in light of the increasing number of applications under Section 100 of the SRC Act being granted by the Minister. If the structure of this scheme is not right and it certainly appears to be the case currently, the placement of more pressure on the scheme by higher risk industries will only serve to further damage its viability.

The Alliance encourages the Government to take a proactive stance and to set up an appropriate working group to examine schemes in Australia that run profitably and provide good benefits to workers, learn from those initiatives and produce a better structured Comcare scheme that should avoid restrictive amendments moving forward. The Australian Lawyers Alliance with its significant expertise of lawyers in this field offers to provide whatever assistance it can to the Commonwealth.