THE COMCARE SELF-INSURANCE OPTION

With the Australian Government actively promoting self-insurance under Comcare, some national employers are now considering whether the transfer from a state scheme to Comcare would be advantageous. Prospective Comcare self-insurers need to evaluate the combined risks and benefits of funding workers’ compensation benefits under Comcare, operating under the national OH&S system, and the upfront costs of exiting state workers’ compensation schemes.

In response to the recommendations of the 2004 Productivity Commission Report National Workers’ Compensation and National Health and Safety Frameworks, the Australian Government has been actively promoting self-insurance under Comcare, the Federal workers’ compensation system, as an option for eligible national employers. Although this action was the least dramatic intervention contemplated in the Productivity Commission report, the movement of large national employers from state workers’ compensation schemes to Comcare has been a political issue, in part because it has been associated with the Australian Government’s broader industrial relations agenda.

In 2005 the Victorian WorkCover Authority challenged on constitutional grounds the validity of the self-insurance licence granted to Optus. The application was finally dismissed by the High Court in March 2007, paving the way for large national employers such as John Holland and National Australia Bank to obtain self-insurance licences under Comcare.

Court action has recently been commenced by a Sydney carpenter, with the support of the Construction Forestry Mining and Energy Union, challenging John Holland’s move to Comcare on the grounds that workers’ interests have been harmed by the move.

A number of national employers are now considering whether the transfer from a state scheme to Comcare would be advantageous. Against this background, prospective Comcare self-insurers need to evaluate the combined risks and benefits of funding workers’ compensation benefits under Comcare, operating under the national Occupational Health and Safety (OH&S) system, and the upfront costs of exiting state workers’ compensation schemes.

Eligibility

A prospective Comcare self-insurer must first be declared eligible under the Safety, Rehabilitation and Compensation Act 1988 (Cth) (SRC Act) by the Workplace Relations Minister. Eligible employers are ex-Commonwealth authorities and corporations that carry on business in competition with Commonwealth or ex-Commonwealth authorities.

Eligible employers must then obtain a self-insurance licence, the requirements for which include:

- meeting financial and prudential requirements
- demonstrated capacity to meet claims management standards
- demonstrating that the granting of a licence will not harm employees’ interests.

Becoming a Comcare self-insurer brings an employer under the umbrella of the Federal OH&S regulatory framework and the SRC Act (Comcare) workers’ compensation benefits and dispute resolution system in place of those defined under the different state schemes.

Uniform Occupational Health and Safety Regulations

For a national employer, a major advantage of self-insuring under Comcare is that all employees are brought within the jurisdiction of a single OH&S framework, irrespective of their state of employment. Avoiding the administration and compliance costs of operating under up to eight sets of OH&S regulations is likely to produce substantial savings.

The different state and federal OH&S schemes are designed with reference to an agreed national framework, however there are differences in implementation between jurisdictions. Our review of OH&S legislation supported the view that the effect of the different state and Commonwealth schemes is...
broadly similar, notwithstanding differences in their detail.

An exception is the strict liability provisions that apply in NSW. In the event of a workplace incident, NSW employers can be prosecuted for failing to provide a safe workplace unless they can demonstrate that everything practicable had been done to prevent the injury. In other jurisdictions, including the Commonwealth, the onus rests with the regulator to demonstrate the employer has not provided a safe workplace.

In recent interviews we conducted with national employers who had considered Comcare self-insurance, half identified strict liability provisions in NSW as a factor in deciding whether to move to Comcare.

Although there is clear scope for compliance savings and administrative efficiencies from moving to Comcare, there are circumstances in which operating under Commonwealth OH&S legislation could add complexity to workplace management. These arise when a workplace is shared by employees and contractors, for example on a building site, in which case the workplace would fall under the supervision of both state and federal OH&S regimes. It is likely that Comcare employers would retain some obligations under state OH&S schemes in relation to contractors that share their premises.

**Occupational Health and Safety Enforcement**

Although Commonwealth OH&S legislation is similar in its effect to the various state schemes, there is evidence that there are material differences in the approach to OH&S enforcement among the jurisdictions.

Publicly available data on enforcement activity under the different OH&S regimes, such as the rate of proactive interventions, enforcement notices and prosecutions, indicates a low level of enforcement activity within the Commonwealth jurisdiction. However, the Comcare scheme has historically been dominated by public sector employees in relatively low-risk occupations and it may be that Comcare’s enforcement approach reflects this risk profile.

As the Comcare scheme expands its coverage to include higher risk industries, the historically low level of enforcement activity may need to increase.

**Workers’ Compensation Benefits**

The benefit structure under the Comcare workers’ compensation system influences the effective premium rates faced by prospective self-insurers, and consequently the attractiveness of the Comcare option.

There are mixed indications about the relative benefits under the Comcare system. Figure 1 (above) illustrates that while lump sum benefits are lower under the Comcare scheme for severe levels of impairment, at the 20 per cent level of impairment Comcare benefits are comparable.

The largest single payment type for workers’ compensation schemes is the weekly benefit paid during finite periods of incapacity. As all Australian workers’ compensation schemes cap their weekly benefit entitlements, the proportion of income replaced under each scheme varies depending on the income of the injured worker. Figure 2 (below) shows the relative income replacement proportions for a middle income earner ($1,000 pw) with two dependent children at 26 and 120 weeks’ incapacity. Comcare weekly benefits are relatively generous at both of these duration thresholds.

A distinguishing feature of the Comcare workers’ compensation system is that there is no effective recourse to common law. Although common law access is restricted in all state jurisdictions, in most states injured workers can still elect to pursue common law compensation subject to meeting impairment thresholds and/or other restrictions.

Recent changes to the Comcare scheme, such as the abolition of benefits for journey claims and the restriction of benefits in the case of psychological impairment, increase the attractiveness of the Comcare option to employers. However, due to the relatively generous weekly benefits under Comcare it appears that prospective self-insurers will achieve savings in workers’ compensation...
costs only if they are able to manage claims at a shorter average duration than has historically been achieved within Comcare.

Dispute resolution

One of the risks of transferring to the Comcare workers’ compensation system is that the cost of operating under the Comcare dispute resolution process is not yet well understood for national self-insurers. Comcare has historically recorded higher than average disputation rates and has a protracted dispute resolution process. In 2004-05 only 13 per cent of Comcare disputes had been resolved within three months, compared with 91 per cent in Queensland, 51 per cent in Victoria and 32 per cent in New South Wales. After nine months only 45 per cent of Comcare disputes had been resolved.

The Administrative Appeals Tribunal (AAT) is responsible for deciding on any Comcare workers’ compensation disputes that are not resolved by internal review. The AAT process is necessarily designed to handle disputes relating to various spheres of government, including welfare and taxation, which results in a comparatively lengthy and expensive process for workers’ compensation matters.

Tail Provisions and Exit Fees

When an employer becomes a Comcare self-insurer, claims incurred under the state schemes (‘tail claims’) remain within the regulatory control of each scheme.

Each jurisdiction has a different approach to managing the liabilities of employers exiting their scheme to move to Comcare self-insurance. Approaches may also vary depending on whether the employer is self-insured or insured in that state.

Two states, Victoria and South Australia, have legislated capacity to charge an exit fee on employers moving from the state scheme to Comcare self-insurance. These fees can, depending on circumstances, be sizable (potentially in excess of a year’s premium), and are a disincentive for employers contemplating the move to Comcare.

Conclusion

There are apparently substantial savings to be made by eligible national employers that transfer to the Comcare workers’ compensation system. Optus claimed savings of $2.2m per year by leaving Victorian WorkCover, while John Holland has estimated nationwide savings of $10m per year by joining Comcare.

The relative contributions of lower workers’ compensation premiums and OH&S efficiencies to these savings will vary between employers depending on the nature of their business and the number of jurisdictions in which they operate.

Our analysis suggests that workers’ compensation scheme costs for Comcare and the large state schemes should not be materially different, and could actually be greater for Comcare due to its higher weekly benefits and protracted dispute resolution process.

A major cost saving from moving to Comcare lies in the reduced compliance costs and administrative efficiency of being able to manage all employees under a single OH&S and workers’ compensation framework. However, as group licences are not available to Comcare self-insurers, cost savings could be partially offset if multiple licences were required.

Employers that are engaged in relatively high-risk industries and those that depend heavily on input from independent contractors would also need to assess the risks of operating on sites that are covered by more than one OH&S regime.

Finally, there may be substantial upfront costs associated with exiting some state schemes.

The risks and benefits of moving to Comcare self-insurance will vary depending on the circumstances of individual employers. Although there is evidence that employers across a range of industries have concluded that savings will be made from the move to Comcare, a proper consideration of the different OH&S and workers’ compensation implications will be required for any employer considering the Comcare option.