

Workers' compensation and occupational health & safety in an outsourced environment

1. Purpose

With an increasing number of Comcare's Customers outsourcing corporate services functions to private providers, it is important that those Customers:

- are aware of the operation of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS(CE) Act) in an outsourced environment;
- are provided with advice on Comcare's relationship with the providers of outsourced corporate services; and
- are reminded of their obligations under the *Privacy Act 1988*.

2. Background

This Circular is based on a letter sent out by Comcare's CEO, in July 2001, to all Agency Heads.

The views expressed in this Circular are based on legal advice provided by the Australian Government Solicitor.

3. Workers' Compensation

Delegation of powers under the SRC Act

The SRC Act contains a number of powers that are exercisable by Customers. The majority of these powers relate to the role of the rehabilitation authority. These powers include arranging for the assessment of an employee's capacity to undertake a rehabilitation program, determining that an employee should undergo a rehabilitation program and engaging an approved rehabilitation provider to manage such a program. There are also a number of other powers and obligations under the SRC Act including the requirement to provide information to Comcare on request under section 71 and the power to request a reconsideration of a decision made by Comcare.

The powers vested in Customers as rehabilitation authorities under the SRC Act cannot be delegated to contracted providers. This is because section 41A of the Act specifically limits delegation of rehabilitation authority powers to officers of, or persons employed by, a Customer. There are no other provisions in the SRC Act which allow for the delegation of powers or functions vested in Customers (other than licensed authorities).

Having said that these powers cannot be delegated, there is nothing to prevent a Customer from utilising the services of a contracted provider to assist it in meeting its obligations under the SRC Act. For example, a Customer might use a contracted provider to organise a rehabilitation program which might then be approved by an employee of the Customer exercising their delegation.

Provision of information to and from Comcare

In determining claims, Comcare provides and receives sensitive personal information. The use and disclosure of this information is covered by the provisions of the *Privacy Act 1988*. Customer contracts can enable Customers to provide such information to their providers. Customer contracts with providers should ensure that the latter adhere to the Information Privacy Principles (IPPs) under the Privacy Act and that they are authorised to provide such information to Comcare.

The release of personal information by Comcare to an outsourced provider is more problematic. Comcare does not have a contract with the providers. As such Comcare can only release information in accordance with IPP 11, which relates to disclosure. The most relevant provisions under IPP 11 are that the claimant has consented to Comcare releasing this information or is likely to have been aware that Comcare would release information to a provider. On the basis of the provisions of the Privacy Act, Comcare would normally release personal information only to the Customer.

However, it is possible for Comcare to provide information direct to contracted providers where a Customer has demonstrated to Comcare that the consent of the employee has been obtained or the employee was likely to have been aware that information would be provided to the contracted provider. Comcare will be amending the *Claim for Rehabilitation and Compensation* form to include advice to claimants that Comcare might release information to contracted providers. On the basis of the above it will continue to be Comcare's policy that access to the Customer Information Service (CIS) is to be given to an employee of a Customer and not to a contracted provider.

Contracts with Providers

Comcare recommends that Customers clearly articulate, through their contracts with providers, the respective roles and responsibilities of the Customer and the providers in relation to the exercise of powers and responsibilities under the SRC Act. Contracts should include provisions which ensure that contractors will perform their services in a manner which does not leave the Customer in breach of its obligations under the SRC Act, the Privacy Act and other relevant legislation, for example, the *Administrative Tribunals Act 1975*. In addition, contracts should require contractors to keep the Customer fully informed of all relevant aspects and maintain proper documentation and audit trails in connection with claims under the SRC Act.

4. Occupational Health and Safety

The situation under the OHS (CE) Act is similar to that for the SRC Act. The OHS(CE) Act imposes a number of obligations on employers. These obligations include the basic duty of care to take all reasonably practicable steps to ensure health and safety of all employees. The employer remains responsible for meeting obligations under the OHS(CE) Act and cannot contract out or delegate these responsibilities to contracted providers. However, these providers might assist a Customer in meeting these obligations, for example, by carrying out risk assessments. Again, contracts need to ensure that the respective roles and responsibilities of Customers and providers are clear and accountability provisions similar to those relating to the SRC Act (set out above) are included. Contracts should also ensure that providers do not do anything to breach the duty of care to employees.

As it is ultimately the employer's duty of care to meet the obligations imposed by the OHS(CE) Act, all notices of powers exercised by or intended to be exercised by Comcare will be sent to the employer not the provider. For example, notification of

Comcare's intention to conduct a planned investigation will be provided to the Customer. In addition, where there is any follow-up action arising from an investigation, advice on this action will be requested from the Customer. Having said this, Comcare recognises that in the course of investigations it may be necessary for providers to provide certain information directly to Comcare. Such an obligation should be included in the provider's contract which should also provide that any information given directly to Comcare be copied to the Customer.

5. General Information

In addition to the operational activities under the SRC and OHS(CE) Acts, Comcare develops policy in relation to SRC and OHS(CE) Acts for consideration by the Safety, Rehabilitation and Compensation Commission and the Minister. In the development of policy, Comcare consults with stakeholders including Commonwealth employers. Due to the sensitive nature of some of these policy proposals, Comcare's position is that it will not consult directly with outsourced providers, although a Customer may seek advice from their own provider in providing feedback to Comcare. Again, providers' contracts will need to preserve the confidentiality of any assistance they give Customers in this regard.

Comcare also provides general information to Customers on the operation of both the SRC Act and OHS(CE) Act through Customer Circulars and OHS Fact Sheets. To ensure that contracted providers are familiar with this general advice, Comcare is happy to provide copies of this advice to contracted providers.

6. Further information

If you have any further questions on this matter, please contact the Manager, Policy and Co-ordination on 1300 366 979.

7. Disclaimer

The contents of this Circular are provided for general information. Please contact Comcare before any action or decision is taken on the basis of the contents of this Circular. Also, advice from an appropriately qualified professional person should be obtained before relying on the contents of this Circular. Comcare, the Commonwealth of Australia, their officers, servants and agents, will not be liable for any loss howsoever caused whether due to negligence to otherwise arising from any use or reliance on any of the contents of this publication.