



COMCOVER CONNECT

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From Tiffany's desk

What an exciting year 2018 is shaping up to be.

Comcover started on 1 July 1998, so this year is our 20th anniversary. Comcover has evolved and adapted to

Fund Members' changing needs over the years, developing initiatives and programs to support entities deliver their best possible operational outcomes.

In the next edition of *Comcover Connect* I look forward to sharing some stories from this 20-year journey.

I would like to introduce and welcome Nick Hunt, the new First Assistant Secretary for Comcover. Nick has worked in several roles in the Department of Finance before coming to the Procurement and Insurance Division.

This issue of *Comcover Connect* features an interview with Nick about his experience and his first impressions of Comcover (see page 2).

Renewal questionnaire

The renewal questionnaire reopened this month so Fund Members can start updating their information. The questionnaire will close on 4 June and the information available then, together with a snapshot of asset schedules and claims history, will determine your entity's final premium.

The onus is on entities to ensure information provided in the renewal questionnaire, the expatriate schedule and asset schedules is up to date and accurate. This is particularly important if your entity has had significant changes, such as machinery of government changes.

Comcover relationship managers will soon start annual contact visits. I encourage you to actively engage with your relationship manager about your entity's insurable risk exposure.

Expatriate cover

Six months ago Comcover invited entities to consider extending their cover for medical expenses for pre-existing conditions. I encourage you to review your requirements for this cover each time you amend your expatriate schedule. You can change your entity's cover at the start of each quarter.

Benchmarking program

In my last column I highlighted some changes Comcover had made to the benchmarking program based on your feedback. I hope initiatives such as providing a copy of the survey questions before the survey opens have assisted you.

I appreciate the time and resources Fund Members put towards completing the survey. I think the ability to benchmark your entity's risk management maturity against the nine elements of the Commonwealth Risk Management Policy provides valuable intelligence about your entity's risk management capability (see page 6 for more information on the 2018 benchmarking program).

In May you will receive a copy of your entity's executive report via the Comcover Launchpad. You can also conduct further detailed analysis through the benchmarking interactive reporting tool (BIRT). We would be happy to present the key findings and comparative analysis of your entity's results to your executive or your audit and risk committee.

Comcover events

As flagged in my December column, the seminar series by the Comcover Legal Services Parcelling Arrangement panel firms are continuing in 2018. The forums provide insight into legal issues impacting on the Commonwealth.

Full details of all Comcover educational activities and events are in the Comcover Learning Centre.

Please feel free to contact me or your Comcover Relationship Manager if there are any issues you would like to discuss.

Tiffany Karlsson

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Introducing Nick Hunt

Running a small business provides a very solid grounding in the fundamentals of risk management.

So says Nick Hunt, the new First Assistant Secretary, Procurement and Insurance Division, Commercial and Government Services, Department of Finance, who is now responsible for Comcover.



Nick Hunt

Before joining the Department of Finance in 2002, Nick and his partner, Bernadette, ran an award-winning vegetarian restaurant and cafe in Canberra's inner north for a decade.

Nick says understanding and managing risk daily is vital for small business owners and their families because it directly affects their livelihoods.

'You're juggling staff turnover and corporate knowledge retention; reputation risk; cash handling; public health and safety, particularly with perishable stock; public liability; and financial risk,' he told *Comcover Connect*.

The intuitive risk management Nick learned in small business readily translated into a broader understanding of the critical role of risk management in the wider government environment.

Until January, Nick had worked in Budget Group in the Department of Finance for 13 years, advising governments on policy proposals across a wide range of agencies and portfolios. For three of those years, he was posted to Papua New Guinea where he was embedded in PNG's Treasury, advising on budget policy and management.

In Budget Group, Nick analysed proposals, briefed the Expenditure Review Committee on their impact, and advised whether there were more efficient ways to achieve the desired outcomes.

The key focus was identifying the problem being solved, then analysing the risks and articulating them to ministers to enable them to factor risk management into decision making.

Since joining Comcover, Nick has been on 'a huge learning curve'. His lack of a formal insurance background has encouraged him to take a step back and examine concepts with a fresh set of eyes.

He says Comcover is a successful, effective and robust model. Several reviews have been conducted since the fund's 1998 inception and all have confirmed how well the model operates.

Nick says the diversity of Fund Members, in size, location and business operations, 'has been a real eye opener and really demonstrates how complex the business of government is'.

Drawing on his budget background, Nick is aware that risk management is critical in effectively managing finite resources to deliver outcomes for taxpayers. 'The onus is on entities to use public resources as efficiently, effectively, economically and ethically as possible. This is an ongoing

challenge, and understanding and managing risk effectively is at the heart of responding to this challenge.'

Nick says risk management is a journey not a destination. 'Comcover helps Fund Members on that journey. By putting a price on risk it provides incentives to improve processes and frameworks. We are partners on the journey with Fund Members.'

Nick says Comcover's self-service offerings empower Fund Members to engage with Comcover and help keep the fund relevant to entities. Important self-service examples include:

- The Comcover Learning Centre that provides access to Comcover's learning pathways and allows participants to register for seminars or workshops and access learning materials and guidance that support the Commonwealth Risk Management Policy.
- The Comcover Launchpad, a one-stop shop for Fund Members to access a range of applications and business intelligence tools, including the benchmarking interactive reporting tool (BIRT), an online interactive reporting tool that enables entities to analyse their benchmarking results and compare their performance against their peers.
- The Comcover website, which provides access to forms, guidance and information sheets for claims, insurance and risk management.
- The Comcover@comcover.com.au email address and the 1800 651540 phone number, which are routed to relevant areas seamlessly.

Outside work, Nick is training to compete in one of Canberra's toughest long-distance cycling events, the 165km Fitz's Challenge, in October. The 3km of vertical climbing, not the distance, is his greatest challenge.

But riding his bike at weekends and gradually adding more kilometres and steeper hills gets him into 'a different head space' which generates greater clarity when the working week starts again. ●

Renewal cycle - next steps

In preparation for determining 2018-19 premiums, Comcover re-opened the renewal questionnaire on Monday 9 April 2018.

It will remain open until 5pm on Monday 4 June allowing sufficient time to update responses after the 2018-19 federal budget. Once the questionnaire closes, no further changes can be made before the annual premium is released.

Comcover strongly recommends entities review questionnaire responses and update asset and expatriate schedules on the Comcover Gateway.

Premium invoices will be available through the Comcover Gateway on 2 July 2018.

Comcover Relationship Managers will soon start their annual renewal contact program.

If you have queries about the questionnaire, or the premium allocation process please raise them at these meetings or contact your Comcover Relationship Manager on 1800 651 540 (option 3). ●

Resource notebook

Comcover's information sheet *Building Risk Management Capability* provides information for entities to consider when assessing their risk capability, including practical tips on how to build expertise.

Developing and maintaining risk management capability is a challenge for many Fund Members. It is the element with the largest gap between entities' current and desired states in Comcover's annual risk management benchmarking survey.

A constrained resource environment may explain why entities find this area challenging. However, as the information sheet explains, improving risk capability can be achieved through working differently or making the most of resources already available including:

- Making risk information more engaging and readily accessible. Using examples and eye-catching graphics to draw staff to the content can often result in information being better understood.
- Identifying risk champions who can help build staff capabilities through sharing expertise and mentoring them on using the risk management process.
- Learning from others through subscribing to professional publications, joining communities of practice, and attending collaborative forums.
- Accessing Comcover's extensive resources such as the Comcover Learning Centre that offers risk management training programs, seminars and educational resources. Courses can be adapted to be run in-house for Fund Members.

These and other practical tips are in the information sheet, which is available in the Comcover Learning Centre and on the Department of Finance website.

A full list of resources, including advice circulars, *Comcover Connect* newsletters, information sheets, and FAQs, is on the Department of Finance website www.finance.gov.au/comcover/policy/resources.html. ●



Events calendar 2018

MAY

- Awards for Excellence in Risk Management - nominations open
- 15-16 May
Generalist pathway – Practical risk management: More than just ticking boxes
- 17 May
Specialist pathway – Embedding risk management: Engaging, influencing and applying risk management in the Commonwealth (day 1)

JUNE

- 4 June
Comcover renewal questionnaire closes
- 6 June
Executive pathway – SES risk management professional development program – Not all superheroes wear capes: A strategic perspective to managing risk
- 13 June
Commonwealth Risk Managers' Forum - panel discussion with chief risk officers from across the Commonwealth Outcomes from the 2018 Comcover risk management benchmarking program
To register email Frank.O'Donoghue @agriculture.gov.au
- 14 June
Business Continuity Community of Practice
Email Brendan Jones – BCMHelpdesk@ato.gov.au
- 19 June
Comcover Launchpad and resources training – Risk and insurance specialists
- 19-20 June
Generalist pathway – Practical risk management: More than just ticking boxes

Managing employment practices continues to be of interest to Fund Members. In this issue of *Comcover Connect*, two members of the Comcover Legal Services Parcelling Arrangement, Norton Rose Fulbright and Moray & Agnew, provide insights into the complex area of employment law.

Parental leave obligations and claims

by Partner Sarah Ralph and Senior Associate Tony Pick, Norton Rose Fulbright

New pregnancy and parental leave cases have increased the focus on conduct that may breach anti-discrimination laws or the National Employment Standards (NES) about return-to-work obligations.

NES provides protections for employees returning to work after parental leave. They are statutory entitlements that require more than a passing glance. Failure to comply with the entitlements may result in claims for breaching NES and claims for penalty provisions to be applied.

- **Consultation** – Section 83 of the *Fair Work Act* (FW Act) requires that if an employee is on unpaid parental leave and the employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position, the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the decision's effects. That means employers cannot simply change an employee's pre-parental leave position while that employee is on leave. An employer must take active steps to discuss the decision with the employee and give them information, even though they are not in the workplace at the time. A desire not to bother employees while they are on leave is no excuse.
- **Return to work guarantee** – Section 84 of the FW Act provides a protection in the form of an entitlement for a person returning from parental leave to return to their pre-parental leave position. If that position is unavailable, the returning employee must be provided with an available position for which they are qualified and that is nearest in status and pay to the pre-parental leave position. This obligation means that, in circumstances where the pre-parental leave position is unavailable, but another position is, the alternative position must be provided to the returning employee.

In *Turnbull v Symantec (Australia) Pty Ltd*, the court described the test as being 'whether a person, having the qualifications and experience of the employee in question, would seriously consider taking that position'. Significantly, the return-to-work guarantee does not oblige an employer to create a new role and there is no express right for a previously full-time employee to return to work on a part-time basis. NES does

Comcover, the Australian Government's self-managed insurance fund, provides insurance and risk management services to the government sector. Comcover was established in 1998 and is administered by the Department of Finance.

provide a right to request flexible work arrangements, which employers may refuse only on 'reasonable business grounds'.

These two provisions are penalty provisions with potential maximum penalties of \$63,000 for a government entity or corporate and \$12,600 for an individual involved in a contravention. The Fair Work Ombudsman is increasingly targeting HR managers and other advisers under the 'accessorial liability' provisions in section 550 of the FW Act.

Managing redundancy processes can pose a significant risk – by either failing to consult about changes that will have a significant effect on a position's status, pay or location while an employee is on parental leave, or failing to consider the return to work guarantee when conducting organisational changes. While consulting with employees in the workplace and their union representatives about workplace change are often conducted by employers, the circumstances and preferences of employees on parental leave must not be overlooked.

Cases examining decision-making about parental leave and return to work issues highlight an increasing focus on reinforcing employee entitlements to parental leave, the return to work guarantee and flexible working arrangements.

In *Heraud v Roy Morgan* [2016] FCCA 1797, an employer was ordered to pay more than \$50,000 in penalties and \$100,000 in compensation for taking adverse action for a prohibited reason, which included as a 'substantial and operative' reason the fact the employee had requested flexible working arrangements. The court found the employer took adverse action under section 340 of the FW Act by:

- not allowing the employee to return to her pre-parental leave position because she had exercised her right to take maternity leave
- failing to transfer the employee to another position because the employee had made a request for flexible working arrangements
- ultimately terminating the employee's employment on the basis of redundancy because the employee exercised her workplace right to request flexible working arrangements.

Judge Suzanne Jones made important comments about community expectations on parents' rights when taking parental leave: 'I am satisfied prevailing community standards demand recognition of the fundamental entitlement of an employee to take [parental] leave to care for their child or children, safe in the knowledge that their employment and future will not be prejudiced because they have exercised their right to take [parental] leave, including to request flexible working arrangements.'

In the Federal Circuit Court decision of *Power v BOC Pty Ltd* [2017] FCCA 1868, the employer was found to have breached the FW Act's adverse action provisions when it terminated a pregnant employee's employment because of redundancy only two days before she was to start parental leave. The employer had brought the redundancy decision forward, which it said was because of concerns for the employee, effectively ensuring the employee did not start parental leave.

While the court found the redundancy decision was genuine, the decision to bring the redundancy forward was unlawful adverse action taken because the employee was pregnant and exercising her workplace right to take parental leave. The employer's decision to bring the redundancy forward affected the employee's right to take parental leave and meant she lost entitlement to the return to work guarantee under section 84 of the FW Act. The employee was awarded \$57,000 in compensation and penalties were imposed.

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In the case of *Mahajan v Burgess Rawson* [2017] FCCA 1560, the employer was found to have taken adverse action against a pregnant employee by dismissing her on the last working day before her probation expired. She had been previously praised for good performance before taking periods of leave because of morning sickness and for doctors' appointments.

The employee was subject to a three-month probation period and the employer said the termination was because of performance issues and because she had been 5-10 minutes late on several occasions.

The court found the employer dismissed the employee because she took leave and because it considered she was 'unreliable' due to her pregnancy and related illnesses, not because of performance-related issues. The case demonstrates that protected attributes under the FW Act and anti-discrimination laws can encompass practical consequences and manifestations such as accessing sick leave, absence from work and occasional punctuality issues.

Practical issues

Managing return to work from parental leave requires consideration of practical issues for employers and employees, and requires close consideration of employees' NES entitlements for a return to work if changes have been made or are proposed to be made to the pre-parental leave job.

That requires employers to carefully consider their reasons for making changes to an employee's pre-parental leave job and ensure the reasons do not constitute unlawful adverse action.

Employers must always consider NES consultation requirements and the return to work guarantee, which may be supplemented by enterprise agreement terms. ●

In issue 11 of *Comcover Connect*, Tim McDonald, Partner and National Workplace Practice Group Leader, Moray & Agnew, provided a review of the Fair Work Commission's (FWC) 2016-17 Annual Report.

He highlighted trends in applications to the FWC and detailed significant matters it had heard. Issue 11 of *Comcover Connect* is available on the Department of Finance website <https://www.finance.gov.au/comcover/resources/comcover-connect.html>.

In this issue, Tim examines decisions in discrimination claims highlighting an increase in general damages awards.

General damages awards for discrimination trend upwards

by Tim McDonald, Partner and National Workplace Practice Group Leader, Moray & Agnew

The Full Federal Court decision in *Richardson v Oracle Corporation Pty Ltd* [2014] FCAFC 82, a case about sexual harassment of a female employee, has set a precedent for increasing the amount of damages awarded in discrimination claims.

The employer was found vicariously liable for a male employee's actions. The employee unlawfully sexually

harassed Ms Richardson on multiple occasions at work. At first instance, Federal Court Justice Robert Buchanan found the employer vicariously liable under the *Sex Discrimination Act 1984* for the male employee's actions and awarded \$18,000 for pain, suffering and loss of enjoyment of life. Justice Buchanan did not think Ms Richardson was entitled to compensation for general damages, but would have assessed them at \$30,000 if she were.

On appeal, the Full Federal Court found the compensation awarded initially was manifestly inadequate and did not reflect community expectations of an appropriate amount for pain and suffering and loss of enjoyment of life. The Full Court increased those damages to \$100,000, and ordered the employer to pay \$30,000 for economic loss.

Since *Richardson*, there has been an increase in awards of damages for other discrimination claims. In *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827, Federal Circuit Court Judge Nick Nicholls determined a discrimination claim made by an employee under the *Disability Discrimination Act 1992*.

The employee had been a probation and parole officer since 2001 and developed Crohn's disease in 2009. One medical restriction meant she could no longer drive for more than 30 minutes. Her duties were informally adjusted by the employer to cater for her condition but, in 2011, her employment was terminated on medical grounds.

Judge Nicholls found the employer had misinterpreted medical evidence that indicated the employee could drive for more than 30 minutes if she planned breaks during the journey. Judge Nicholls also found the employer had not made reasonable adjustments to allow the employee to meet the inherent requirements of her role. He ordered the employee's leave entitlements be re-credited, awarded her \$75,000 for loss and damages and breach of contract, and \$98,863 plus interest for loss of wages and other entitlements.

In *Muruges v Australia Post & Anor (No 2)* [2016] FCCA 2355, Australia Post was found vicariously liable for the racially discriminatory conduct of a manager towards a sub-contractor of Sri Lankan descent. The sub-contractor complained that his manager had racially taunted him over several years and compared him to a slave. The court found the sub-contractor had been discriminated against on the basis of race and ordered the respondents to pay the sub-contractor \$40,000 in loss and damages.

In the penalty decision of *Heraud v Roy Morgan Research Ltd (No 2)* [2016] FCCA 1797, Federal Circuit Court Judge Suzanne Jones ordered the employer to pay \$52,000 in compensation to a former employee. Judge Jones found the employer had taken adverse action against Ms Heraud by:

- not allowing her to return to her pre-parental leave position because she had exercised her right to take maternity leave
- failing to redeploy Ms Heraud to a position in the research centre, after creating an expectation she would be redeployed to that position because of her request for flexible working arrangements
- making Ms Heraud redundant because she exercised her workplace right to request flexible working arrangements.

Judge Jones found the employer's contraventions of the Act were serious, noting the employee was in a vulnerable position following maternity leave.

It will be interesting to see whether the trend for courts to award higher amounts of compensation in discrimination cases continues in 2018 and beyond. ●

Executive reports analyse capability

Comcover's 2018 risk management benchmarking survey closed on Friday 16 March.

Through a series of targeted questions, entities were asked to assess their risk management capability and maturity for each of the nine elements of the Commonwealth Risk Management Policy.

In May, each participating entity will receive an executive report. It will provide entities with an analysis of their current risk management capability. Current capability is compared against the results of the 2017 survey, the entity's self-select group and more broadly across the Fund.

The benchmarking interactive reporting tool (BIRT) will be updated with the 2018 survey data to enable entities to perform their own analysis of current performance against prior years, their self-select group, and the Fund.

A key findings report for the benchmarking program will be prepared at the end of the program. The report will provide insight into how all entities are performing and identify elements where entities have performed strongly and which are the lowest-scoring elements.

The 2018 report should be available to entities on the Department of Finance website in early July.

Comcover will use the reports to inform educational activities and resources to support ongoing development of Fund Members' risk management capabilities.

If you have questions about benchmarking please contact the Comcover Risk Management Team on 1800 651 540 (option 4). ●



Statement of cover - motor

Comcover provides comprehensive motor vehicle cover for onshore and offshore vehicles owned or leased by Fund Members under the Australian Government Fleet (AGF) leasing arrangement.

The cover is intended to respond to situations that result in loss, destruction or damage to motor vehicles.

Comcover will pay up to market value or a value agreed between the Fund Member and Comcover. If an entity owned vehicle is less than 24 months old, Comcover will replace it with the same make, model and series or, if that is unavailable, its equivalent.

If a vehicle is leased through the Australian Government Fleet arrangements, different conditions for vehicle replacement apply in line with the lease agreement.

Other circumstances where Comcover will respond are specified in sections 12(2) to 12(5) of the *Comcover Statement of Cover 2017-18*.

There are exclusions. For example, Comcover will not cover a Fund Member if a motor vehicle is being used with the Fund Member's permission that is in contravention of any laws, such as the vehicle being driven by an unlicensed driver, a suspended licence driver or a person under the influence of drugs or alcohol. Comcover will not cover damage from normal wear and tear, rust or corrosion to Fund Members' motor vehicles.

A full list of exclusions is in section 12(6) of the *Statement of Cover*. In addition to those exclusions, there are other circumstances where Comcover does not provide cover. For example, Comcover will not cover damage to employees' personal vehicles being used for work purposes. Nor will Comcover cover repair costs for damaged hire cars used by Commonwealth employees.

The limit of liability and the associated excess is specified on the *Schedule of Cover*, which is available in the Comcover Gateway on the Comcover Launchpad (www.comcoverlaunchpad.com.au).

The *Comcover Statement of Cover 2017-18* is available on the Department of Finance website, www.finance.gov.au/comcover/insurance.

If you have questions about motor cover, please contact your Comcover Relationship Manager on 1800 651 540 (option 3). ●

Awards for Excellence

Nominations will open in May for the 2018 Comcover Awards for Excellence. The awards recognise and reward excellence in managing risk across the Comcover Fund. They profile entities that have systematically embedded risk management into their business processes and consequently developed a high level of expertise. All Fund Members are encouraged to consider nominating. For more information email Comcover@comcover.com.au or go to www.finance.gov.au/comcover/risk-management/awards-for-excellence.

Notifying Comcover of a motor vehicle accident

Vehicles used by Australian Government entities may be owned directly by the entity or leased as part of the Australian Government Fleet (AGF) arrangements.

For Comcover Fund Members, owned vehicles are covered by Comcover and AGF leased vehicles may be covered by Comcover or through private insurance arrangements under an agreement with the external provider for fleet services, *sgfleet*. All Fund Member-leased vehicles through AGF will eventually transition to Comcover as leases are renewed.

All Comcover motor claims, regardless of whether a vehicle is leased under the AGF arrangements or owned by a Fund Member, are managed the same way once the claim is registered with Comcover. The only difference is how the claim is reported.



Australian Government Fleet

Report the incident to Innovation, which will confirm whether the claim will be managed by Comcover or *sgfleet*.



Innovation will assist in completing the claim form, which is signed by the fleet manager, the insurance contact, or the driver and forwarded to Comcover.



Comcover acknowledges receipt of the claim.



Comcover considers the claim against the terms and conditions of the *Statement of Cover*, reviews the repair estimate, and determines whether a formal damage assessment is required.



Repairs authorised and vehicle repaired.

Entity-owned vehicles

Report the incident to your entity's primary insurance contact.



The insurance contact or the driver forwards the completed claim form and other information to Comcover.



Comcover does not have a preferred repairer network so, regardless of whether it's an AGF vehicle or owned by an entity, vehicles may usually be taken to a convenient repairer.

If you have questions about motor claims cover under the Comcover Statement of Cover, contact your Relationship Manager 1800 651 540 (option 3).

If you have questions about a specific motor claim, contact the Comcover Claims Team 1800 651 540 (option 1).

To learn more about how to access Comcover's services, email comcover@comcover.com.au or call 1800 651 540.

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