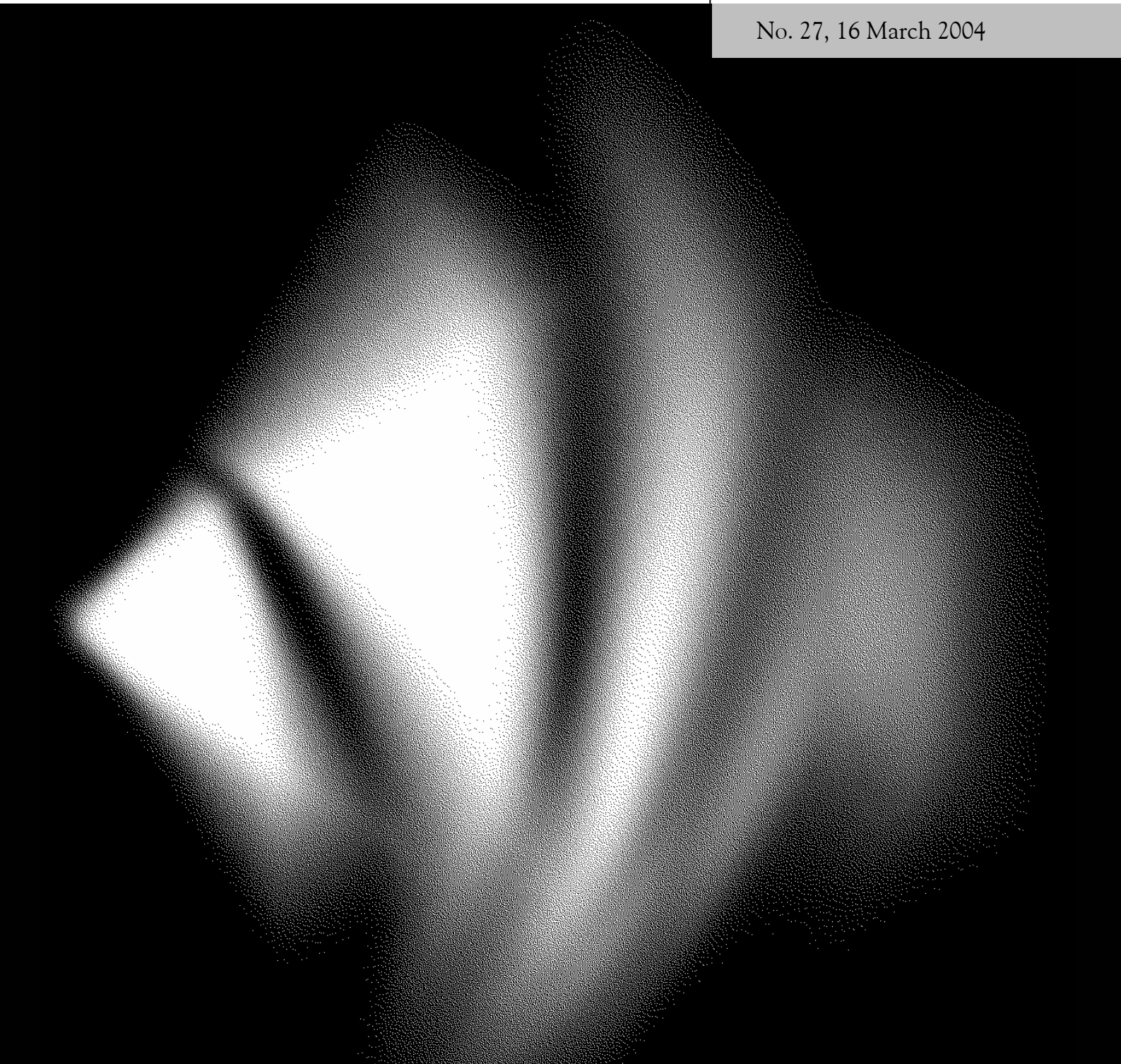
Australian Government
Productivity Commission

National Workers' Compensation and Occupational Health and Safety Frameworks

Productivity Commission Inquiry Report

No. 27, 16 March 2004



ISSN 1447-1329
ISBN 1 74037 142 9

This publication is available in hard copy or PDF format from the Productivity Commission website at www.pc.gov.au. If you require part or all of this publication in a different format, please contact Media and Publications (see below).

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An appropriate citation for this paper is:

Productivity Commission 2004, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, March.

The Productivity Commission

The Productivity Commission, an independent agency, is the Australian Government's principal review and advisory body on microeconomic policy and regulation. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

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March 2004

Australian Government
Productivity Commission

The Honourable Peter Costello MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

In accordance with Section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission's report on *National Workers' Compensation and Occupational Health and Safety Frameworks*.

Yours sincerely

Mike Woods	Judith Sloan	Gary Johns
Presiding Commissioner	Commissioner	Associate Commissioner

Terms of reference

I, IAN CAMPBELL, Parliamentary Secretary to the Treasurer, pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998*, hereby refer Workers' Compensation and Occupational Health and Safety (OHS) Frameworks to the Commission for inquiry and report by 30 November 2003 or within 12 months of receipt of the reference, whichever is the later.

Background

2. In 1994 and 1995, the then Industry Commission conducted comprehensive inquiries into Australia's workers' compensation and OHS arrangements - Report No. 36 *Workers' Compensation in Australia* (4 February 1994) and Report No. *47 Work, Health and Safety* (11 September 1995). In doing so, the Commission made a number of recommendations addressing national arrangements for both workers' compensation and OHS.

3. Since the Industry Commission inquiries there have been a number of developments bearing on Australia's workers' compensation and OHS programmes. Most States and Territories (States) have made a significant number of legislative and operational changes to their programmes that have primarily focused on local conditions. The coverage of employees under workers' compensation and OHS programmes appears to have declined due to changes in the composition of the workforce and working arrangements.

4. There have also been a number of other developments that relate to, or may have a direct impact on future, workers' compensation and OHS arrangements, including:

- the House of Representatives Standing Committee on Employment and Workplace Relations inquiry into Aspects of Workers' Compensation is expected to report in early 2003;
- the HIH Royal Commission, scheduled to report in 2003, is expected to, inter alia, report on the adequacy and appropriateness of arrangements for the regulation and prudential supervision of general insurance, including workers' compensation;
- the response by governments to the report by joint Commonwealth and States panel on the law of negligence (the Ipp Report) and the Australian Health Ministers' Advisory Council work on legal process reform;

- the response by governments to the withdrawal of reinsurance for injuries resulting from terrorist attacks; and
- report in 2003 is expected to, inter alia, report on OHS in that industry.

5. Workplace injury and illness impose significant social and economic costs on injured workers and their families, employers and the wider community. The lack of a nationally consistent approach appears to have imposed significant compliance costs on business and may have lead to inequities for injured workers in terms of benefits payable and entitlement to benefits.

6. There is a need to examine whether the establishment of national frameworks can deliver comprehensive and consistent workers' compensation and OHS programmes across Australia. More broadly, there is a need to consider whether any alternative systems to the existing arrangements may be appropriate to support employees and others who may suffer a workplace injury or disease. The frameworks/models should also deliver better outcomes for businesses of different sizes, employees and the general community, while recognising the differing economic characteristics of the States.

7. A key goal of any new model would be to facilitate improved workplace safety and provide adequate compensation to injured employees while offering a more effective continuum of early intervention, rehabilitation and return to work assistance for those injured in the workplace.

8. Ideally, a national framework for workers' compensation and OHS would encompass a cooperative approach between the Commonwealth and State governments while still leaving primary responsibility for these systems with the States. Moreover, any national frameworks would provide the States with adequate flexibility to address local conditions, encourage competition and facilitate competitive neutrality.

Scope of the Inquiry

9. Drawing on the Industry Commission recommendations in Report No. 36 and No. 47, the Commission should assess possible models for establishing national frameworks for workers' compensation and OHS arrangements. In doing so, the Commission should identify and report on, but not be limited to the following:

(a) a consistent definition of employer, employee, workplace and work-related injury/illness and fatalities relevant to both workers' compensation and OHS that could be adopted consistently across Australia;

(b) a consistent benefits structures that provides adequate levels of compensation, including income replacement and medical and related costs, for injured workers and their families;

(c) the implications of retaining, limiting or removing access to common law damages for work-related injuries/illness and fatalities on the models identified;

(d) the most appropriate workplace based injury management approaches and/or incentives to achieve early intervention, rehabilitation and return to work assistance to injured workers and to care for the long-term and permanently incapacitated, including the opportunities for re-employment or new employment of people with a compensable injury, and the incentives and disincentives for employers with regard to the employment of workers who have suffered a compensable injury;

(e) effective mechanisms to manage and resolve disputes in workers' compensation matters that:

  (i) encourage the development of internal dispute resolution processes by employers;

  (ii) encourage the involvement of the employer, the employee, and insurers/schemes;

  (iii) encourage the use of alternative dispute resolution including mediation and conciliation; and

  (iv) retain an appropriate appellate structure for employers and employees.

(f) the premium setting principles necessary to maintain fully funded schemes while delivering to employers equity, stability and simplicity. In doing so, the Commission is asked to identify models that provide incentives for employers to reduce the incidence of injury and improve safety in the workplace;

(g) regulatory framework which would allow suitably qualified employers to obtain national self-insurance coverage that is recognised by all schemes;

(h) a regulatory framework which would allow licensed insurers to provide coverage under all schemes. In doing so, the Commission should identify and assess the likely impact on employers, employees and the wider community from the introduction of competition, including on the level of premiums;

(i) options to reduce the regulatory burden and compliance costs imposed on businesses of different sizes across Australia by the existing legislative structures for workers' compensation and OHS, within the context of the national objective to improve the workplace health and safety of workers. In doing so, the Commission should examine the interrelation between the

workers' compensation and OHS legislative frameworks with other statutory regimes in place;

(j) the appropriate boundaries of responsibility for the cost of work-related injury/illness and fatalities between the employer, employees and the community. In doing so, the Commission is asked to report on the current level of employee coverage by the workers' compensation schemes and the current sharing of costs and to identify under any national framework model for workers' compensation, an appropriate sharing of costs for work-related injury/illness and fatalities;

(k) the costs to the community of complementing or supplementing the coverage of existing workers' compensation arrangements, such as income support and Medicare benefits that may be paid to injured persons; and

(l) the national and State and Territory infrastructure and relative costs necessary to support the models identified in establishing national frameworks for workers' compensation and OHS.

10. The Commission should take into account any substantive studies/or inquiries undertaken elsewhere. It should also take into account such policy and legislative changes in the Commonwealth and States in the areas of general insurance, public liability, common law negligence, and the calculation of damages and settlements that may assist it to provide advice on this Reference.

11. In undertaking the inquiry, the Commission is to advertise nationally inviting submissions, hold public hearings, consult with key interest groups and affected parties, and produce an interim report for consultative purposes and a final report by 30 November 2003 or within 12 months of receipt of the reference, whichever is the later.

12. The Commonwealth Government will consider the Commission's recommendations, and the Government's response will be announced, as soon as possible after the receipt of the Commission's report.

IAN CAMPBELL
13 MAR 2003

Additional terms of reference received on 30 January 2004

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20 January 2004

Mr Gary Banks
Chairman
Productivity Commission
PO Box 80
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Dear Chairman

The Australian Government welcomes the Productivity Commission's interim report on the inquiry into National Workers' compensation and Occupational Health and Safety Frameworks released on 21 October 2003.

I am writing on behalf of the Government to request that the Commission examine, and include in its final report, the impact on small business of any proposed national workers' compensation and occupational health and safety arrangements.

I look forward to receiving the final report in March 2004.

Yours sincerely

PETER COSTELLO

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Abbreviations and explanations

Abbreviations

AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
ABL	Australian Business Limited
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
ADR	Alternative dispute resolution
AGA	Australian Government Actuary
AGS	Australian Government Solicitor
AHMAC	Australian Health and Medical Advisory Council
AMA	American Medical Association
AMWU	Australian Manufacturing Workers' Union
ANZSIC	Australia and New Zealand Standard Industry Code
APRA	Australian Prudential Regulation Authority
ARWM	Australasian Return to Work Monitor
ASIC	Australian Securities and Investments Commission
ATC	Australian Transport Council
BCA	Business Council of Australia
CAA	Chiropractors' Association of Australia
CEO	Chief Executive Officer
CFMEU	Construction, Forestry, Mining and Energy Union
CML	Coles Myer Limited

COSBOA	Council of Small Business Organisations of Australia
CRS	Commonwealth Rehabilitation Service
CTP	Compulsory third party
DEWR	Department of Employment and Workplace Relations (Australian Government)
DISC	Development and Implementation Sub Committee
DSP	Disability Support Pension
EBR	Experience based rating
FaCS	Department of Family and Community Services (Australian Government)
FAQs	Frequently asked questions
FRSC	Food Regulation Standing Committee
FSANZ	Food Standards Australia New Zealand
GST	Goods and Services Tax
GTO	Group training organisation
HoR	House of Representatives
HIA	Housing Industry Association
HOSCA	Health and Other Services (Compensation) Act [1995]
HWCA	Heads of Workers' Compensation Authorities
HWSCA	Heads of Workplace Safety and Compensation Authorities
IC	Industry Commission
IAG	Insurance Australia Group
ILO	International Labor Organisation
IR	Industrial relations
IT	Information technology
ITAA	Income Tax Assessment Act [1997]
MCA	Minerals Council of Australia
MHF	Major Hazard Facilities
NADRAC	National Alternative Dispute Resolution Advisory Council
NOHSC	National Occupational Health and Safety Commission

NRCOHSR	National Research Centre for Occupational Health and Safety Regulation (Regulatory Institutions Network (RegNet))
NRTC	National Road Transport Commission
OHS	Occupational health and safety
OH&S	Occupational health and safety
OHS(CE)	Occupational Health and Safety (Commonwealth Employment) Act [1991]
OHSW	Occupational health safety and welfare (South Australia)
PACIA	Plastics and Chemicals Industries Association
PAYE	Pay as you earn
PC	Productivity Commission
PEO	Professional Employer Association
PSB	Personal services business
PwC	PricewaterhouseCoopers
QCU	Queensland Council of Unions
RACP	Royal Australasian College of Physicians
RCBC	Royal Commission into the Building and Construction Industry (the Cole Royal Commission)
RTW	Return to work
SMEs	Small to medium enterprises
SRC	Safety Rehabilitation and Compensation
SRCA	Safety Rehabilitation and Compensation Act [1998]
SRCC	Safety and Rehabilitation and Compensation Commission
TAG	Technical Advisory Group
TLCs	Trades and Labor Councils
TMS	Transformation Management Systems
UK	United Kingdom
US	United States of America
VACC	Victorian Automobile Chamber of Commerce
VECCI	Victorian Employers' Chamber of Commerce and Industry

VWA	Victorian WorkCover Authority
WAIRC	Western Australian Industrial Relations Commission
WC	Workers' compensation
WCC	Workers' Compensation Commission (NSW)
WRMC	Workplace Relations Ministers' Council

OVERVIEW

Key points

- With a total economic cost in excess of $31 billion annually, work-related fatalities, injuries and illnesses impose significant costs on individuals, businesses the community and the economy as a whole. Injured workers and their families face varying degrees of pain and suffering.
- There is a common objective underlying the 10 principal Occupational Health and Safety (OHS) statutes in Australia — to prevent workplace injury and illness. National uniformity in OHS regulation should be a priority.
- OHS uniformity should be driven by a reformed national body appointed on the basis of expertise and skills, which consults with employer and employee representatives and reports to all jurisdictions through the Workplace Relations Ministers' Council. The jurisdictions should agree to adopt, without modification, the legislation and regulations proposed by the national body and approved by the Council.
- There are also common core objectives to the 10 principal workers' compensation schemes: adequate financial compensation; appropriate rehabilitation and return to work; affordable premiums; and full funding by employers. However, significant differences exist between them and multi-state employers face significant compliance burdens and costs from having to deal with multiple workers' compensation schemes and OHS regimes. Mobile workers are also affected. In addition, all workers, employers and the economy more generally suffer from inefficiencies in each of the current schemes.
- Governments should address these compliance burdens, costs and inefficiencies. The Australian Government can take steps immediately by allowing qualifying employers to self-insure under its Comcare scheme and be covered by the Australian Government's OHS regime. The Australian Government should, at the same time, commence the development of an alternative national self-insurance scheme (and extend its OHS regime) for all employers who so wish, and who meet appropriate standards.
- A final step could be an alternative national workers' compensation scheme which provides privately underwritten insurance as well as self-insurance, together with coverage under the national OHS regime.
- States and Territories would continue to administer their own workers' compensation schemes and OHS regimes. The impact of the Commission's recommended initial steps on their schemes is likely to be minimal, as would be the likely impact on small business. If there was widespread uptake of a future alternative national insurance scheme, the impact on existing schemes is potentially greater.
- National consistency in workers' compensation would be enhanced by the establishment, now, of a national body charged with developing reform proposals for consideration by the Workplace Relations Ministers' Council. Reform of the schemes would be to benefit workers and employers who operate within, as well as across, jurisdictions.

Overview

The Australian, State and Territory governments each administer their own Occupational Health and Safety (OHS) regulatory regimes and workers' compensation schemes. The Commission has been requested to develop and assess possible models for establishing national frameworks for them. In doing so, the Commission has examined the various elements of all the arrangements, but has not undertaken a detailed comparative review. It has accepted the case for some form of government intervention to enhance OHS and workers' compensation outcomes.

For OHS, the Commission considers that national uniformity in OHS regulation should be established as a matter of priority. In essence, all jurisdictions agree with the fundamental principle of 'duty of care'. It is the foundation stone of OHS regulation and has been found to be sufficiently robust to accommodate the wide range of circumstances and changes facing the various jurisdictions. There are no compelling arguments against a single national OHS regime, and there are significant benefits from a national approach, particularly for multi-state employers and for the increasingly mobile workforce.

For workers' compensation, each scheme reflects community norms, evolving workplace arrangements and the legal and medical practices of that particular jurisdiction. However, this leads to compliance and cost issues for multi-state employers that should, and can, be addressed. The solution is the progressive expansion of a scheme offering alternative national coverage, which would operate alongside those of the individual jurisdictions. Such an alternative national scheme would also partially address the concerns of an increasingly mobile workforce. In addition, all jurisdictions should collectively pursue improvements to workers' compensation by establishing a formal review mechanism similar to that already in place for OHS. This should lead to an increasing level of national consistency (and perhaps for some scheme elements, national uniformity) over time. The resulting improvement in scheme performance would be to the benefit of all workers, employers and the economy more generally.

Background

Size and scope of the issues

Work-related fatalities, injuries and illnesses impose significant costs on individuals, their families, businesses, the community and the economy as a whole. In 2001-02, the various workers' compensation schemes compensated the families of some 300 fatalities as a result of workplace injury and disease. Compensated injuries and diseases resulting in one week or more off work amounted to 10.2 cases per million hours worked. The actual number of work-related injuries and illnesses would be considerably higher. A recent survey by the Australian Bureau of Statistics found that many individuals who experienced a work-related injury or illness did not apply for workers' compensation. In most cases this was because the injury was considered to be minor, but other reasons included: a lack of awareness of eligibility or the availability of benefits; the negative impact on employment; the effort of making a claim; or the employer agreeing to pay the cost outside a workers' compensation scheme.

The National Occupational Health and Safety Commission (NOHSC) estimates that the total economic cost of workplace accidents to workers, employers and the community more generally is in excess of $31 billion annually, or some 4.3 per cent of Gross Domestic Product. The varying degrees of pain, suffering and changed life circumstances of workers and their families are immeasurable.

Many changes have occurred in the decade since the Industry Commission reported on OHS and workers' compensation. There has been a continued decline in the proportion of the workforce employed under traditional 'contracts of service' as new working arrangements have emerged. This has reduced workers' compensation coverage. Jurisdictions have responded by modifying their definitions of 'employees' and by deeming a range of contractors and others to be employees for the purposes of coverage under their schemes.

Also, there has been an overall ageing of the population and of the workforce — with implications ranging from the attribution of age-related illness and injury to the workplace, the time taken for medical recovery, to options for reskilling as part of return to work.

Overall, the number of workers' compensation claims has declined over the last decade, although there have been increases in claims for occupational overuse syndrome, stress and disease. Offsetting this, the average number of days of paid compensation has risen, from 52 in 1998-99 to 57 in 2002-03. The nominal cost of claims has also increased, from an average of $7532 to $10 102 over the same period. Thus, despite the fall in the number of claims, premiums have continued to rise.

Nationally, workers' compensation schemes collected $5.81 billion in premiums from employers (excluding GST) in 2001-02, paying out $3.43 billion to injured workers, $1.26 billion in medical and other costs, and $1.23 billion for administration. Publicly underwritten schemes (inclusive of the New South Wales scheme) account for 85 per cent of the premium revenue.

Investment returns on premium revenue set aside for future claims costs have swung from the high real returns of the mid 1990s, to negative returns until recently. This has contributed to a situation where all but one of the publicly underwritten schemes now have significant unfunded liabilities. There has also been significant insurance industry consolidation, affecting the availability and cost of insurance to employers in those schemes where there is private underwriting.

Governmental responses to the changed environment

Governments have responded to these changes in ways that both reflect, and oftentimes reinforce, the uniqueness of their own schemes and regulatory regimes, while learning from the innovations of others. Each scheme is the product of a long history of negotiation and compromise between governments, employers, unions, lawyers, insurers and others. Workers' compensation is very much a package of inter-related measures, and one element cannot easily be assessed in isolation, nor amended without affecting other elements.

Frequent reviews have been a feature of the landscape, as have the consequent administrative and legislative amendments. For workers' compensation, governments have changed their statutory benefits and access to common law, tightened eligibility requirements, formalised rehabilitation and return-to-work provisions, and introduced alternative dispute resolution procedures.

Pressures for national frameworks

In relation to workers' compensation, the Commission has found that, with the multiplicity of schemes, differences between their elements and changes to them impose a significant compliance load and cost on multi-state employers. Not surprisingly, these firms have been a driving force for a national approach to workers' compensation and OHS. They employ over a quarter of Australian employees and the costs to them of meeting the requirements of the various jurisdictions, rather than those of a single national scheme, can be in the order of millions of dollars a year (box 1). The goals of these multi-state employers are to reduce their compliance burden, develop common procedures and cultures across their various worksites, and offer their workers in different jurisdictions the same workplace conditions. In pursuit of these goals, some have attempted to self-insure under the Australian Government's Comcare scheme.

Box 1 **Some estimates of the direct costs of multiple schemes**

Optus (sub. 57) estimated that, if it received a single national self-insurance licence, it would expect savings of up to $2 million per annum of its $6 million annual workers' compensation costs. It estimated (sub. 134) that the cost of complying with multiple workers' compensation and OHS arrangements adds about 5 to 10 per cent to the cost of workers' compensation premiums.

CSR (sub. 109) estimated the cost of maintaining and renewing five self-insurance licences at over $700 000 per annum, compared to $200 000 for a single licence.

Insurance Australia Group (sub. 89) estimated that the existence of multiple schemes added $10.1 million to the (once-off) cost of setting up a single national IT platform. In total, it estimated that having to comply with multiple jurisdictions adds about $1.7 million to IT costs annually. Further, it estimated that a national scheme could offer overall operating cost savings to the group of $1.2 million per annum and reduce actuarial costs by $400 000 per annum.

BHP Billiton (sub. 110) commented that it cost in the vicinity of $50 000 to purchase a system to manage and supply information for each of the jurisdictions.

Skilled Engineering, (IRsub. 177) estimated that the annual cost saving from operating under a single set of national OHS and workers' compensation rules would be in excess of $2.5 million, or some 15 per cent of the company's annual costs of OHS and workers' compensation.

Scheme differences also provide difficulties for workers who operate across jurisdictions. Differences in the definition of 'employee' may mean that a worker is covered by one scheme, but not by another. Accordingly, working temporarily inter-state may leave them uncovered. Recent initiatives on cross-border coverage by Queensland, followed by New South Wales and Victoria provide a partial, but incomplete, solution to this latter problem.

Some have argued for a uniform national regime for workers' compensation on the basis that the schedule of benefits should be the same for all workers across all schemes. Under current arrangements, benefit schedules differ across the various jurisdictions. However, variations in benefits are only one element of the many differences among jurisdictions in their workers' compensation schemes. Employees also have different degrees of access to common law and journey to work claims, are subject to different work-related tests, and have to comply with different rehabilitation and return-to-work requirements. In this respect, a relative disadvantage in one element of a scheme may be offset, to varying degrees, by advantages in other elements. Accordingly, the Commission does not accept that equality of benefits, assessed in isolation from other scheme elements, is in itself a compelling argument for a uniform national workers' compensation scheme. There are advantages, however, in progressively adopting uniform elements of the schemes, such as common definitions of employee and wages.

In OHS, changes in response to external factors have been more gradual than have been the case with workers' compensation, and these changes have occurred with some degree of national consistency. This is due, in part, to the universal support for the duty of care principle, for a reduction in work-related injury and illness, and to there being a national institutional process, administered by the NOHSC, which addresses common issues.

It is true, however, that in terms of achieving national uniformity of OHS regulation, progress has been slow and the process unwieldy. The compliance burdens and costs imposed by multiple regimes, regulations, administration and enforcement, compounded by regular amendment, are a feature of OHS across the jurisdictions, although not to the same degree as with workers' compensation.

Occupational health and safety

There are ten principal OHS statutes across Australia — six State, two Territory and two Australian Government (one relating to Australian Government employees and the other relating to seafarers). The essential objective underlying each OHS regime is to prevent workplace injury and illness.

There is strong support for government intervention through regulation of OHS and this question is not revisited in this inquiry. All jurisdictions have drawn on the 1972 Robens approach to regulation. This involves a general duty of care imposed on those having control over aspects of the workplace, backed by detailed regulations and codes of practice. All jurisdictions agreed to the establishment, in 1985, of NOHSC, a tripartite body comprising the Australian Government, States and Territories, employers and trade unions, which reports to the Workplace Relations Ministers' Council (WRMC).

In the early 1990s, NOHSC pursued national uniformity in OHS regulation. This has been replaced by a process aimed at achieving greater consistency across jurisdictions, by which NOHSC develops national standards and codes of practice which are forwarded to the individual jurisdictions for implementation. Typically, there is then further tripartite consideration within each jurisdiction, where the proposals may be accepted in total, accepted with modifications on the grounds of unique jurisdictional circumstances, or rejected. Of the seven priority national standards agreed over a decade ago, only one (on certification) has been fully adopted, although a few of the major elements of most of the others have now been adopted in most jurisdictions.

In 2002, NOHSC formulated a *National Occupational Health and Safety Strategy 2002–2012*. The strategy was signed by the Ministers of all States and Territories and the Australian Government, and was adopted by the peak employer and union bodies that are parties to NOHSC. It sets out nine national targets and priorities. One element that it seeks to achieve is a nationally consistent regulatory framework. However, implementation of

the strategy rests with the individual jurisdictions and their action plans lack uniformity in both content and pace.

National framework issues

The Commission considers it essential that the existing broad agreement on OHS regulation should be taken further to develop, adopt and enforce uniform national legislation and regulations. Outcome-based regulations and codes of practice can accommodate valid differences in jurisdictional circumstances in the same way as current regimes accommodate regional variation within each individual jurisdiction.

A uniform national regime would make it much more efficient for multi-state employers to ensure that their management and employees understand the one set of requirements and any changes to it. Also, equipment could be moved interstate and not be in contravention of local regulations. Employers could establish a single safety culture, with common associated manuals and procedures, throughout their organisations. Employees could be trained in, and understand, the one set of OHS requirements, irrespective of the locality in which they work.

As concluded by the Cole Royal Commission into the Building and Construction Industry '... there would be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating occupational health and safety in Australia'. However, as Cole also concluded, such an outcome does not seem imminent under current arrangements.

National framework proposals

The Commission is proposing two broad approaches, to operate in parallel, for the reform of OHS with the clear intent of achieving national uniformity in legislation and regulation within a reasonable time frame.

The first approach is to strengthen the cooperative national institutional structure to drive uniformity. The second approach, additional to and independent of the first, is to provide nation-wide coverage under an alternative single regime. This latter approach involves progressively opening up access to the existing Australian Government's OHS regime (in conjunction with the Commission's proposals for workers' compensation).

Reform of the national standards setting body

The challenge of introducing uniform national standards and the associated institutional structures has been tackled in other areas of the Australian economy, such as in transport

and food standards. They involve quite different organisational structures from that of the current NOHSC, and more formal standard making and adoption processes.

The Commission's proposed reform model to drive national uniformity would have the following features:

- a smaller NOHSC with members appointed on the basis of their expertise and skills by the relevant Australian Government portfolio minister with the approval of the WRMC;
- the objective of achieving uniform national OHS legislation and regulations to be specified clearly in the legislation;
- an agreement (similar to the Food Regulation Agreement 2002) that all jurisdictions adopt the draft legislation, acts and regulations as approved by the WRMC without variation;
- the NOHSC would have the ability to appoint advisory bodies, given the importance of consulting with employers, unions and all jurisdictions in the development of OHS regulation;
- specified timetables (similar to that in food standards) for WRMC review of proposals from NOHSC — the process to be prescribed in the legislation; and
- funding for NOHSC to be provided by the Australian Government, States and Territories similar to the National Transport Commission, with a commitment to fund the research and data collection necessary to ensure the development of best practice OHS.

The proposed model recognises that the prevention of injury and illness is a matter for the individual factories, offices, shops and other workplaces across Australia and that to be effective, it is at this level that OHS regulation should influence outcomes. Accordingly, consultation with employer and employee bodies is an important feature of the NOHSC process. Importantly also, the model recognises State and Territory commitment to, and ownership of, the regulatory process and policy outcomes. The model also retains the benefits of innovation and learning.

This is not to suggest that simply changing institutional structures or the wording of acts or memoranda will result immediately in improved or more timely outcomes. The experiences in both the transport and food standards areas demonstrate the magnitude of the task. The achievement of national frameworks in any area is challenging within a federal structure, even where there is strong agreement with the ultimate objectives.

Access to the existing Australian Government's OHS regime

In the area of workers' compensation, the Commission is proposing that a progressively expanding number of employers could apply for coverage under an alternative national

scheme, restricted to self-insurers in the first instance. The Commission considers that these same employers should be able to opt for coverage under a single national OHS regime — the Australian Government's OHS regime.

The Australian Government Solicitor has advised that national OHS coverage could be achieved constitutionally, principally under the corporations head of power. Such coverage would require legislation. Similarly, the Australian Government's OHS regime could be extended to cover all industries, such as mining. In the interim, the individual State and Territory regimes would apply, as they do now, to areas not covered by the Australian Government's regime.

Small business

Most small businesses would be unlikely to seek access to the alternative national OHS regime proposed, as they operate within a single jurisdiction where they are covered for workers' compensation and where an existing OHS regime applies. However, the Commission's proposed strengthening of the cooperative national institutional structure to drive uniformity should benefit all workers and businesses, including small business, by encouraging the more timely development and uptake of 'best practice' workplace safety procedures. Further, greater uniformity would assist those small to medium enterprises that wish to expand beyond their state or territory boundaries.

Workers' compensation

As with OHS, there are multiple State and Territory workers' compensation schemes: eight State and Territory schemes; two Australian Government schemes (for employees of existing and former Australian Government authorities (including ACT government employees) and seafarers); as well as a small number of industry-specific schemes (such as for the coal industry in New South Wales).

The underlying objectives of each jurisdiction's workers' compensation scheme are essentially the same:

- to provide adequate financial compensation in the event of workplace fatality, injury or illness;
- to provide an appropriate injury management continuum of early intervention, rehabilitation and return-to-work assistance; and
- to ensure that employer contributions fully cover the cost of scheme liabilities arising from current employment, in an affordable manner.

There is also an inter-related objective — to provide feedback to employers on the prevention of workplace injury and illness through costs, incentives and data analysis.

Employers are obliged to pay premiums to a public or private insurer, or otherwise self-insure, to cover their liability for work-related fatality, injury or illness. Monies collected by insurers are used for compensation, rehabilitation and administration. Employers can self-insure if they meet certain prudential and other requirements. The various elements of each scheme have been the subject of intense and regular negotiation and form complex wholes which have often proven to be relatively unstable. Publicly underwritten schemes dominate Australia's workers' compensation.

Each jurisdiction operates a no-fault compensation scheme, but there are jurisdictional differences between their various elements, relating to:

- access and coverage, involving definitions of employee and work-relatedness, the inclusion of journeys to and from work, and recess breaks;
- benefit structures, step downs and commutation;
- injury management processes involving early intervention, rehabilitation and return to work;
- the role of private and public insurers, and approaches to premium setting; and
- access to common law settlements.

Existing national coordinating mechanisms governing workers' compensation comprise the WRMC and the Heads of Workers' Compensation Authorities (HWCA). The latter does not have a legislated set of roles and responsibilities for workers' compensation, unlike those applying to NOHSC for OHS. Nonetheless, in 1997, the HWCA explored the issues of `national consistency in some depth, publishing *Promoting Excellence: National Consistency in Australian Workers' Compensation.*

National framework issues

The most significant issue arising from the differences in the schemes is the compliance burdens and costs for multi-state employers. Areas of cost, as illustrated earlier in box 1, include the employment of additional staff in the personnel units (together with their on-going retraining to maintain currency with the many changes to each scheme) and the development and maintenance of multiple IT programs.

Self-insured employers must comply with different prudential requirements, variations in the statutory benefits payable to their employees and differences in common law requirements. Premiums, for those employers who insure, are calculated according to different and complex rules of coverage of employees and definitions of remuneration in

each of the jurisdictions. There are further variations in injury management and dispute resolution procedures.

Problems also arise for the increasingly mobile workforce, for example from differences in coverage and the allocation of liability for degenerative injuries and illnesses of long latency. The lack of uniformity of benefits, however, must be considered within the broader framework of all elements of each scheme.

The lack of jurisdictional uniformity can spill over to several Australian Government programs. Ignorance or confusion about eligibility for coverage, because of the differences in definitions of an employee, can mean an injured worker becomes the responsibility of the Australian Government (under its Medicare or social security programs). Purposeful action by one of the parties, say to avoid recording an injury or to lodging a claim, could have the same effect. (ABS data suggest significant under-reporting of work-related injury and illness.) Conversely, employers can end up meeting some costs of injuries and illnesses that are not primarily work-related.

Injured or ill workers may also resort to Australian Government programs in those jurisdictions where the benefit structures do not include long-tail claims. In Victoria, for example, payments for some end at 104 weeks and, in Queensland, all benefits cease at five years. Premature exhaustion of lump sum compensation can leave no alternative than to fall back on the Australian Government's social security programs.

National framework reform proposals

Existing national coordinating mechanisms have proven ineffective in resolving the compliance complexities and costs for multi-state employers. Over the last five years, HWCA's primary output has been the provision of comparative information about the schemes. The WRMC, whilst also generating comparative performance monitoring information, has been primarily concerned with industrial relations matters.

The Commission, in its initial issues paper, set out six possible models of national frameworks for workers' compensation arrangements. Following feedback from participants and its own analysis, the Commission refined its preferred strategy to four models, with the first three to be introduced consecutively and the fourth to be implemented independently.

A. The Australian Government offers to license employers who qualify under the current competition test to self-insure under the Comcare scheme, subject to their meeting the scheme's requirements as to prudential matters, claims management, OHS and other matters.

B. The Australian Government establishes, for all corporate employers, an alternative national scheme of workers' compensation self-insurance to operate in parallel to existing State or Territory schemes. Again, approval of applicants would be subject to employers meeting the scheme's requirements as to prudential matters, claims management and other matters.

C. The Australian Government considers, at a later date, an alternative national premium-paying insurance scheme for all corporate employers who wish to join, to operate in parallel to existing schemes. It would be privately underwritten and incorporate the self-insurance arrangements of model B.

D. The Australian Government, States and Territories establish a national workers' compensation body that would be charged with such functions as developing nationally consistent scheme elements for adoption by individual jurisdictions.

The Commission also explored the scope for mutual recognition among the jurisdictions to provide national frameworks that address the cost and compliance concerns of multi-state employers. However, this model is not pursued further as it would require jurisdictions to be indifferent to underlying differences among schemes — and they would face added administration and enforcement costs. Importantly, it would add complexity and confusion, with potentially many different procedural requirements applying to various employers and employees within the one jurisdiction (notwithstanding that Australian Government OHS and workers' compensation currently coexist with the local schemes in the States and Territories). It is noted, however, that a form of mutual recognition has already been agreed to, where workers from one jurisdiction are working temporarily in another — essentially cross-border recognition of coverage under the 'home' compensation scheme. There is also scope for cost savings from greater coordination among the jurisdictions by mutual recognition in some areas of the schemes, such as the approval of rehabilitation providers.

The Commission has no evidence of support by the States and Territories for a single uniform national workers' compensation scheme. Many of the stakeholders at the individual jurisdiction level have suggested that concessions won in hard fought negotiations would not be willingly surrendered for the sake of national uniformity.

Importantly, the Commission does not support national uniformity of workers' compensation for its own sake. In arriving at this view, the Commission recognises that the vast majority of employers (who are predominantly small to medium enterprises) and their employees operate only within a single jurisdiction. To them, national uniformity has little relevance. Further, it is not apparent that there is any single perfect or best scheme. Best practice can be reflected in a number of different ways. Innovation and learning should be encouraged, with the consequent reforms benefiting workers and employers.

Australian Government development of a national scheme to operate in conjunction with existing State and Territory schemes

Step 1: Actively encourage self-insurance applications under Comcare (model A)

Currently, the Australian Government's *Safety Rehabilitation and Compensation Act 1988*, which establishes the Comcare scheme, enables private employers to apply for a licence to self-insure. The Minister has discretionary power to declare as 'eligible', employers who are 'carrying on a business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority'. This test could potentially apply to the banking, telecommunications, air transport, defence, broadcasting and postal sectors. The granting of a licence is then subject to approval by the Safety Rehabilitation and Compensation Commission (SRCC) under certain prudential and other criteria.

Four public policy principles that guide the Minister in exercising discretion are the impacts of the grant of a licence on: employees; the employer; the integrity of the Comcare scheme; and the operations of State and Territory schemes.

Employees would become eligible for benefits as provided under Comcare. Employers will self-select, but will need to comply with the rigorous prudential and other requirements.

Of direct concern to the Australian Government is the risk to itself associated with granting a self-insurance licence to a company which is subsequently declared bankrupt or is otherwise unable to meet its workers' compensation liabilities. On the basis of advice sought by the Commission, the Australian Government Actuary proposed specific prudential requirements that would reduce the residual risk to the Government. The Commission proposes that the cost of any residual risk be internalised to self-insurers by a post-event levy, as has been recommended for insurance by the HIH Royal Commission. The Commission has also proposed that the existing regulatory framework provided by the SRC Act be modified and developed progressively to support the expansion of national insurance under this and the subsequent steps, with the SRCC being developed as a stand-alone regulator.

Actuarial advice to the Commission is that the impact on the State and Territory schemes is unlikely to be significant. Many of the employers eligible for self-insurance under the proposed national scheme are likely to be self-insured under existing State and Territory arrangements and are thus already outside the premium pools in those jurisdictions. However, the national scheme would extend to some employers who currently pay into some premium pools for various reasons, such as not meeting minimum employee criteria for self-insurance of particular jurisdictions. Queensland's threshold of 2000 local employees is a case in point.

Strong concern was expressed by some participants that small businesses, in particular, could be disadvantaged by the loss of premiums from their risk pools by large firms self-insuring. The concerns related to the effects that the loss of premiums could have on the viability of some risk pools and on the ability to provide cross-subsidies from within a scheme. There could be some changes in premiums for those remaining if risk pools were to be reformulated, but, of itself, this would be unlikely to systematically increase (or decrease) premiums.

In privately underwritten schemes, the nature and extent of any existing cross-subsidies is likely to be limited by commercial considerations and competition between licensed insurers. Accordingly, the loss of premiums from large employers would have little, if any, effect on the premiums of those remaining. For publicly underwritten schemes, and notwithstanding policies to minimise the extent of cross-subsidies, actuarial advice was that any increase in average premiums on remaining employers would be very small, even if those employers who were to exit were providing quite large cross-subsidies.

Once the Minister is satisfied on each of the four policy principles, the Australian Government could encourage applications under existing legislation. The outcome would be competitively neutral between private and Australian Government (or former Australian Government) employers. Such a move could also motivate States and Territories to develop greater consistency across their own schemes.

Without further legislation, private employers self-insured under the Comcare scheme would continue to operate under State and Territory OHS arrangements. The Australian Government Solicitor has advised that the Australian Government, drawing on its constitutional heads of power, could enact legislation which enabled all employers self-insured under the Comcare scheme to elect to be covered by Australian Government OHS legislation. The Australian Government could extend its current OHS inspection and enforcement arrangements (including cooperation of the States and Territories) to this wider group of employers. Matters not covered by Australian Government OHS would continue to be regulated by the State and Territory OHS regimes.

Step 2: Establish an alternative national self-insurance scheme (model B)

The Australian Government could also commence, at the same time, the drafting of legislation to establish an alternative national self-insurance scheme (administered by the SRCC) for all employers who so wish and who meet certain prudential and other requirements. The Australian Government Solicitor has advised the Commission that this could be covered under the Commonwealth's corporations power under the Constitution.

In terms of scheme design, the Australian Government could offer the current Comcare arrangements, or redesign particular elements of the scheme, such as the current long-tail

benefit structure and the dispute resolution procedures. Actuarial advice, as noted earlier, is that this step is also likely to have little impact on existing schemes as the relevant employers are predominantly self-insurers. The initiative may pick up the smaller premium paying State or Territory offices of some firms.

Again, as with step 1, employers opting into this scheme could be covered by Australian Government OHS legislation.

Step 3: Establish an alternative national premium-paying insurance scheme (model C)

Following consideration of the success achieved under steps 1 and 2, and the outcome of cooperative institutional reform (model D, below), the Australian Government could extend its alternative national scheme to be available to all corporate employers, involving both self-insurance and premium-paying insurance. As with the previous step, it would require the exercise of the Commonwealth's constitutional powers and the passage of new legislation.

In the Commission's view, private underwriting of this expanded scheme would be desirable. Although research into the relative merits of public and private underwriting suggests that sound management can be more important than the form of underwriting, the characteristics of private underwriting are nevertheless attractive. These include: the capital risk being accepted by the capital markets; competition in the marketplace, with incentives for efficiency and innovation; and greater transparency of any governmental influence over premiums.

Employers covered by the national insurance scheme would also be eligible for coverage by Australian Government OHS legislation.

The opening up of an alternative national insurance scheme to all corporate employers could have potentially significant impacts on existing State and Territory schemes, if there was widespread uptake. Those public schemes with large unfunded liabilities may need to impose appropriate 'exit' arrangements. Some of the smaller schemes may ultimately become unviable on a stand-alone basis if a significant number of employers switch to the national scheme. Nevertheless, the operation of a number of private underwriters in small jurisdictions such as Tasmania, the Northern Territory and the Australian Capital Territory attests to the capacity of insurers to operate with small premium pools for any one class of insurance. Further, if introduced in the staged form recommended, then it is unlikely that the changes would occur at a pace that precluded the steady rationalisation of existing arrangements. To the extent that such a scheme adopted improved practices, it could provide an added incentive for State and Territory schemes to reform.

National cooperative institutional reform (model D)

Independent of and in parallel to the Australian Government's own initiatives as set out above, the Commission is proposing that the States and Territories join with the Australian Government to strengthen and upgrade the national institutional infrastructure relating to workers' compensation. This model centres on formalising cooperation between the jurisdictions as follows:

- A national body would be established by Australian Government legislation. It would have a board of five to nine members with relevant expertise and skills in workers' compensation matters appointed by the relevant Australian Government portfolio Minister with the approval of the WRMC.
- The WRMC would determine the priority areas requiring attention by the national body and make decisions on its recommendations.
- The national body's main functions would be to develop nationally consistent scheme elements for consideration by the WRMC, collect data and undertake/coordinate analysis and research, and monitor and report on the performance of workers' compensation arrangements. It would have the ability to appoint advisory bodies, given the importance of stakeholder concerns and operational matters to maintaining the contemporary relevance of existing schemes. It is envisaged that the current WRMC performance monitoring role would be transferred to it.
- The Australian Government, States and Territories would retain responsibility for implementation, with a view to improving the performance of their respective schemes and, over time, achieving greater national consistency.
- Funding of the national body would be shared by the jurisdictions.

Initially, the body could focus on developing standards over which there is common agreement or where agreement is possible (for example, definitions of employee, employer and wages/remuneration), rather than on more intractable matters (for example, access to common law settlements and private underwriting). The progressive reform of the various schemes would be to the benefit of all workers, employers and the performance of the economy more generally.

The Commission envisages that the two bodies responsible for progressing national frameworks for OHS and workers' compensation would cooperate in relevant areas.

Small business

The impacts on small business of the models for national workers' compensation proposed by the Commission depend largely on their effects on the risk pools into which small business pays premiums for the coverage provided to their workers. Model D is unlikely to

have any direct impact initially and over the longer term should provide benefits to all employers as greater operational efficiencies are achieved by all schemes through improved cooperation between them.

There is some evidence, however, that small business benefits currently from cross-subsidies built into some schemes, although most jurisdictions have policies to reduce or minimise such cross-subsidies over time. Under models A and B, the exit of larger non-self-insuring businesses from premium paying schemes into national self-insurance has the limited potential to change the premiums faced by the remaining employers, including small business. However, empirical analysis using a wide range of values for uptake by larger employers of national self-insurance and of levels for cross-subsidies reveals that any increases on average premiums are likely to be very small.

Under model C, the impact could be quite variable. On the one hand, the availability of an alternative national insurance could add greater competition to the provision of workers' compensation insurance, with benefits for small business. On the other, it could also erode any special benefits provided for small business under current arrangements. Any erosion, however, is likely to result in more appropriate pricing of the risks that small businesses bring to the schemes.

Other matters

In the course of this inquiry and as requested, the Commission has considered a range of other matters relating predominantly to particular elements of workers' compensation schemes. The results of these considerations are detailed in the Report. In brief, the Commission does not support such elements as:

- access to common law, on the grounds that any benefits are outweighed by the negative effects on early rehabilitation and the high legal costs; and
- coverage for journeys to and from work on the grounds of limited employer control and the availability of Compulsory Third Party coverage for most events.

The Commission favours:

- a narrow definition of work-relatedness that emphasises the significant causation of the work environment;
- premium setting principles which encourage full funding and which do not distort price signals to employers as to the importance of occupational health, safety and rehabilitation; and
- injury management procedures which encourage early intervention and return to work.

The Commission is mindful, however, that any changes made to individual elements of an existing scheme must maintain or improve the overall integrity of that particular scheme to the benefit of workers and employers. Changes to a scheme should also be approached cautiously, with due prior assessment, as they can also have far reaching and unexpected impacts on scheme outcomes. In this respect, actuaries suggest that it can take up to five years for the outcomes of scheme changes to become fully apparent.

Care for the catastrophically injured

In workers' compensation schemes, the catastrophically injured account for a small proportion of claims but a larger proportion of scheme costs. Claims relating to such events can have a significant impact on employers and on the financial performance of those schemes that do not shift a proportion of these costs to the Australian Government.

There is wide community concern about the care of catastrophically injured persons and it has been the subject of discussion at Ministerial meetings on insurance issues. The majority (61 per cent) of catastrophic injuries result from motor vehicle accidents, with workplace accidents contributing a further 13 per cent. The cost of caring for catastrophically injured persons varies considerably and depends on injuries sustained. Invariably it is large. The funding available from insurance depends on the cause of the injury and its adequacy for meeting the cost of caring varies considerably. Most cases eventually involve Australian Government funding.

The Commission considers that a national approach could ensure an appropriate standard of care is provided to the catastrophically injured, irrespective of cause of accident, and supports a review to this end.

Recommendations

National frameworks for occupational health and safety (chapter 4)

The Commission recommends that the following features be included in a cooperative occupational health and safety national framework model in Australia:

- ***a National Occupational Health and Safety Commission (NOHSC) of five to nine members appointed by the Minister on the basis of their expertise and skills, the appointment to be approved by the Workplace Relations Ministers' Council (the Council);***
- ***clear specification of the objective of achieving uniform national occupational health and safety legislation and regulation in all jurisdictions in the NOHSC enabling legislation;***
- ***agreement by all jurisdictions to adopt, without variation, the legislation and regulations proposed by NOHSC and approved by the Council;***
- ***NOHSC have the ability to appoint advisory bodies, noting the importance of consulting with employers, unions and all jurisdictions;***
- ***specified timetables for Council review of proposals from NOHSC, similar to those applying in relation to food standards — the process to be prescribed in the legislation; and***
- ***funding of NOHSC shared by the jurisdictions, together with a commitment to funding the research and data collection necessary to ensure the development of a best practice national occupational health and safety system.***

The Commission recommends that the Australian Government amend the* Occupational Health and Safety (Commonwealth Employment) Act 1991*, to enable those employers who are licensed to self-insure under the Australian Government's workers' compensation scheme to elect to be covered by the Australian Government's occupational health and safety legislation. This legislation would be extended to cover those insuring under any future alternative national premium-paying insurance scheme.

National frameworks for workers' compensation (chapter 5)

The Commission recommends that the Australian Government develop an alternative national workers' compensation scheme to operate in parallel to existing State and Territory schemes by taking the following steps progressively:

- ***step 1 — immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare***

scheme, subject to meeting its prudential, claims management, occupational health and safety and other requirements;

- *step 2 — commence, at the same time, the development of an alternative national self-insurance scheme for corporate employers who wish to join such a scheme, and who meet prudential, claims management and other requirements; and*
- *step 3 — in the longer term, consider the establishment of an alternative national premium-paying insurance scheme for corporate employers who so wish, including small to medium enterprises, which would be competitively underwritten by private insurers and incorporate the national self-insurance scheme established under step 2.*

The Commission recommends that the current regulatory framework for the oversight of the Australian Government's workers' compensation schemes and occupational health and safety regimes be strengthened by progressively developing the Safety, Rehabilitation and Compensation (SRC) Commission as a stand-alone regulator. The SRC Commission to:

- *be controlled by a board of independent directors appointed for a fixed term on the basis of their expertise and skills;*
- *have a full-time director appointed as chairperson; and*
- *be provided with its own staff and funding.*

The Commission recommends that, independent of, and operating in parallel to, the progressive development of a national workers' compensation scheme, the States and Territories join with the Australian Government to establish immediately a new national body for workers' compensation having the following features:

- *establishment by Australian Government legislation with an independent board of five to nine members appointed by the Minister on the basis of their relevant expertise and skills, the appointment to be approved by the Workplace Relations Ministers' Council (the Council);*
- *it would develop nationally consistent scheme elements for consideration and approval by the Council, collect data and undertake/coordinate analysis of research, and monitor and report on the performance of workers' compensation schemes. It would take over the current performance monitoring role of the Council;*
- *its priority work areas would be determined by the Council;*
- *it would have the ability to appoint advisory bodies, noting the importance of stakeholder concerns and operational matters to maintaining the contemporary relevance of workers' compensation schemes; and*
- *its funding would be shared by the jurisdictions.*

The Australian, State and Territory governments would retain responsibility for implementation, with a view to improving the performance of their respective schemes and, over time, achieving national consistency.

Defining access and coverage (chapter 6)

The Commission recommends the following as principles to use when defining an employee, to determine coverage under compulsory workers' compensation schemes:

- ***employer control, recognising that the common law 'contract of service' provides a solid basis for defining an employee in most situations;***
- ***certainty and clarity, as coverage under workers' compensation should be clear to both workers and employers at the commencement of the work relationship. For certain groups of workers and types of work relationships, deeming may be necessary;***
- ***administrative simplicity, to reduce the costs of administration and enforcement;***
- ***consistency with other legislation, to capture significant informational benefits and cost savings; and***
- ***durability and flexibility, to deal with a wide variety of work arrangements.***

The Commission recommends the following as principles to use when defining work-related fatality, injury and illness under compulsory workers' compensation schemes:

- ***definition of injury and illness to be comprehensive in terms of coverage of medical injuries and illnesses and include aggravation, acceleration, deterioration, exacerbation or recurrence of a medical condition;***
- ***definition of work-relatedness to be in terms of 'arising out of or in the course of employment', as used by nearly all jurisdictions;***
- ***definition of attribution, 'a significant contributing factor', which is used in a number of jurisdictions, to be a minimum benchmark, while 'the major contributing factor' would add greater clarity;***
- ***coverage for journeys to and from work not to be provided, on the basis of lack of employer control, availability of alternative cover in most instances and the ability to be dealt with under enterprise bargaining; and***
- ***coverage for recess breaks and work-related events to be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events.***

Injury management (chapter 7)

The Commission recommends the following as principles to facilitate durable return to work:

- ***early intervention, including the early notification of claims and the provisional assignment of liability;***
- ***workplace-based rehabilitation where possible, at the pre-injury workplace, noting the various schemes aimed at overcoming the particular difficulties faced by small to medium enterprises in this respect; and***
- ***return to work programs developed and implemented by a committed partnership of the employer, employee and treating doctor, drawing on the services of a rehabilitation coordinator and allied health professionals as required.***

Common law access (chapter 8)

The Commission recommends that common law should not be included in a national framework for workers' compensation on the grounds that it:

- ***does not offer stronger incentives for accident reduction than a statutory, no-fault scheme;***
- ***can provide lump sum compensation which may prove inadequate to the longer term needs of seriously injured workers;***
- ***may over-compensate less seriously injured workers who, in the normal course of events, could be expected to rehabilitate and return to work;***
- ***delays rehabilitation and return to work (if there are psychological benefits to be derived from receiving a lump sum, these could be obtained through statutory benefits); and***
- ***is a more expensive compensation mechanism than statutory workers' compensation.***

If common law is to be included in a national framework, then access should be restricted to:

- ***the most seriously injured workers (subject to meeting an impairment threshold); and***
- ***non-economic loss only.***

Where common law access is retained, jurisdictions might give consideration to:

- ***imposing restrictions on plaintiff legal fees (including incentives for early settlement);***

- ***mandatory settlement conferences (which include an exchange of offers); and***
- ***legislative provision to encourage early rehabilitation by plaintiffs.***

Statutory benefit structures (chapter 9)

The Commission recommends the following principles be used in the development of nationally consistent benefit structures:

- ***the provision of sufficient incentives for injured or ill employees to participate in rehabilitation. Benefit step-downs and caps are generally the most appropriate mechanisms for providing these incentives;***
- ***benefits not to be so 'low' as to result in workers bearing an unacceptably high burden of workplace injury or illness. Employers to face appropriate incentives to promote workplace safety. Income replacement to be related to pre-injury average weekly earnings, including any regularly received overtime;***
- ***all reasonable medical and rehabilitation expenses to be reimbursed by the scheme;***
- ***access to lump sum payments, which are intended to compensate those suffering a permanent impairment, to be based on meeting minimum impairment thresholds, while minimising the extent to which the availability of such payments delays rehabilitation and return to work; and***
- ***such structures, and health and income support schemes, to minimise the extent of any cost-shifting.***

Premium setting (chapter 10)

The Commission recommends the following be used as premium setting principles to meet the objectives of: the full funding of schemes; incentives to prevent workplace fatality, injury and illness and to promote rehabilitation and return to work; stability; and administrative simplicity for employers:

- ***no cross-subsidisation between employers through premiums as it distorts pricing signals. If cross-subsidisation is to exist, it should be minimal and transparent;***
- ***premiums be set efficiently. In essence, premiums for large employers to be based on experience rating. Premiums for small to medium employers to be based on industry class rating (where the classes reflect common risk profiles) accompanied by experience rating to the degree appropriate, and by explicit, cost-effective financial incentives for preventing workplace fatality, injury and illness, and for promoting rehabilitation and return to work;***

- *compliance by private insurers with relevant requirements under the* **Insurance Act 1973** *(particularly the prudential standard governing liability valuation for general insurers), to ensure full funding of schemes. There should be separate but light-handed regulatory monitoring of the premiums set by private insurers; and*
- *premiums be set by public insurers so as to achieve full funding, with independent monitoring by a separate body to ensure transparency of any differences between appropriate and actual premiums.*

The role of private insurers (chapter 11)

The Commission recommends the following regulatory framework which would allow licensed insurers to provide coverage under all schemes:

- *in privately underwritten schemes, it should be sufficient for insurer licensing requirements to rely on Australian Prudential Regulation Authority authorisation under the* **Insurance Act 1973** *as evidence that prudential concerns are satisfied;*
- *in publicly underwritten schemes, competitive outsourcing to appropriately skilled and resourced service providers to be supported by carefully designed and monitored contracts; and*
- *were the Australian Government to establish a national insurance scheme as an alternative to existing schemes, it should be privately underwritten by insurers authorised by Australian Prudential Regulation Authority under the* **Insurance Act 1973.**

Self-insurance (chapter 12)

The Commission recommends the following principles be used for assessing self-insurance licence applications under the national self-insurance scheme:

- *self-insurers to demonstrate appropriate prudential and claims management requirements, to ensure that they can adequately fund and manage claims;*
- *prudential requirements to be based on financial capability (including actuarial evaluation of claims liability), bank guarantees and reinsurance policies;*
- *remaining risks to be reduced further by making provision for a post-event levy;*
- *occupational health and safety requirements to apply equally to all employers; and*
- *there to be no explicit minimum employee requirement as it adds no prudential or operational value.*

Self-insurers under the national scheme should withdraw from, rather than be recognised under, any or all other schemes.

Dispute resolution in workers' compensation (chapter 13)

The Commission recommends the following features of mechanisms to manage and resolve disputes about claims in an equitable and effective manner:

- ***be tailored to deal with the disputes arising from the specific workers' compensation scheme that it supports and the broader dispute resolution culture of the jurisdiction within which it operates;***
- ***be supported by claims handling methods that minimise the likelihood of disputes arising in the first place. These include:***
  - ***the provision of information about the scheme to stakeholders which explain their benefits and rights;***
  - ***informed initial claims decisions based on an early exchange of all available information; and***
  - ***use of provisional liability/payments for a limited period; and***
- ***applications to be screened, using the least invasive methods first. These include:***
  - ***a requirement for claims managers to provide for, and injured workers to first use, internal review procedures;***
  - ***use of alternative dispute resolution procedures involving mediation/ conciliation and arbitration, with incentives for the use of the least invasive;***
  - ***identification and, as appropriate, rectification of informational and power imbalances;***
  - ***appeals allowable to a suitable court on points of law; and***
  - ***use of independent medical panels to provide final and binding determinations on questions of medical opinion.***

1 About the inquiry

Work-related fatalities, injuries and illnesses result in significant human suffering and impose large costs on individuals and the economy as a whole. Occupational health and safety (OHS) arrangements are aimed at preventing them. Workers' compensation schemes provide injury management and compensation for injured and ill workers, as well as compensation for their dependents in the event of a fatality. Workers' compensation insurance (including self-insurance) in Australia is compulsory and benefits are provided regardless of fault. Some jurisdictions also provide limited access to common law.

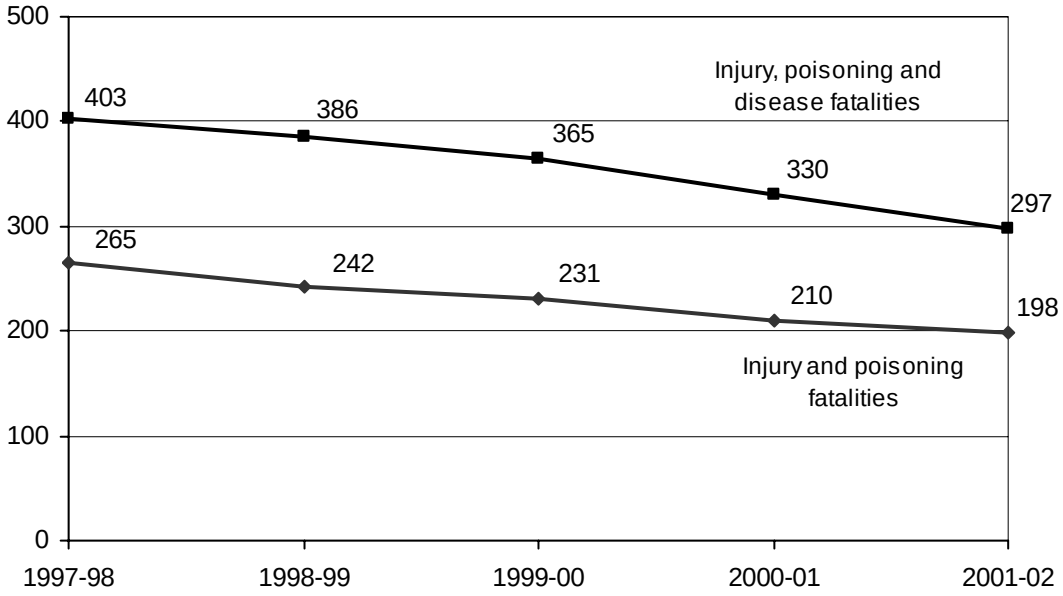
The Australian, State and Territory governments each have responsibility for OHS and workers' compensation arrangements within their own jurisdictions. There have been attempts to coordinate these arrangements across jurisdictions, including: the National Occupational Health and Safety Commission (NOHSC); the Workplace Relations Ministers' Council (WRMC); and the Heads of Workers' Compensation Authorities (HWCA). Coordination has been more successful in providing consistency across Australia in the area of OHS than it has been in workers' compensation. There are key differences in the latter, such as in: access to common law; benefit structures; and the public or private underwriting of workers' compensation insurance.

1.1 Background to the inquiry

Since the time of the Industry Commission's reports on OHS and workers' compensation (IC 1994, 1995), there has been a steady decline in the number of compensable work-related fatalities and in the frequency of compensable occupational injuries and illnesses. Figure 1.1 indicates that compensated fatalities resulting from injury and disease declined from 403 in 1997-98 to 297 in 2001-02. Similarly, figure 1.2 indicates that the frequency rate of compensated occupational fatality, injury and disease claims for wage and salary earners declined from 13.4 cases per million hours worked in 1996-97 to 10.2 cases per million hours in 2001-02.

Figure 1.1 **Compensated fatalities from injury and disease, 1997-98 to 2001-02[a]**

Australia



a These statistics are drawn from claims data collected by workers' compensation schemes. They exclude injuries and diseases not covered by workers' compensation schemes (chapter 5), defence force claims and journey claims. The data are based on the year in which a claim was lodged, which may not be the year in which the fatality occurred. With disease fatalities, considerable time could elapse between diagnosis and claim lodgement and death. Occupational disease are defined as all employment-related diseases which result from repeated or long-term exposure to an agent(s) or event(s) or which are the result of a single traumatic event where there was a long latency period.

Source: WRMC (2003, p. 30).

Figures 1.1 and 1.2 also show injury and poisoning claims separately as there are considerable problems with the accuracy of data for disease. This is because of the difficulty of attributing long latency diseases to the correct year given the lag involved and the difficulty of determining the work-relatedness of some diseases. It should also be noted that, as these statistics are drawn from claims data, they do not include data on workers not covered by workers' compensation schemes, such as the self-employed, and data on work-related injury and illness not claimed for.

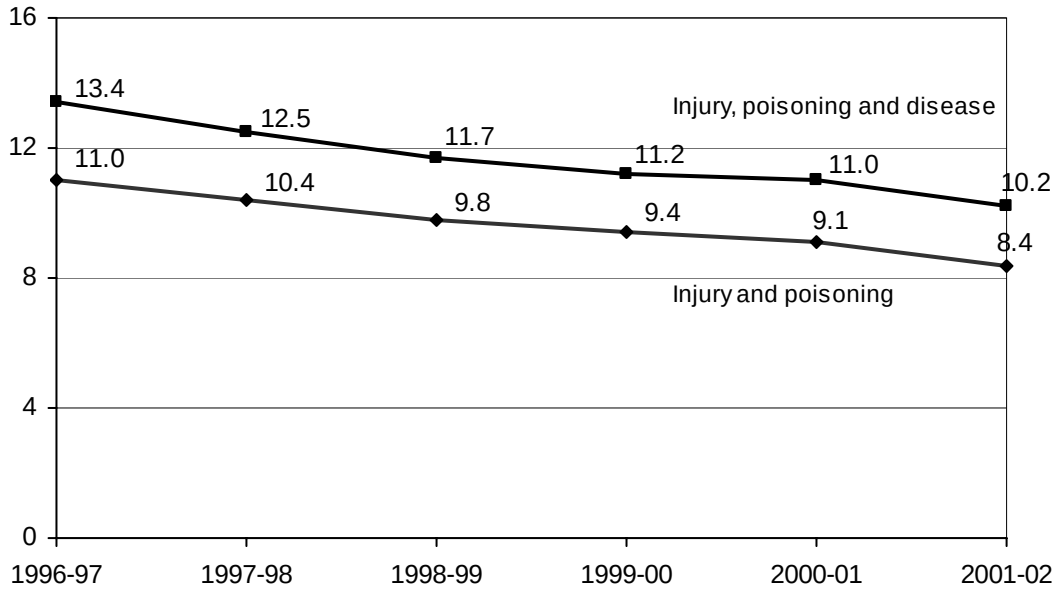
The decline in fatalities, injuries and illnesses is the result of many factors. These include safer workplaces, safer work practices and changes to the nature of work, such as a decline in the relative importance of manufacturing and manual labouring jobs.

The nature of reported injuries and illnesses has also been changing. Whereas there have been declines in most categories, there have been increases in the incidence of

occupational over use syndrome and stress claims, and there is some evidence of an increase in permanent disabilities.

Figure 1.2 **Frequency rate of compensated fatalities and injuries, 1996-97 to 2001-02** [a]

number of occupational fatality and injury cases per million hours worked by wage and salary earners in Australia



[a] Includes poisoning and fatalities resulting from injury, poisoning and diseases resulting in a successful workers' compensation claim, but does not include journey claims. These statistics represent all claims made under the Australian, State and Territory workers' compensation schemes which resulted in a fatality, permanent disability or a temporary disability resulting in an absence from work of five days or more, (with the exception of Victoria that has provided data on the basis of cases involving more than 10 working days lost from work) as well as claims for fatalities and for permanent disabilities which may involve less than five days time lost time. Data for the Australian Capital Territory were unavailable. Cases which are pending, in dispute, withdrawn or rejected are excluded.

Source: NOHSC, pers. com.

The duration of rehabilitation has tended to increase in recent years as the average number of days of paid compensation has risen from 52 in 1998-99 to 57 in 2002-03 (HWSCA 2003). Associated with this has been an increase in the average nominal cost of claims from $7532 to $10 102, although jurisdictions that privately underwrote insurance experienced a decrease in claims costs (ACCC 2002b).

Claims data could substantially understate the incidence of work-related injury and illness. A recent ABS survey (ABS 2001b) has shown that 5 per cent of those that worked during the survey period suffered a work-related injury or illness. Of those that were injured, only four out of ten reported receiving workers' compensation. For the balance, the main reason given for not receiving workers' compensation was that the injury or illness was minor.

However, some stated that they were not covered, were not aware of their entitlements or thought that reporting the injury would have a negative impact on their employment. Interpretation of the available work-related injury and illness data is discussed further in chapters 3 and 6, where participants' comments are also given.

An important feature of the growth and development of the labour market over the past 20 years that has influenced the development of workers' compensation schemes, in particular, has been the shift away from traditional employer-employee, full-time work arrangements as contract, casual and part-time work arrangements have increased. There is growing evidence that this has adversely affected OHS outcomes and reduced the likelihood of workers lodging claims. Also influencing the development of workers' compensation schemes more recently have been the rapid escalation in medical and legal costs, changes in investment returns and more general developments in the insurance industry, such as the commercial failure of HIH and the tightening of the reinsurance market. In addition, most publicly underwritten schemes have large unfunded liabilities.

Responses to these developments by governments have included:

- changing access and coverage provisions;
- altering statutory benefits and tightening eligibility conditions;
- further restricting access to common law settlements;
- strengthening early intervention, rehabilitation and return-to-work provisions; and
- reforming dispute resolution arrangements to give greater emphasis to alternative procedures that provide quicker and cheaper settlements.

1.2 Current arrangements

Occupational health and safety

There are ten principal OHS statutes — six State, two Territory and two for the Australian Government (one relating to Australian Government employees and the other relating to the maritime industry).

To varying degrees, all jurisdictions have drawn on the approach to regulating for safer workplaces espoused by the Robens Committee in 1972, involving codifying a general duty of care to avoid risks to health and safety (Robens 1972).

Recognition of the need for greater consistency between the jurisdictions led to the establishment of NOHSC in 1985 (through the *National Occupational Health and Safety Act 1985*). NOHSC is a tripartite body with an 18 member board comprising representatives from Australian, State and Territory governments, employers and trade unions. The Chairman and the Chief Executive Officer of the Commission are appointed by the Australian Minister for Employment and Workplace Relations. Funding is provided by the Australian Government and NOHSC reports to the WRMC.

NOHSC develops national standards and codes of practice which are forwarded to the individual jurisdictions for implementation. Typically, this involves further reconsideration by tripartite bodies in each of the States and Territories and subsequent acceptance, modification or rejection.

Workers' compensation

As with OHS, there are multiple State and Territory workers' compensation schemes — eight State and Territory schemes; one Australian Government scheme (for employees of existing and former Australian Government authorities, and for employees of the Australian Capital Territory Government), as well as a small number of industry-specific schemes (for example, the Australian Government's military compensation scheme and seafarers scheme, and the New South Wales coal industry scheme).

Basically, each scheme operates as a compulsory, no-fault insurance arrangement. Employers are obliged to pay premiums to a public or private insurer, or otherwise self-insure, to cover their liability for all work-related fatality, injury and illness. Premiums are used to compensate and/or rehabilitate workers with work-related injuries or illnesses, or their dependants in the case of fatalities. Employers can self-insure if they meet certain requirements (for example, in relation to prudential matters, employment size, claims management and OHS).

To varying degrees, the schemes contain provisions covering eligibility for income support and rehabilitation (through definitions of employee and work-related injury and illness), injury management (claims processes, rehabilitation and return-to-work requirements), statutory benefits (provisions for compensation for medical costs, periodic payments and commutations), licensing requirements for insurers and self-insurers, premium setting arrangements and dispute resolution processes.

There are several areas of difference between the schemes including:

- the role of private and public insurers and approaches to premium setting;
- access and coverage, including definitions of employee and work-relatedness (including journeys to and from work);

- the benefit structures, step downs and commutations;
- injury management processes involving early intervention, rehabilitation and return to work; and
- access to common law settlements, with thresholds for impairment and timing.

Existing national coordinating mechanisms for workers' compensation comprise the WRMC and HWCA. The WRMC is a council of Australian, State and Territory ministers responsible for inter-jurisdictional discussion of all matters affecting workplace relations. OHS and workers' compensation are only two of the policy areas they cover. The HWCA consist of chief executives (or their representatives) of the peak bodies responsible for OHS and workers' compensation arrangements. They consider operational issues, exchange experiences and provide expert advice to WRMC, and other ministerial councils, on the operation of existing schemes.

Scheme design, as well as workers not lodging claims for various reasons, can lead to the Australian Government's Medicare or social security programs meeting some of the costs of work-related injury or illness. Conversely, employers can end up meeting some costs of injury or illness that are not work related. There are also interactions between workers' compensation arrangements and other government programs, such as the taxation system and transport accident schemes in the various jurisdictions.

1.3 Terms of reference

The Australian Government has asked the Commission to assess possible models for establishing national frameworks for OHS and workers' compensation arrangements. The Government has signalled that, ideally, these models should encompass a cooperative approach between the Australian, State and Territory governments, while still leaving primary responsibility with each jurisdiction. In addition to identifying and assessing suitable models, the Commission has been asked to identify and report on various elements of OHS regulatory regimes and workers' compensation schemes.

On 30 January 2004, the Commission received a letter from the Treasurer asking it to 'examine, and include in its final report, the impact on small business of any proposed national workers' compensation and occupational health and safety arrangements'. The letter, together with the terms of reference, are reproduced at the front of this report.

1.4 The Commission's approach

This inquiry is not a comprehensive review of the existing arrangements for OHS and workers' compensation in each jurisdiction. In keeping with the terms of reference, it

focuses on the need for, and possible models of, national frameworks. While the Commission has also been asked to look at specific elements of the arrangements and has undertaken a review of them, it has not sought to design the perfect set of arrangements. Instead, it has considered how the specific elements could support better national frameworks and advocated principles for selecting them.

In considering suitable national frameworks, the Commission has taken an economy-wide view. That is, as in all of its inquiries, it has sought to identify arrangements that would advance the interests of the Australian community as a whole rather than just those of employers, employees or insurers.

The inquiry process

In preparing this report, the Commission provided the opportunity for all interested parties to contribute to its deliberations. It advertised the commencement of the inquiry in the national press and invited public submissions. To help those preparing submissions, it released an issues paper in April 2003. It also established a website (http://www.pc.gov.au/inquiry/workerscomp) on which it placed relevant inquiry material, submissions from interested parties and transcripts from the public hearings.

The Commission commenced informal discussions with interested parties soon after the inquiry was announced. The Commission spoke to 120 organisations and individuals in all jurisdictions, representing a range of interests, including: Australian, State and Territory government agencies; injured workers and injured worker support groups; unions; employers and employer associations; insurers and insurer associations; self-insurers and self-insurer associations; academics; medical and allied health professionals; safety professionals; lawyers; and actuaries.

The Commission held initial public hearings in all the capital cities during June 2003, providing interested parties with an opportunity to present and discuss their submissions.

The Commission released its Interim Report in October 2003. Interested parties had the opportunity to comment on the preliminary analyses and findings in this report through written submissions and by participation in public hearings held in December 2003.

The Commission received 177 written submissions prior to the release of the Interim Report and 262 by the end of February 2004. The submissions were from organisations and individuals covering a wide spectrum of interests. Some raised selected matters of particular concern and others commented on a broader range of issues.

More detail on the inquiry process is provided in appendix A, including a list of all those the Commission has met, all who have made submissions and all who have participated in

the public hearings. The Commission wishes to record its appreciation for their contributions.

Other relevant analysis

In preparing this report, the Commission has had regard to recent reports examining OHS and workers' compensation in Australia and overseas. Australian reports include, but are not limited to:

- the Industry Commission reports on OHS and workers' compensation arrangements (IC 1994, 1995);
- the House of Representatives Standing Committee on Employment and Workplace Relations inquiry into Aspects of Workers' Compensation (HoR 2003);
- the HIH Royal Commission (2003) report, which included information on the adequacy and appropriateness of arrangements for the regulation and prudential supervision of general insurance, including workers' compensation;
- the report by a joint Australian and States panel on the law of negligence (the Ipp Report) (Treasury, Law of Negligence Review Panel 2002);
- the Australian Health Ministers' Advisory Council's work on legal process reform (Department of Health and Aging, Medical Indemnity Policy Review Panel 2003);
- the (Cole) Royal Commission into the Building and Construction Industry (RCBC 2003a) which reported on OHS and workers' compensation in that industry, among other things; and
- the many reports of each jurisdiction's reviews of their OHS and workers' compensation arrangements.

In addition, the Commission sought advice on various implications of its proposals for national frameworks from:

- the Australian Government Actuary (appendix B);
- the Australian Government Solicitor (appendix C); and
- consulting actuaries (appendix D).

1.5 Report structure

The remainder of this report is structured as follows:

Chapter 2 sets out the broad rationales for developing national frameworks for OHS and workers' compensation in Australia, as well as identifying arguments against this change. It also sets out criteria for selecting national framework models.

Chapter 3 outlines features of the existing OHS regulatory regimes in the jurisdictions.

Chapter 4 considers appropriate arrangements for developing better national frameworks for OHS.

Chapter 5 describes appropriate models for a national framework for workers' compensation, as well as assesses the models and presents the Commission's proposals for a national framework for workers' compensation. It is supported by an appendix (appendix E) which provides details of the institutional arrangements for workers' compensation national frameworks.

The subsequent chapters deal with specific elements of workers' compensation schemes that the Commission has been asked to identify and report on. Each chapter concludes with a discussion of national framework issues and recommended principles.

Chapter 6 examines who and what is covered by workers' compensation arrangement. Discussed are definitions of employee, employer, workplace and work-related fatality, injury and illness.

Chapter 7 looks at arrangements for injury management, including early intervention, rehabilitation and return to work.

Chapter 8 examines access to common law damages for work-related fatalities, injuries and illnesses which may provide an alternative to compensation from statutory benefits.

Chapter 9 considers statutory benefit structures in workers' compensation legislation, including: income replacement, medical benefits, lump sum payments and cost-shifting issues.

Chapter 10 considers approaches to premium setting in the workers' compensation schemes.

Chapter 11 looks at the role of private insurers in workers' compensation schemes and the regulatory arrangements they are subject to.

Chapter 12 examines requirements for employer self-insurance with the employers themselves financing and managing their own workers' compensation claims rather than a third party insurer.

Chapter 13 examines the causes of disputes and their resolution under workers' compensation schemes. It is supported by an appendix (appendix F) giving details of the operation of the Administrative Appeals Tribunal.

Additional information and supporting analyses are contained in appendices to the report.

2 National frameworks

The inquiry is charged with the identification and assessment of models for establishing national frameworks for occupational health and safety (OHS) and workers' compensation arrangements across Australia. The terms of reference specify that:

- there is a need to examine whether the establishment of national frameworks can deliver comprehensive and consistent OHS and workers' compensation programs across Australia;
- a key goal of any new model would be to facilitate improved workplace safety and provide adequate compensation to injured employees while offering a more effective continuum of early intervention, rehabilitation and return to work assistance for those injured in the workplace;
- ideally, a national framework would encompass a cooperative approach between the Commonwealth and State governments while still leaving primary responsibility for these systems with the States; and
- any national frameworks would provide the States with adequate flexibility to address local conditions, encourage competition and facilitate competitive neutrality (paras 6–8).

This chapter looks at the broad rationales for developing national frameworks for OHS and workers' compensation in Australia and at the case for individual jurisdictions tailoring arrangements to suit their particular needs. The criteria for selecting models of national frameworks and the models the Commission considers to be the most appropriate are then reviewed. The Commission's proposals for national frameworks for OHS and workers' compensation are dealt with in chapters 4 and 5 respectively, while subsequent chapters look at particular elements of workers' compensation arrangements.

The review of national framework issues and options is not intended to establish any particular level of workplace safety nor identify the ideal workers' compensation scheme. It is intended to improve the procedures involved in establishing OHS regulation and workers' compensation arrangements throughout Australia, eliminating unnecessary differences, and establishing a system where best-practice features can be developed and implemented in a timely manner in all jurisdictions thereby improving workplace safety and the provision of workers' compensation.

The debate about greater national consistency or uniformity is not new, nor is it unique to OHS and workers' compensation. In 1985, the National Occupational Health and Safety Commission (NOHSC) was set up with an objective of achieving greater consistency between jurisdictions in OHS legislation, regulation and enforcement. National coordination has been the underpinning of the Heads of Workers' Compensation Authorities (HWCA), comprising chief executives (or their representatives) of the peak bodies responsible for the regulation of workers' compensation in each of the jurisdictions.

In other areas of the economy, mechanisms have also been established to promote national uniformity. In the areas of transport (the National Transport Commission (NTC)) and food standards (Food Standards Australia New Zealand (FSANZ)), this same objective has been paramount.

2.1 Previous reviews

The Industry Commission (IC) in 1994 with reference to workers' compensation, and in 1995 with reference to OHS, examined the issue of greater national consistency and in both cases concluded that this was desirable, and in the case of OHS that national uniformity was the preferred objective. The IC, in its 1995 OHS report, noted:

> National employers have to work within multiple OHS jurisdictions. Multiple regimes mean additional costs whenever systems of work are changed or staff are moved between regimes. They also raise the cost of internal monitoring of compliance by their operations.
>
> … The problem of multiple jurisdictions is compounded by the plethora of legal instruments that national employers must have regard for when conducting their business. …
>
> This volume of legislation impedes the efficient functioning of national markets, places even higher costs on those employers operating in multiple jurisdictions and detracts from competitive neutrality.
>
> The Commission surveyed the members of the Business Council of Australia … Two thirds of respondents (26 out of 42) consider that non-uniformity imposes costs on their operation, but only three were able to quantify the costs. (pp. 148–9)

In its 1994 workers' compensation report, the IC noted:

> A focus beyond the specific concerns of individual jurisdictions is required. Greater national consistency in a range of areas is needed, particularly for the level of and access to compensation. To achieve this end, the preferred route is via agreement among jurisdictions. A nationally available scheme is also warranted, to enhance competitive pressures for ongoing improvements in scheme performance and to facilitate consistency in key areas (eg in the definition of a worker). A nationally available scheme would also provide a way for firms to avoid inconsistencies between jurisdictions. (p. 221)

In 1997, the Labour Ministers' Council, in adopting a strategy for continuing workers' compensation reform nationally, noted five key principles put forward by HWCA as providing a suitable reference point for Australian workers' compensation design (box 2.1). The last principle said that inter-jurisdictional competition should be maintained on the basis that it provides opportunity for best practice benchmarking.

Box 2.1 **Key principles of workers' compensation scheme design outlined by the Heads of Workers' Compensation Authorities**

- Workers' compensation systems must reinforce the primacy of the employer/employee relationship in preventing and managing workplace injuries and ensuring that injured workers are returned to meaningful work.
- Schemes throughout Australia should be consistent and predictable in terms of employers' liabilities and workers' entitlements.
- Allocation of the costs of workplace injuries must be equitable in relation to employers, workers and the community.
- Prevention and return-to-work objectives must be supported by the delivery of high quality claims management, medical, rehabilitation and other services, according to clearly defined criteria designed to promote scheme outcomes.
- Inter-jurisdictional competition predicated on service delivery should be maintained on the basis that this provides the best opportunity for continuous improvement based on best practice benchmarking and, combined with national consistency in important aspects of scheme design, enables regulators to focus on the standards of service necessary to achieve scheme outcomes.

Source: HWCA (1997, p. 3).

The recent review of the Building and Construction Industry strongly supported national uniformity in OHS legislation. In its discussion paper, the Cole Royal Commission commented:

> The arguments in favour of one set of national OHS laws for Australia are clear. At present there are at least 11 separate statutory regimes applying throughout the country, each with its attendant regulations and codes of practice. The conventional arguments in favour of conformity are that it will lead to more equitable outcomes in that employees will be protected by the same standards wherever they work and that economic efficiency will be promoted because employers, employees, and other duty-holders will have only one set of laws with which to comply. (RCBC 2002, p. 7)

In the final report, the Cole Royal Commission concluded:

> From the perspective of the building and construction industry, there could be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating occupational health and safety throughout Australia. (RCBC 2003a, p. 15)

and:

> It is therefore not surprising that there is strong — indeed, overwhelming support in the building and construction industry for a national system to regulate workplace health and safety in the industry. (RCBC 2003a, p. 16)

The House of Representatives Standing Committee on Employment and Workplace Relations 2003, considered that it was timely for the States, Territories and the Commonwealth to consider jointly the feasibility, benefits and disadvantages of greater national consistency in workers' compensation, saying:

> While the Committee believes that the primary responsibility for workers' compensation and occupational health and safety should stay within the respective Commonwealth, State and Territory jurisdictions, there is significant capacity for increased national consistency and cooperation. (p. xxix)

The Committee also commented that there is a need to ensure that injured workers are not falling through the gaps when they are working in more than one jurisdiction. Similarly, the employer should not have to obtain cover for a particular worker in more than one jurisdiction.

2.2 The case for national frameworks

The differences between jurisdictions

There are many differences in OHS and workers' compensation arrangements between the jurisdictions in Australia. These cover the principal legislation in each jurisdiction, the regulations and codes, and differences in the style and extent of enforcement. Some of the differences are quite marked, while some are more subtle. Reasonably fulsome descriptions of each workers' compensation scheme are presented annually in a consolidated form by HWCA (see HWCA 2002), providing extensive instances of those differences. A similar description of OHS arrangements in each jurisdiction are presented bi-annually by the Workplace Relations Ministers' Council (see WRMC 2002b).

A number of participants specifically mentioned some of the more problematic differences, principally in relation to workers' compensation. For example, the Association of Payroll Specialists (sub. 15, p. 20, and IRsub. 227, pp. 3–4), the National Australia Bank, (sub. 42, pp. 1–5), Aon (sub. 73, pp. 1–2), the Insurance Council of Australia (sub. 74, appendices 2 and 3), Westpac (sub. 75) and in relation to self-insurance, the National Meat Association of Australia (sub. 82, p. 15), and Insurance Australia Group (sub. 89, appendices 1 to 3). Key areas that were identified include:

- definitions of employee and employer differ;

- definitions of injury differ markedly;
- levels and layers of compensation vary — for instance, an employee injured in Albury will not receive the same benefit as one injured in Wodonga, even though they may live next door to each other;
- each system defines earnings or weekly amounts in a different manner;
- access to common law exists in some systems, but not in others;
- there are different excess payments required;
- different approaches to claims management exist — some are privately operated while others are not, with each system providing an unique set of problems;
- the mediation and appellate processes differ;
- there are different rules and regulations in relation to rehabilitation programs; and
- premiums for employers are calculated differently, including differences in the way in which payroll is calculated for premium collection.

As a result, employers face uncertainties in relation to:

- knowing if a worker is really an employee as these definitions are not consistent throughout Australia, a problem that is particularly marked when managing contractors;
- ensuring that they have the appropriate cover — Aon (sub. 73) has advised several clients who have had to pay the premium for their workers' compensation insurance and then had to pay the benefit to the worker due to a loophole in one jurisdiction's legislation;
- knowing if employees are covered during recess breaks and in what circumstances, and if they are covered when travelling overseas; and
- ensuring they have cover in all jurisdictions where their employees work, not just the jurisdiction in which their business is based.

The National Australia Bank commented:

> The current state based systems result in the National dealing with eight different legislations which provide, eight different levels of benefits, eight different definitions of injury, eight different claim forms, eight different requirements for self insurance, eight different reporting requirements and so on. There is very little consistency between the different jurisdictions. (sub. 42, p. 1)

In many instances, participants could not see good reason for these differences. For example, the Insurance Australia Group commented:

> It is difficult to provide a rational explanation as to why the median cost of sprain or strain injuries is more than twice as much in Victoria ($990) than South Australia

($339) or median costs of knee injuries are almost five times as much ($1915 v $355). (sub. 89, p. 9)

The Victorian Government considered that the differences between jurisdictions in their OHS regimes has been overstated, saying that:

> The performance-based nature of OHS standards and an outcome-oriented regulatory system has meant that superficial differences in the wording and structure of legislation and regulation have been mistakenly perceived as major differences between the States and Territories. (IRsub. 256, p. 31)

While in a general sense there is greater commonality in OHS provisions, closer analysis of OHS legislation reveals that differences in their wording can have significant consequences. In a recent study of the legal concept of work-related injury and disease in Australian OHS and workers' compensation systems, Clayton looked at a range of provisions in the various OHS statutes, commenting:

> Once again, although a common pattern is discernible amongst most of the reporting requirements in the OHS jurisdictions, closer analysis of the precise wording of the provisions shows that there are significant differences in their wording, which undermine comparisons of reported incidents from jurisdiction to jurisdiction. (Clayton et al., 2002, p. 39)

Some examples identified by Clayton relating to reporting requirements and differences in some key definitions are presented in box 2.2.

Such wording differences open up the scope for differences in interpretation, adding to the cost and contributing confusion for businesses operating in multiple jurisdictions. It is not clear to the Commission why there is a need for each jurisdiction to draft its legislation in different ways to that used elsewhere in Australia, particularly as there is such a high level of agreement on the objectives that such legislation seeks to achieve.

Box 2.2 **Examples of differences in the wording of OHS legislation**

In a recent study of the legal concept of work-related injury and disease in Australian OHS and workers' compensation systems, Clayton identified a wide range of differences in the wording of the legislation between jurisdictions. In relation to reporting requirements, for example;

- differences in reporting requirements resulting from such things as the requirement to immediately notify work-related injuries and fatalities to 'employees' in some jurisdictions and to 'persons' in others (p. 35); and
- differences in the 'workplace' involving wording such as 'work-related', 'at a workplace', 'at or in relation to the place of work', 'at or near the workplace', 'out of the conduct of the undertaking or out of work preformed by an employee in conjunction with the undertaking'. (pp. 38–9).

In relation to the general duties and regulations, Clayton identified differences in the wording of the workplace covered in relation to the duty to employees, noting a range of wording: 'working environment' (WA); 'working environment at a workplace' (NT); 'while at work' (SA and Tas); 'at work' (Australian Govt., NSW, Qld and ACT).

In relation to the duty to others, wording differences include: 'the conduct of an undertaking' (most eastern states), 'work-relatedness' defined by reference to work undertaken by the duty holder (SA and WA); 'work carried out at a workplace' (Tas), (p. 43). The duty in NSW, the Australian Government and the ACT however, differs from that in Victoria and Queensland in that the former restrict the duty to persons 'at or near the workplace under the employer's control.

Clayton concluded:

> Any attempt to identify a particular notion of 'work-relatedness' characteristic of worker' compensation regimes is an illusory hunt for an elusive quarry since there are many (at least seven) different notions of 'work-relatedness', the resort to which varies over time and in respect of context. There are similar difficulties in attempting to isolate the concept of work-relatedness in the OHS statutes. (p. 45)

Source: Clayton et al. (2002).

Problems of multiple arrangements

The multiplicity of OHS and workers' compensation arrangements, their divergent elements and their constant change impose a significant compliance burden and cost, particularly on multi-state employers. They also present problems for an increasingly mobile workforce.

While multi-state businesses make up less than 1 per cent of businesses, they are typically larger firms and account for almost 30 per cent of employment (table 2.1).

Table 2.1 **Single and multi-state businesses: number and employment, 1998**

Size of business (number of employees)	*Single state*		*Multi-state*		*Multi-state*	
	Number of businesses	*Number of employees*	*Number of businesses*	*Number of employees*	*Share of businesses*	*Share of employees*
	No.	No.	No.	No.	%	%
< 200	886 147	3 868 395	6 725	245 842	0.8	6.0
200 to < 300	641	153 328	308	74 847	32.5	32.8
300 to < 400	341	116 576	209	72 008	38.0	38.2
400 to < 500	191	84 764	146	65 438	43.3	43.6
500 +	609	1 002 257	651	1 621 268	51.7	61.8
All	**887 929**	**5 225 320**	**8 039**	**2 079 403**	**0.9**	**28.5**

Source: Unpublished ABS data based on *ABS Business Register.*

For multi-state employers, there is the burden of meeting different jurisdictions' requirements. For those that pay a premium to an insurer, the requirements that cause particular compliance difficulties include definitions of eligibility (who is covered and for what) and injury management (such as claims management procedures and return to work requirements). For self-insured employers, the compliance concerns become much broader, extending, for example, to benefit structures and access to common law damages. More detailed reviews of access to common law, benefits structures, and self-insurance are presented in chapters 8, 9 and 12, respectively.

Problems with differences between arrangements also arise for workers who operate across jurisdictions. Differences in the definition of employee may mean that a worker is covered in one jurisdiction but not in another. If unaware of such differences, there is the possibility that an injured worker may find him or herself without workers' compensation cover.

Issues also arise regarding the appropriate allocation of responsibility for injuries and illnesses that are carried from one jurisdiction into another, particularly where there is progressive degeneration. Hearing loss and back strain are but two examples. For mobile workers, there is also a need to be trained in the particular OHS requirement of each jurisdiction.

The failure to resolve such problems can result in cost-shifting to the Australian Government and to individuals. Gaps in coverage due to differences in definitions of employee, for example, could mean that injured workers become the responsibility of the Australian Government under its social security and Medicare schemes.

The range of problems that participants face as a result of multiple jurisdictions essentially relate to:

- the increased costs of compliance;

- inequity in treatment of employers and employees;
- the increased risk of errors and fraud; and
- inadequate coverage because of 'gaps' between schemes.

The costs of compliance

The costs for multi-state employers of complying with multiple arrangements can be considerable, sometimes amounting to millions of dollars a year. Although most employers were not able to give precise estimates of the cost they faced, a few provided estimates relating to particular cost elements.

Insurance Australia Group (IAG) (sub. 89, p. 10) estimated that the existence of multiple arrangements added $10.1 million to the (once off) cost of setting up a single national IT platform. In total, IAG estimated that having to comply with multiple jurisdictions adds about $1.7 million to its information technology costs annually. It further estimated that a national workers' compensation scheme could offer overall operating cost savings to the group of $1.2 million per annum and a reduction in its actuarial costs of $400 000 a year. IAG estimated total direct savings from a single national workers compensation scheme of some $4 million per annum, but said that the potential savings could be considerably greater:

> While significant in its own right, these [$4 million] savings may well be dwarfed by the impact on claims costs, liability development and therefore premiums through more timely and relevant data collection and better reporting systems. The above savings do not include staff costs associated with collecting data and reporting to multiple workers' compensation regulators. This is because we believe these resources can be put to much more effective use in benchmarking and performance measurement under a national framework.
>
> Insurance Australia Group's workers' compensation staff in total manage more than $5 billion in liabilities for the company and for state monopolies. A data-driven 10 per cent improvement in scheme efficiency, reflected in better targeting of resources and claims management strategies, better health outcomes and improved return to work rates, would over time reduce these liabilities by $500 million. Savings forecasts of this magnitude are both conservative and achievable. (sub. 89, p. 11)

Optus estimated that the cost of complying with multiple OHS and workers' compensation arrangements adds about 5 to 10 per cent to workers' compensation premiums (sub. 134, p. 2).

BHP Billiton (sub. 110, p. 5) commented that it cost in the vicinity of $50 000 just to purchase a system to manage and supply information for each of the jurisdictions.

Skilled Engineering, a labour hire company operating in all eight States and Territories, estimated that the annual cost savings from operating under a single set of national OHS

and workers' compensation rules would be in excess of $2.5 million (15 per cent of the company's estimated OHS and workers' compensation annual costs). Skilled Engineering commented:

> Workers' Compensation and OH&S legislation is becoming increasingly complex as regulation increases. This has the effect of:
>
> - Consuming resources due to the degree of staff specialisation required for each set of regulations. These resources could otherwise be directed toward accident prevention.
> - Prevents the establishment of national best practice, reducing the effectiveness of internal systems.
> - Increases the risk to the company of non-compliance.
> - Adds costs to the company. (sub. 177, p. 6)

Costs for multi-state self-insurers

Multi-state employers which self-insure in more than one jurisdiction are required to comply with the differing prudential requirements of each of those jurisdictions. This involves the replication of costs of meeting the different financial capability requirements, bank guarantees and reinsurance policies, both initially and on an on-going basis.

Some multi-state employers have estimated the costs that could be avoided if there were uniform requirements or they were able to take out one self-insurance licence covering all their workers. CSR said that it costs over $700 000 per annum to maintain and renew five self-insurance licences, whereas the cost for one self-insurance licence would be $200 000, a saving of $500 000 (sub. 109, p. 6). According to CSR, the cost savings are achieved by a:

- Reduction in administration staff
- Reduction in administration fees
- Reduction in reporting costs

  > A component of this is removing the necessity to report at different times in different formats to different regulators. The extra cost of reporting to five different regulators is estimated for CSR Limited at in excess of $60,000 per annum.
  >
  > Cost savings to CSR of implementing an effective single scheme, single licence claims management service is estimated at $150,000 pa. (sub. 109, pp. 6–7)

CSR further commented that:

> These savings are in addition to those estimated for licence administration.
>
> Each state regulator expects that a self-insurer will write and maintain a set of self-insurer operating procedures.

> CSR Limited has about 30 operational procedures of which ten are common to all states. The remaining 20 are continually updated to take account of both the legislation and the changes in regulator guidelines for self-insurers.
>
> The extra cost to CSR of making changes to more than one set of procedures is estimated to be $30,000 per annum.
>
> The cost to the 5 regulators reviewing these changes and approving them is probably of the order of $50,000 per annum. (sub. 109, p. 7)

Woolworths conservatively estimated that it could save up to 50 per cent of the costs associated with the self-insurance licensing process (sub. 156, p. 3). This included avoiding the costs of obtaining multiple actuarial reports and bank guarantees. Further, it could save approximately $400 000 per annum if it could maintain a single OHS management system (sub. 156, p. 3). Pacific National estimated that it could save 50 to 70 per cent of recurrent financial costs alone if insurance was available on a national basis (sub. 169, p. 6). Optus estimated that it could save up to $2 million of their total $6 million annual workers' compensation costs if it were able to take out one self-insurance licence under the Comcare scheme (trans., p. 292).

Other costs

In addition to the costs imposed by the current multiple arrangements, the need to focus on complying with the differences between jurisdictions was seen as a distraction for management, away from a preferable focus on developing a company-wide culture of preventing injury and illness. Pacific National stated that:

> Rather than being proactive and developing better prevention and implementation strategies, internal safety management staff must spend time training and researching jurisdictional differences. (sub. 169, p. 7)

Similar views were expressed by Skilled Engineering (IRsub. 202, p. 6). Some caution should be exercised in assessing whether the resources saved would be redirected to other areas of OHS rather than to the company's bottom line. Nonetheless, to the extent that companies must pay a certain level of attention to OHS matters, this would be better directed towards outcomes rather than managing unnecessary differences between jurisdictions. In this way, employees of multi-state firms could benefit from a common culture of safety, compensation and rehabilitation throughout the company.

As well as generating costs of compliance, scheme differences can also result in different premium levels for apparently similar businesses. For example, Group Training Australia commented that:

> These jurisdictional anomalies can mean that a GTO [group training organization] in NSW can be paying twice as much, or more, in workers' compensation premiums as a GTO in Victoria of similar size and operating across similar industries. (sub. 65, p. 12)

Similarly, BHP Billiton highlighted the differences in premiums that can arise between jurisdictions:

> At present BHP Billiton pays in the vicinity of $16,000,000 per annum in insurance premiums to cover approximately 1,000 coal miners, that is, approximately $16,000 per year per employee. This compares with approximately $3,000 per employee in our self insured Queensland coal operations. The cost is in the vicinity of 14% of wages for NSW employees compared to 3% in our Queensland operations. Due to improved safety performance, BHP Billiton has experienced a significant decline in the number and incidence of claims in NSW. Despite this, premiums have tripled over the last three years. Common law claims from past employees, coupled with the unfunded liability of Coal Mines Insurance, have had a significant impact on these costs. (sub. 110, p. 6)

Coal Services Pty Ltd commented that the actual cost to BHP was lower and had declined in 2003, saying:

> The actual figure paid by BHP Billiton in the year referred to was $11,269 per person. Furthermore, for the calendar year 2003 the amount paid by BHP was $8,834 per person. (IRsub. 232, p. 4)

While the precise figures may vary, there is nonetheless a significant difference between New South Wales and Queensland. However, some caution needs to be exercised in looking at such premium differences. Some of the differences represent different benefit structures or other elements of the scheme, which may or may not be justified in particular jurisdictions. Other differences may reflect the differences in risk patterns, such as the higher accident risk in the form of mining undertaken in New South Wales compared with that in Queensland.

Inequities in treatment

Some participants have argued that one of the problems presented by multiple arrangements is that it results in unequal benefits to workers. Aon said that:

> The current system is not equitable on employees either. There are different benefit levels across the states with seriously injured workers not being compensated equitably. A clear example of this is shown by reviewing the benefit levels payable for death – surely one life is not worth more in economic terms than another, simply based on the state where a claim is made. (sub. 73, p. 3)

Aon (p. 3) reported that death compensation varied from $266 800 in New South Wales to $103 514 in the Australian Capital Territory, and differed in all jurisdictions. Similarly, the Australian Physiotherapy Association commented that:

> Differences also result in differential outcomes for injured workers: workers with the same injury in different jurisdictions can be entitled to different treatment and compensation. The APA contends that this system is inequitable and unsustainable. (sub. 20, p. 2)

Injured or ill employees may receive different benefits for the same type and severity of injury depending on the jurisdiction involved. However, they are also subject to different work-relatedness tests, have different levels of access to common law or journey to work coverage, and may have alternative sources of benefits, such as employer paid journey insurance, or particular payment conditions negotiated as part of industrial relations bargaining. Thus, a relative disadvantage in one element may be offset, to varying degrees, by other elements. Accordingly, the Commission does not consider that equality of benefits, assessed in isolation from other scheme elements, necessarily represents a disadvantage of multiple jurisdictions.

An increased risk of errors and fraud

The cost of compliance extends beyond simply the additional administration and financial cost of meeting the requirements of the various arrangements. Even a single OHS regime, or a single workers' compensation scheme is complex, and subject to regular change. A number of participants noted that, with multiple schemes with different requirements, the chance of making errors is greatly increased. For example, the Housing Industry Association noted:

> The main problems with the failure to have a consistent workers' compensation system across Australia is a cost to all contractors who undertake business in more than one State or Territory in understanding and complying with the various laws. A contractor who subcontracts work may not need to cover the subcontractor in one state yet be liable as that subcontractor's employer in a different State. This may lead to extra costs in having double insurance in place to ensure that there is coverage and compliance with the law or a situation where a law is inadvertently broken due to confusion as to when a subcontractor is covered. (sub. 35, p. 6)

Pacific Terminals (Australia) Pty Ltd (sub. 85, p. 1) identified the increased risk of overlooking or misinterpreting a requirement as a result of the differences in state legislative framework. It also commented that small to medium sized enterprises are required to spend a disproportionate amount of time on OHS and workers' compensation administration. Similarly, the Association of Payroll Specialists said that, when a business operates in more than one jurisdiction, the difficulty in ensuring the accuracy of the information being provided to the insurer increases substantially, and that these differences, and many others, lead to the likelihood of payments and calculations being incorrect (sub. 15, p. 1). In their submission following the interim report, the Association said that the errors in wage declarations for workers' compensation could be as high as the 90 per cent error rate estimated for the different payroll tax calculations in the different jurisdictions (IRsub. 227, p. 5).

The Australian Government Department of Employment and Workplace Relations (DEWR), in its submission to the House of Representatives Standing Committee on Employment and Workplace Relations, commented that the:

> … complexities within the different workers' compensation schemes (particularly regarding coverage) in Australia and the inconsistencies across those schemes give rise to situations that are or may be considered fraudulent. The structural arrangements can and often do contribute to the incidence of fraud and the level of non-compliance. A further contributing factor is the inflexibility of the schemes to respond to changing working arrangements. There is abundant evidence to show that the Australian workforce is highly mobile and that more and more employers are choosing to operate in more than one jurisdiction. (House of Representatives Standing Committee on Employment and Workplace Relations 2002, trans., p. 14)

The Department said that the implementation of a single national framework for workers' compensation coverage has the potential to remove the complexity that exists under the plethora of existing legislation and lessen confusion, non-compliance and the potential for fraud.

Gaps in coverage and cross-border issues

A particular problem generated by multiple arrangements relates to the interactions between them as workers move between jurisdictions, particularly for short periods of employment. This presents coverage problems for workers and can involve additional costs for employers (box 2.3).

Aon identified additional costs faced by employers as a result of the failure of the jurisdictions to reach agreement on the treatment of workers from other jurisdictions:

> There are a significant number of "nominal" policies in place in most schemes that are there simply because of the potential uninsured risk employers have when their staff travel outside the normal state of business.
>
> … The cross border arrangements being considered should address this issue but the various jurisdictions have been working on this for a number of years and the problem is still not resolved. Nominal policies are required in all states except SA and Qld. Again a confusion for employers. If you consider the number of contracts involved the unnecessary costs are enormous. (sub. 73, p. 4)

Similarly, the Australian Physiotherapy Association identified costs for practitioners moving between jurisdictions saying:

> The difference between the systems makes it more difficult than it should be for members to re-establish themselves in another jurisdiction.
>
> At a policy level the different systems do not encourage the development of consistent, evidence based OHS standards or practices. In practice development and research activities are duplicated and resources are wasted. (sub. 20 p. 2)

Box 2.3 **Examples of cross-border problems and gaps in coverage**

Aon identified gaps in coverage resulting from multiple arrangements, saying:

> We have encountered a number of companies who have found themselves uninsured even when they have taken out cover in all states. The particular problem is with the common law provisions and their application. The legislation in each State provides protection for statutory cover only. One of our large clients has found themselves in the situation of having to pay the damages component of a common law claim in Queensland. The problem has arisen, not because the client was uninsured, but due to the mis-matching of cover between NT and Qld. The client had cover in both states, the injured worker worked out of Qld, but was temporally employed in the NT when the injury occurred. The worker claimed in Qld and sued for damages. WorkCover has refused to provide indemnity to the client on the basis that the injury occurred in the NT. The client cannot claim under their NT policy as there is no common law in the NT and the worker has not claimed in the NT so their insurance policy will not respond. The common law claim, if successful is not covered by an insurance policy due to the inadequacies of the multiple jurisdictions. (sub. 73, p. 4)

Similarly, Green Triangle Injured Persons Support Group, noted:

> It [national uniformity] would also help the anomalous situation that we have in our region where, if a worker does not earn at least 10% of their annual income in South Australia, then they cannot claim for compensation in South Australia. You then have the ridiculous situation where Victoria refused compensation, because the injury happened across the border in South Australia.
>
> It would appear that while reciprocal agreements are in place between Victoria and New South Wales, none exists, at least to the same degree, between Victoria and South Australia. Whilst this is a simplistic overview of the situation, and that other factors do impact upon that scenario, nevertheless it does cause major problems for meatworkers, vineyard workers, shearers and others. (sub. 21, p. 3)

Cross-border problems are an issue currently being addressed by the States and Territories. The Tasmanian Government noted:

> One issue which has been of concern for a number of years is the "cross border" situation where workers are required to work in more than one State, leading to confusion and uncertainty about workers' entitlements, and employers' obligations. It is noted that the States and Territories have been working towards addressing workers compensation cross border issues through uniform legislation which is intended to be implemented in all States and Territories this year. Tasmania has always supported the concept of cross border legislation and intends to implement the proposed legislation as soon as practicable. (sub. 135, p. 2)

After a significant period of inter-governmental debate, Queensland unilaterally enacted a form of mutual recognition legislation in this area, followed by New South Wales and Victoria. The other jurisdictions are now at different stages in considering and implementing cross-border legislation which would recognise the coverage of workers who are temporarily working in their State or Territory. The Queensland Government said:

> Queensland along with New South Wales and Victoria have reached agreement to address cross border issues associated with workers working temporarily interstate. The agreement which has been given legislative effect in Queensland commenced on 1 July 2003. The agreement seeks to:
>
> - eliminate the need for employers to obtain workers' compensation coverage for a worker or deemed worker in more than one jurisdiction and enable employers to readily determine the state in which to obtain that insurance;
> - ensure that workers and deemed workers temporarily working in another jurisdiction only have access to workers' compensation entitlements available in their "home" jurisdiction;
> - provide certainty for workers about their workers' compensation entitlements;
> - eliminate forum shopping; and
> - ensure that each worker is connected to one jurisdiction or another.
>
> The cross border agreement is presently being considered by other States and Territories for implementation through the Heads of Workers' Compensation Authorities (HWCA). HWCA members at the 29 July 2003 meeting agreed to progress implementation of the cross border agreement throughout Australia. (sub. 154, p. 13)

The Australian Capital Territory, in September 2003, introduced legislation to the Assembly which includes changes to cover cross-border arrangements for workers' compensation.

However, the time taken for jurisdictions to act on this matter came in for some criticism. The Victorian Employers' Chamber of Commerce and Industry (sub. 66, p. 6) noted that the problems were identified in Industry Commission reports on workers compensation and OHS in 1994 and 1995 respectively. The National Farmers Federation said:

> While it is understood that work is currently underway in an aim to simplify and clarify the problems with cross border recognition, it is an issue that has been on the table for far too long and is causing significant concern to those farmers affected because presently an employer is required to have multiple workers' compensation policies for those workers working in other states which results in additional administrative and compliance costs. (sub. 94, p. 20)

The Housing Industry Association noted the changes that were occurring, but said that problems would, nonetheless, remain:

> HIA notes recent moves among the eastern States to develop systems allowing workers to work for a limited time in each other's jurisdictions while remaining covered for workers' compensation in their home State. This is a very desirable development and reflects credit on those States which have embraced it. However, HIA notes that so long as there is significant differences between the States and Territories over the nature and extent of coverage, mutual recognition will remain difficult to implement. (sub. 35, p. 7)

Despite the agreement between the eastern states, some degree of uncertainty remains. For example, Jim Pearson Transport commented:

> … both states [NSW and Qld] have similar tests however the wording is different and the interpretation could leave an employer operating in two states open to claims from both jurisdictions. … This means that an employer will still require policies in both states. (IRsub. 224, p. 1)

Similarly, NatRoad Limited (the National Association of Road Freight Operators) highlighted particular difficulties for their members who regularly operate in multiple jurisdictions. The Association commented:

> Operators contact NatRoad on a daily basis regarding interjurisdictional OHS issues, many of whom express their frustration about the additional burden that having to be aware of so many different regimes creates. Despite their genuine desire to provide a safe workplace for their employees, many operators are simply overwhelmed by the unnecessary duplication that exists. (IRsub. 236, p. 2)

Whether, in practice, cross-border problems arise in any numbers is, in some ways, a secondary issue. The fact is that subtle differences in wording open the opportunity for different interpretations and adds confusion and uncertainty for business. Why there is any need for such wording differences is unclear, but it highlights the inherent problem of pursuing 'consistency' rather than 'uniformity' in OHS provisions within Australia.

Advantages of multiple arrangements

A number of arguments have been put forward for individual jurisdictions to tailor arrangements to their particular needs. In general, these arguments have focused on workers' compensation arrangements. In OHS, greater standardisation is seen by all parties as desirable.

The Australian Psychological Society recommended that the inquiry '... supports and commends, as broad goals, restructuring those [OHS and workers' compensation] systems over time into a single national system...' (sub. 38, p. 9). Nevertheless, it identified the following benefits arising from separate systems:

- *a greater sense of ownership of and influence* in the separate systems by their various stakeholders, including and especially State and Territory governments, that might be lost with a national system.
- a strong likelihood that the *positive features of the separate systems will be lost* in a national system, by such processes as "averaging" or "using the lowest common denominator", and/or that *negative features may be too readily introduced* without the "checks and balances" inherent in separate, loosely-linked systems.
- a single system will be *too readily controlled* by whichever political party is in office in Canberra.

- separate systems provide a *natural laboratory* for trying different variants of WC or OHS schemes or projects and evaluating their outcomes, such as the Self Managed Employer Network in South Australia, which the State's workcover authority and the Stanley Report have recommended be closed down after evaluation revealed a poor set of outcomes. (See Stanley Report Vol. 2.)
- *beneficial competition* is provided by separate systems in terms of relative WC premiums charged to employers and associated benefits to injured workers.
- *jobs and careers will be lost*, particularly in specialised fields such as in the OHS area, leading to loss of important expertise and organisational effectiveness. (sub. 38, p. 14)

A number of participants, particularly State and Territory governments, unions and the legal profession argued strongly for retaining control over workers' compensation arrangements at the State and Territory level. The Queensland Government said:

> Queensland does not support the adoption of a national workers' compensation scheme or national self-insurance. These would add significant complexity to the existing arrangements, in effect adding a new layer of regulation where the Commonwealth would be required to impose and monitor a range of legislative requirements including workers' compensation benefit levels, solvency and coverage without the surety of any benefit to scheme members. ... A co-operative approach to achieve national consistency for workers' compensation, based on the model used for occupational health and safety through the National Occupational Health and Safety Commission is the preferred model of the Queensland Government. (sub. 154, pp. 2–3)

The Community and Public Sector Union and the State Public Services Federation Group said:

> We submit that the best and most appropriate place to formulate law and policy in respect to OH&S and workers' compensation remains the State governments. These legislators are closer to the day-to-day concerns of workers and their families than the Federal government can ever be. ... These legislators are more accessible to organisations, including unions, that represent the employment based interests of their members. (sub. 52, p. 2)

The Law Council of Australia expressed the view that, in relation to OHS, as for workers' compensation, there is no need for national legislation, and that the States and Territories should be able to tailor things to their own needs (sub. 62, p. 1). The NSW Bar Association (sub. 64) and the Australian Plaintiff Lawyers' Association (APLA) expressed similar views, with the latter saying that:

> APLA concedes that, in the case of national employers, there may be some perceived problems with multiple jurisdiction-based regimes. It could not be said that these regimes have any real impact on employers that operate within the confines of particular state schemes. The only possible issue touching upon the latter category involves interstate accidents which are catered for within the legislative structures of multi-state schemes.

> ... On the assumption that the only reasonably affected employers, by operation of multiple jurisdiction-based regimes throughout Australia, are national employers, APLA is firmly of the view that to provide a national framework simply for ease of convenience, when one has regard to the disparities in the current state schemes, would operate as a severe injustice to many workers in the country. (sub. 69, pp. 5–7)

The APLA was particularly concerned about the possibility of restricted access to common law under any national scheme.

In relation to OHS, the Department of Consumer and Employment Protection of Western Australia argued for the continuation of flexibility at the local level, saying:

> In general terms, the Department of Consumer and Employment Protection supports moves toward national consistency of arrangements. Not-withstanding it is considered important to retain some flexibility at the local level in order to respond to local issues or local imperatives. To this extent, it is considered the report pays insufficient regard to the positive aspects of localised arrangements and tends to overemphasise the value of a 'one size fits all' approach. (IRsub. 219, p. 1)

To a large degree, the debate about local flexibility is one of degree, and about the areas where this is most appropriate, rather than whether local flexibility should be allowed or not. At its most fundamental level, the duty of care concept, together with performance-based standards, seeks to allow, and even encourage different approaches to complying with the duty and with meeting the performance standards set. These differences can be at the local, industry or even individual firm level.

Economic and other differences between jurisdictions

A number of participants argued that there was a need to tailor both OHS and workers' compensation to reflect different attitudes to risk and differing work or business arrangements in the various jurisdictions. The existing arrangements are the product of a long history of negotiation and compromise between governments, employers, unions, lawyers, insurers and others, resulting in differences between jurisdictions which range from significant to the trivial.

The Tasmanian Government commented:

> The Government believes that there are some advantages to having multiple jurisdiction-based regimes. States and Territories have different needs and conditions, and individual regimes allow them the flexibility to provide for those specific needs. Another advantage is that the States and Territories benefit from and build upon each other's experience and initiatives leading to overall improvement in the schemes. (sub. 135, p. 2)

Certainly, there is a range of economic, social, workplace, legal, medical and other differences between jurisdictions within Australia. However, these need to be put into context. Some of these differences, such as firm size and industry concentration, also differ markedly within jurisdictions, and yet the States and Territories have been able to accommodate them within their single regulatory regime. A single OHS standard can include the spectrum of conditions faced from the tropics to cooler climes while maintaining it's integrity. Various of the jurisdictional differences, however, weigh more heavily on the workers' compensation schemes.

Risk of lowest common denominator

Some participants expressed concern that the compromises necessary to move to a single national scheme would result in the choice of the 'lowest common denominator'. For example, the Labor Council of New South Wales commented:

> The Labor Council supports the approach towards national consistency and harmonisation across workers compensation and occupational health schemes, and the greater integration of both. The Council, however, is deeply concerned that in trying to obtain national consistency there would be a move towards adopting the lowest common denominator and the weakest aspects of the State schemes and therefore, on this basis, we are extremely sceptical about any national consistency approach, which fails to utilise the strengths and advantages of the state jurisdictions.
>
> The unions are of the view that multiple jurisdiction-based schemes are the best option for Australia. The USA and Canada have multiple jurisdiction-based schemes. Some of the schemes in the United States are privately underwritten where others are Government managed Funds.
>
> Moreover, the Union movement is sceptical that the multi-jurisdictional approach is as difficult to manage as is claimed. The majority of employers are not national corporations or entities. (sub. 147, pp. 4–8)

The Australian Nursing Federation (sub. 70, p. 1), the National Tertiary Education Industry Union (sub. 68, p. 4), and the Australian Plaintiff Lawyers' Association (sub. 69, p. 5) expressed similar views.

The risk of arriving at a lowest common denominator depends in part on the process involved, and will differ in the two areas being considered in this inquiry. In relation to OHS, there is considerable agreement on both the objectives and the broad method of achieving them. The focus appears to be on achieving an appropriate common denominator.

Achieving consensus will be more difficult in the area of workers' compensation, where the positions of the stakeholders are more divergent, where the existing differences can be significant, and where the various elements of each scheme interact as part of a complex whole. Nevertheless, it is not clear that changes over time within the States and Territories,

and moves towards greater consistency are leading to a lowest common denominator. Some benefits and conditions for coverage have been tightened, but these appear to be principally a reaction to cost increases. On the other hand, the scope of workers' compensation coverage has increased, now extending well beyond the traditional area of injury resulting from a discrete accident at work.

Innovation from federation

Learning from the experience of other jurisdictions has been a feature of the Australian federal system. It allows, whether intentionally or not, for trial arrangements to be introduced and observed while containing any negative impact that could result if the change is unsuccessful. The Queensland Government commented:

> ... the existence of the various state-based models and industry-based approaches within each State enables a range of regulatory responses to be introduced and evaluated to inform and continually improve health and safety outcomes across Australia. In effect, States "learn" from each other's best practice models. (sub. 154, p. 8)

Similarly, the IC in its 1995 OHS report said that innovation in the design and execution of regulatory instruments is a key element in improving the efficiency and effectiveness of regulatory regimes, such as that for OHS, and that some inconsistency between jurisdictions may allow greater innovation. The IC nevertheless recommended uniformity of OHS arrangements through template legislation for core elements and the adoption of national standards.

Moves to greater national consistency carry the risk of reducing the scope for regulatory innovation. The risk is greatest with national uniformity. If regulatory innovations require the agreement of all or most governments, the scope for experimentation is likely to be less than would otherwise be the case. It is recognised that industry, the labour market and other influences on both OHS and workers' compensation will continue to change over time. Research, responsiveness and innovation are important. Model design for national frameworks needs to retain these attributes.

There is also the ability to learn from the experience of other countries in their application of OHS and workers' compensation arrangements. In many ways there is a greater variety internationally than there is within Australia. Because Australia is a small relatively open economy, there are strong incentives to move towards best-practice arrangements.

Competitive federalism

Capital and labour are, to an extent, mobile and have, at the margin, the potential to move to the jurisdiction with the 'best' set of regulatory arrangements. Indeed, State and Territory governments have publicised aspects of their schemes, particularly their workers'

compensation premiums, as a means of competing for investment. Aon commented on the use of workers' compensation arrangement to attract business to a State saying:

> It has been recognised for some time that the States are interested in maintaining their control over the workers' compensation arrangements for employers and employees in their State. It has been used by some States for marketing the benefits of moving to that State – "Come to this State, we have the lowest workers' compensation premiums in Australia". (sub. 73, p. 2)

This policy, however, has not been without criticism and not without some adverse effects for the financial health of the various workers' compensation arrangements in Australia. It is also an issue that is being faced in other parts of the world, whether federal in structure or seeking greater integration of nation states. For example, Esy and Geradin commented:

> Should trade liberalisation and economic integration between states or nations be accompanied by a degree of regulatory cooperation or coordination? Or should states or nations remain free to maintain their own approaches to economic, social and environmental issues? The former strategy, promoting a degree of regulatory harmonisation, aims to minimise market failures caused by interjurisdictional spillovers and strategic standard setting that might trigger a welfare-reducing regulatory 'race towards the bottom' as jurisdictions seek to advance the competitiveness of their industries through lax regulation. The latter approach, encouraging regulatory competition, sees a benefit in variations in approaches and standards across jurisdictions as a mechanisms for testing and refining alternative policies, disciplining overreaching governments, and creating incentives for bureaucratic efficiency. (2001, p. 1)

A source of market failure for workers' compensation which has an impact on the extent to which competitive federalism is desirable is that the beneficiary of the 'insurance product', the worker, is not the one facing the cost, while the party facing the cost, the employer, is not the one receiving the benefit. Importantly, the decision to locate or re-locate investment lies with the employer. Further, neither party sets the benefit level nor, at times, the costs — this being a consequence of both insurance risk 'pooling' and various forms of government involvement in premium setting. Thus, no party faces the correct set of incentives to arrive at an appropriate mix of cost and benefit.

There is the added competitive element of shifting costs to the Australian Government. Limiting benefits, either by making early access difficult (thus placing costs onto Medicare) or by limiting the time over which compensation is paid (thus shifting costs to social security), allows States and Territories to offer lower premiums. The extent of cost shifting can be extensive. In its 1995 OHS report, the IC estimated that annually, some $200 million of costs were being shifted to the Australian Government from workers' compensation schemes.

DEWR commented that an increasing proportion of the cost of work-related injury and illness was being shifted to others, primarily due to policy decisions of State and Territory governments. In particular, DEWR noted that:

> A recent national survey revealed that in the preceding twelve months, some 60,000 workers who suffered a workplace injury sought assistance from taxpayer funded programs. (sub. 166, p. 27)

The Australian Government Department of Family and Community Services estimated that the Australian Government paid out $180 million in social security payments to people affected by workers compensation payments (sub. 167, p. 1).

Basic provisions for dealing with social dislocation, injury and illness are provided by the general social security and health systems. These are jointly provided by all Australian governments. However, where injuries and illnesses are demonstrably work-related, it is appropriate that the cost be attributed to employment.

In some cases, the attribution of cost may not be clear. This can occur where the work-relatedness of the injury or illness is itself problematic — there was some debate in this inquiry about the inappropriate attribution of injuries and illness to workplace causes, in part because for some conditions, this is difficult to do accurately. For injuries of a very minor nature, coverage under workers' compensation may not be cost-effective — a situation reflected in the existence of arrangements where employers absorb initial low levels of claim costs, and 'excess' arrangement. There is, however, the separate question of comprehensive data collection and sound workplace safety.

The Commission's view on the case for national frameworks

The majority of employers and employees operate within a single State or Territory and therefore deal with only one OHS regime and one workers' compensation scheme. However, multi-state employers, who employ over a quarter of the workforce, face costs associated with dealing with the differing requirements in the various jurisdictions. These can be significant as set out earlier in this chapter. There are also problems facing employees and other organisations dealing with the differing jurisdictional requirements. With increasing mobility in the workforce, and within firms, the number of affected employees is growing.

The case for national frameworks aimed at promoting greater national consistency, and even uniformity, in OHS and workers' compensation arrangements does, however, differ between the two.

In the case of OHS, while it is arguable that the costs imposed by differences between the jurisdictions are less than in the area of workers' compensation, the differences are also

less fundamental (in part because of the existence of a formal mechanism via NOHSC for coordination in the former area), and thus the cost of achieving the benefits of national uniformity in OHS is more justifiable. In addition, there is a more widely held belief that national uniformity is both desirable and achievable.

At the same time, the 'duty of care' nature of OHS legislation, and the use of outcome-based regulations and codes, reduces the risk that national uniformity will stifle innovation. Prescriptive regulation, with its potential to limit innovation, should be limited to a small number of clearly agreed areas, such as dealing with hazardous waste or toxic chemicals. National frameworks for OHS and workers' compensation, nonetheless, need to incorporate mechanisms for evaluating both the costs and benefits of any proposed new or amended standards so as to avoid rigid and inappropriate rules. Governments already provide some mechanisms in this area. Regulation Impact Statement procedures involve the review of new legislation and regulations and have the potential to be useful if well operated. However, having procedures in place at the development stage to ensure well developed legislation and regulation is preferable to the need for modifications as the result of subsequent review.

In the case of workers' compensation, the cost imposed by differences between jurisdictions is greater, and the differences are also more fundamental. Consequently, achieving national uniformity would be a much more costly exercise. In addition, there is no clear consensus that national uniformity in workers' compensation arrangements is the best outcome, nor is there any consensus on the elements of an ideal model. Greater consistency between the jurisdictions is, however, widely seen as desirable.

In relation to compliance costs, lack of uniformity does not affect the majority of employers or employees as they operate within a single jurisdiction. The costs of differences between workers' compensation arrangements within Australia are predominantly born by multi-state employers, and there are significant benefits to them from being able to operate within a single nationally-available scheme. A national framework needs to primarily address the problems faced by multi-state employers. Their employees could also benefit from improved whole-of-company workplace safety, compensation and rehabilitation processes. There are also benefits for the nationally mobile workforce.

The impacts on the current State and Territory schemes of multi-state employers moving to a national scheme are explored in chapter 5, and are not considered to be large. The innovative benefits of competitive federalism can be retained in various ways through appropriate model design as is explored in the following section.

While there are links between OHS and workers' compensation, particularly in the area of information, their objectives differ significantly, and their current position in relation to a nationally consistent set of rules is quite different. Consequently, the Commission is

treating the development of options for national frameworks for OHS and workers' compensation separately.

Because Australia is a small open economy, there are likely to be strong incentives to adopt practices that raise the competitiveness of local firms relative to counterpart producers overseas. The cost-related evidence submitted in this inquiry suggests that a national framework would provide a suitable vehicle for achieving a reduction in compliance burdens and costs, while continuing to promote organisational innovation and associated improvements in competitiveness.

2.3 Criteria for model selection

There are three broad design parameters to take into account when developing models of national frameworks for OHS and workers' compensation arrangements:

- consistency with the commonly agreed objectives of existing arrangements;
- capacity to effectively target deficiencies in having multiple arrangements; and
- acceptability to stakeholders.

By way of background, there are political and constitutional issues that arise from Australia's federal structure.[1] The States and Territories have had a long history — in some cases, over one hundred years[2] — of policy involvement in, and responsibility for, OHS and workers' compensation matters. Their arrangements, particularly for workers' compensation, reflect that history of consultation and compromise between governments, employers, trade unions, workers, lawyers, insurers and others. Each workers' compensation scheme is very much a package of inter-related measures, individual components of which cannot easily be changed in isolation. The differences between individual workers' compensation schemes, including their degree of financial health, can be quite marked — a situation that is not the case with OHS regimes.

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1 There is no express reference to OHS and workers' compensation in sections 51 and 52 of the Constitution, which specify the Commonwealth's concurrent and exclusive powers to make laws. But constitutional intent may not fully explain the current dominant role of the States and Territories. For example, the Insurance Australia Group considered that it:

> ... is not the result of a deliberate distribution of powers at federation since workers' compensation at that point was still essentially a common law matter. Rather, it simply reflects the fact that the primary focus through most of the 20th century was on the development of personal injury and industrial relations law at state level rather than the creation of an efficient market for workers' compensation insurance, which is essentially a Commonwealth responsibility. (sub. 89, pp. 5–6)

2 Workers' compensation legislation was first enacted in the States and Territories as follows: Queensland (1886); Western Australia (1894); South Australia and, possibly, the Northern Territory (1900); Tasmania (1910); Northern Territory (1910); Victoria (1914); New South Wales (1926); and the Australian Capital Territory (1946).

Most OHS and workers' compensation arrangements have already been subject to frequent review and change. Such changes, and the inevitability of further change, creates a climate of complexity and uncertainty for all stakeholders.

In reviewing the issues associated with developing national OHS and workers' compensation frameworks, the Commission has only briefly reviewed the rationale for government intervention in this area. The matter has been addressed extensively in the literature and in previous reports, and the Commission does not intend to revisit the arguments in any detail.

In brief, the essential reasons for government intervention is the observation that the private market does not, for a variety of reasons, adequately account for the costs of workplace fatalities, injuries and illnesses, nor apportion those costs to the appropriate party. The reasons for intervention in OHS and workers' compensation are essentially similar, each addressing different, though related, aspects of the limitations of private markets. The reasons include:

- limited information about, and understanding of, workplace risk. The evidence suggests that people tend to over-assess low-probability events such as fatalities, and under-assess high probability events. Several studies have identified systematic shortcomings in the way people learn about risk and incorporate risk into their decisions;
- as a consequence of poor risk perception, and asymmetric information on the level of risks in individual workplaces (where employers know more about risks than prospective workers), it cannot be argued that differential wages accurately reflect different levels of risk. Such differentials would allow workers to take out their own insurance, but this appears not to be the case, and employers avoid some of the costs associated with the risk generated by their activity;
- the common law is inadequate in sending signals to employers about the need for appropriate levels of workplace safety. While claims can be made under the common law for negligence or breach of contract, they can involve high legal and other costs and do not provide timely compensation in an equitable or effective manner. Any awarded compensation may fail to be delivered as some employers may not take out insurance to adequately cover their liability to employees. Moreover, the adversarial nature of common law actions does not necessarily encourage early return to work;
- governments may also intervene when there is a lack of information about the risks of some hazards, and where the cost, if the wrong assessment is made, is particularly high. For example, some cancers may only arise after a period of 20 to 40 years, and the cost to individuals can be very high. Contemporary practice is to be prudent in protecting against exposures to such substances;

- external costs are imposed on taxpayers if injured workers use the social security and (subsidised) health care systems for work-related injury, rather than the workers' compensation system. To the extent that this occurs, there is less incentive to provide an appropriate level of safety; and
- there is an element of a 'public good' where an employer, at their private expense, develops safe workplace practices and these practices are appropriated by others.

In the light of these inadequacies, employers do not necessarily have sufficient incentives to prevent, and compensate for, work-related fatalities, injuries and illnesses in the absence of explicit government intervention.

Consistency with current objectives

Existing OHS and workers' compensation arrangements have related but different objectives. OHS arrangements seek to prevent fatality, injury and illness in the workplace. Workers' compensation arrangements are primarily intended to:

- provide adequate financial compensation in the event of workplace fatality, injury or illness;
- provide an appropriate injury management continuum of early intervention, rehabilitation and return-to-work assistance; and
- ensure that employers' contributions fully cover the cost of scheme liabilities arising from current employment, in an affordable manner.

There is also an inter-related objective — to provide feedback to employers on the prevention of workplace fatalities, injuries and illnesses through costs, incentives and data analysis.

The goal for national frameworks for OHS and workers' compensation arrangements, referred to in the terms of reference for this inquiry:

> … would be to facilitate improved workplace safety and provide adequate compensation to injured employees while offering a more effective continuum of early intervention, rehabilitation and return to work assistance for those injured in the workplace. (para. 7)

This goal is, in its essence, already reflected in existing arrangements. A model design parameter, therefore, is to work within the current broadly-based objectives of existing arrangements, while overcoming demonstrable deficiencies in having multiple arrangements.

Acceptability of the models

A key model design parameter for any national framework is that it must be capable of implementation in a timely manner. Indeed, there may be a need to trade-off a conceptually superior framework with one that is able to be implemented.

Implementation is affected by the institutional history of, and stakeholder interests in, each scheme as well as the complex interaction of the various scheme elements. Acceptability of a national framework to those stakeholders in individual jurisdictions with an interest, or who are empowered to enact changes, is thus an important aspect of implementation.

A national framework may also need to be implemented in a staged manner to enable stakeholders to assess and adjust to the impacts on an incremental basis.

2.4 Formulation of the models

Early in the inquiry, the Commission identified six possible models of national frameworks for OHS and workers' compensation — a cooperative model for workers' compensation, a mutual recognition model, an expanded Comcare model, a uniform template legislation model, an extended financial sector regulation model and a new national workers' compensation scheme or OHS regime (PC 2003, pp. 7–8).

In response to participants' comments, the Commission no longer considers the following two models to be feasible for workers' compensation.

- A mutual recognition model. For a national framework, there would need to be agreement amongst all jurisdictions to pass the necessary legislation enabling mutual recognition. As it would require jurisdictions to be indifferent to underlying differences among schemes, this is highly unlikely. Moreover, there would be practical difficulties for jurisdictions in implementing mutual recognition given the many diverse requirements, except where workers from one jurisdiction are working temporarily in another (cross-border recognition). As the Northern Territory Government said, 'dealing with a multiplicity of different workers' compensation and OH&S schemes would be unwieldy' (sub. 144, p. 14).
- A model involving a single national workers' compensation scheme. As noted, the majority of employers (who are predominantly small to medium enterprises) and their employees operate only within a single jurisdiction. It is also not clear that there is any single perfect or best scheme. Best practice can be reflected in a number of different ways, and schemes must adapt to the wider socio-economic environments within which they operate. In addition, the benefits of choice of scheme and the scope to learn from the experience in other jurisdictions would be lost. On the other hand, there are

compelling arguments for national uniformity in OHS arrangements through a single national regime. This particular option is considered further in chapter 4.

Chapter 4 looks briefly at the following models for a national OHS framework:

- a single national OHS scheme;
- an alternative national OHS scheme;
- template legislation, regulations and codes of practice;
- mutual recognition; and
- strengthening the existing cooperative approach.

This is followed by the development of the Commission's preferred approach based around an alternative national OHS scheme (linked to the recommendations for expanding national workers' compensation arrangements), and an amalgamation of the template legislation model with proposals to strengthen the existing cooperative approach.

Chapter 5 develops the following models for worker's compensation in more detail:

- self-insurance under the Australian Governments' Comcare scheme (model A);
- an alternative national self-insurance scheme (model B);
- an alternative national insurance scheme (model C); and
- a new national cooperative body (model D);

The workers' compensation models could be combined, and/or be implemented in a sequence of steps. Models A through to C are largely matters for Australian Government consideration, and their implementation could be phased, with progressively greater impacts on State and Territory schemes. Indeed, Model C may not eventuate depending on the degree of parallel harmonisation by the States and Territories. Model D requires the full cooperation of all jurisdictions, and could be commenced immediately, and could operate concurrently with Model A and, when developed, any subsequent model. These models and any linkages between them are explored in more detail in chapter 5.

3 Current occupational health and safety regimes

This chapter summarises the existing arrangements for occupational health and safety (OHS) in Australia. The following chapter looks at the development of national OHS frameworks.

3.1 The incidence of injury and illness

Regulation of OHS aims at prevention — to safeguard the health, safety and welfare of workers, as well as to protect others from risk at work sites, thereby controlling the personal and economic costs that arise from work-related fatalities, injury and illness. In 2001-02, preliminary data indicated that there were 297 compensated fatalities which occurred as a consequence of workplace activity. Of these, 198 were due to injury and poisoning and the remaining 99 were due to disease. A further 78 fatalities occurred on journeys to and from work. There were almost 139 000 accepted workers' compensation cases which resulted in a fatality, permanent disability or a temporary disability which resulted in an absence from work of one or more working weeks (NOHSC 2003b, p. x).

Data based on workers' compensation claims must be treated with some caution. The Department of Employment and Workplace Relations (DEWR) noted that:

> The available evidence suggests, however, that the total number of workplace injuries and diseases in Australia may be much higher than the number eligible for compensation. A survey by the Australian Bureau of Statistics found that over a twelve month period, five percent of the workforce or 477,800 workers experienced a work-relate injury or illness. This equates to an incidence of injury rate of 49.3 per thousand employees, compared to an incidence rate of 15.2 per thousand employees that the workers' compensation schemes actually reported. (sub. 166, p. 3)

The ACTU, in their submission and at the hearings noted a considerable underreporting of work related deaths from disease. They referred to the recent conference 'Australian OHS Regulation for the 21st Century' in July 2003, which made reference to Australian estimates for deaths from diseases of almost 2300 per year (Kerr et al. 1996), and Finish estimates (Nurminen & Karjalainen 2001) that 7 per cent of all deaths are work related. The Australian Manufacturing Workers' Union also referred to work presented at the conference saying:

> According to the ILO, it is estimated that the toll from accidents is ¼ of ALL work-place related ill health.[1] Using the same methodology as Finnish research he estimates that the real Australian toll is close to 7,000 deaths per year. Mr. Tukaala also noted that maybe 32% of all work related deaths are due to occupational cancer e.g. exposures to asbestos, passive smoking, radiation etc., … (IRsub. 231, p. 1)

The National OHS Strategy document noted that:

> Although no reliable data exist on deaths arising from occupational disease, it has been estimated that over 2,000 people die per year from past occupational exposures to hazardous substances. (NOHSC 2002c, p. 1)

Estimating the contribution of work-related factors to deaths from disease and similar long latency conditions is difficult. There is both a lack of agreement on the appropriate methodology and limited access to data. This situation has been reviewed by NOHSC with particular reference to data sources in Australia (NOHSC 2000; 2002e), and with reference to means by which this data could be improved.

NOHSC has also commissioned Access Economics to review the current estimate of the economic cost of work-related injury and disease based on an examination of the international literature and the NOHSC/Industry Commission modelling. Initial estimates incorporating the Access Economics recommendations on modifications to the methodology indicate the final estimate of the total cost of work-related injury and disease to the Australian economy will exceed the $31 billion supplied by NOHSC in its original submission to the Productivity Commission in 2003[2].

While the cost is and remains high, the frequency of compensated work-related fatalities, injury and disease (number per million hours worked has declined from 13.4 in 1996-97 to 10.2 by 2001-02. The level of compensated work-related fatalities has declined from 403 in 1996-97 to 297 in 2001-02 (chapter 1).

DEWR noted that a number of factors might be influencing the level of reported injury:

> They include the underreporting of minor injuries; the structural changes by workers' compensation schemes in respect of coverage and entitlement to injuries; changes to the composition of the workforce; and a shift in employment from high risk industries to industries of lower risk, reflecting the Australian economy's change from a manufacturing sector to the services sector. (sub. 166, p. 9)

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[1] Mr. Jukka Tukaala, International Labour Organisation speaking at NOHSC Conference "Australian OHS Regulation for the 21st Century", Queensland, July 2003.

[2] This compares to an estimate of $20 billion contained in the Industry Commission's 1995 review relating to the year 1992-93. The IC estimated that employers bear 40 per cent, injured workers 30 per cent and the community 30 per cent of this cost.

All parties acknowledge that the incidence of work-related fatalities, injury and illness significantly exceeds that reported through workers' compensation claims but, as reported by NOHSC and the individual schemes, the incidence is in decline. Notwithstanding this decline, a number of developed countries, particularly the United Kingdom and Scandinavia are acknowledged to have a better OHS performance than Australia. The room for improvement in Australia is reflected in the recent National OHS Strategy 2002-2012 which has been endorsed by the Australian, State and Territory Governments. It aims for a 20 per cent reduction in work-related fatalities and a 40 per cent reduction in the incidence of workplace injury by 30 June 2012 (NOHSC 2002c, p. iii).

3.2 Current OHS arrangements

Under the Australian Constitution, the power to legislate for OHS was not explicitly referred to the Australian Government (in contrast to the referral of a broader corporations power). Consequently, ten principal OHS statutes have been developed — six State, two Territory and two Commonwealth (one relating to Australian Government workers and the other relating to the maritime industry).

To varying degrees, all jurisdictions have drawn on the approach to regulating for safer workplaces espoused by the Robens Committee in the United Kingdom in 1972. This involves a principal OHS Act that codifies the duties of care that are owed under the common law. The expression 'duty of care' has been defined as the obligation owed to anyone whom it is reasonably foreseeable would be injured by the lack of care of that person (CCH 2003a, p. 118).

This duty is imposed on employers, the self employed, owners, occupiers of premises and suppliers. The duty is owed to both employees and others (workers other than employees, customers and visitors) who may be affected by the worksite, activity or equipment. Workers have obligations not to put others at risk and to obey the reasonable instructions of their employer in relation to OHS (box 3.1).

Regulations

All OHS Acts provide for the making of regulations. These set out in detail the carrying out of some aspects the more general duties outlined in the Acts. They cover such matters as working in confined spaces, plant design and use, electrical hazards, manual handling, risk management, consultation and training. Failure to comply is a breach of the relevant OHS Act and may result in a penalty being imposed.

Box 3.1 **Who has a duty to whom?**

The Cole Royal Commission summarised the obligations as follows:

> With some variations in detail and emphasis between jurisdictions, the various Acts impose duties on the following parties:
>
> – Employers, for the benefit of employees;
> – Employers, for the benefit of non-employees;
> – Self-employed persons;
> – Employees;
> – Occupiers of premises; and
> – Manufacturers and suppliers of plant and substances, erectors and installers of structures in workplaces.
>
> The Australian courts have generally construed the general duty provisions in accordance with the intent of the Robens report. Thus they have been interpreted broadly so as to maximise the protection of employees and others whose safety may be affected adversely by work-related activities. (RCBC 2002, pp. 69–70)

An essential element of the duties is that they are intended to encourage 'pro-active' rather than 'reactive' behaviour on the part of the duty holder. The Cole Royal Commission referred to *State Rail Authority v Workcover (2000)* 102 IR 219 at 230 (Industrial Relations Commission of New South Wales in Court Session), reporting:

> This case is yet another illustration of the need for employers to exercise abundant caution, maintain constant vigilance and take all practical precautions to ensure safety in the workplace. It is essential that the approach be a pro-active one and not a re-active one; employers should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace. (RCBC 2002, p. 72)

The Cole Royal Commission, when commenting on regulations under OHS Acts, noted:

> The debate has largely been resolved in favour of a move away from detailed prescriptive laws to laws that are 'performance-based' in that they identify the statutory standards to be reached but not the means by which they must be reached. ... OHS regulations made during the last two decades in Australia have tended to focus on processes to be followed by duty-holders in meeting their general duty requirements. (RCBC 2002, p. 17)

However, Laing, in his review of the Western Australian OHS arrangements noted that comments from industry on the practical extent of performance-based regulation reflected a view that a gradual process of re-regulation is taking place. Laing reported the Chamber of Commerce and Industry of Western Australia as saying:

> ... while on the surface it may appear that there has been a substantial move towards performance-based regulation of occupational safety and health, at a fundamental level this is not the case. In fact, the body of law relating to occupational safety and health is actually increasing and the inherently desirable aspects of self-regulation are gradually being lost rather than enhanced. (Laing 2002, p. 221)

Codes of practice

Many of the regulations are supported by codes of practice. These explain the processes that will achieve the outcomes required by the regulations, with practical examples and references to relevant Australian Standards.

Compliance with the codes and standards referred to in the codes is not mandatory. If a person can show compliance with the duties under the OHS Act (that is, an appropriate process of hazard identification, risk assessment, and control to a practicable level), then compliance with the Code of Practice and any standard referred to in the Code is not required.

The codes of practice represent evidence of industry knowledge of risk and risk control. They therefore may be evidence of what is practicable in the circumstances and may provide, in effect, a reverse onus of proof, requiring the person not following the code to demonstrate that compliance with the Act or regulations was achieved by other means (CCH 2003a, p. 74).

Workplace systems, policies and procedures are the means of implementing and monitoring compliance with duties under OHS Acts and regulations. As outlined by CCH:

> An employer or a person who owes a duty under the relevant OHS Act and regulations will be in a better position to be found to have met that particular obligation if a carefully developed workplace system is in place. This is the case even if a failure within the system occurs. A lack of proper workplace systems, or ill-considered and inappropriate systems will expose the employer to liability. (2003a, p. 77)

Such an approach, however, can have its limitations. In relation to the construction industry, the Cole Royal Commission noted:

> Implementation of risk management initiatives has, thus far, been more to document compliance than to achieve real change. It appears that the application of risk management techniques is often perceived as a way of demonstrating compliance, rather than as an effective preventive strategy. There has been considerable recent progress in more effective use of risk management approaches, in particular in Queensland and NSW. (RCBC 2002, p. 9)

OHS representatives and committees

All Australian OHS legislation makes provision for worker representation in OHS matters. Generally, the legislation provides for the election of employee OHS representatives and for the establishment and conduct of OHS committees if requested by employees. OHS representatives and committees have two primary functions. First, they act as a conduit between the employer and employees in respect of decisions affecting health, safety and

welfare at the workplace. Second, they play a role in monitoring, maintaining and improving workplace health and safety.

Despite this commonality of purpose, the National Research Centre for Occupational Health and Safety Regulation (NRCOHSR 2003, p. 5) noted that the provisions vary markedly between the jurisdictions. For example, some jurisdictions allow OHS representatives or committees to issue provisional improvement notices while some do not. Some jurisdictions empower representatives to direct the cessation of dangerous work while some do not (WRMC 2002b, pp. 74–87).

NRCOHSR commented that the available data suggests that the introduction of representatives has caused major changes in OHS attitudes and practices, saying:

> They worked best when the OHS legislation gives them a significant role, and when management adopted a positive attitude to OHS, and gave representatives enough time to perform their duties. A further factor in the success of the representative provisions is union support. (NRCOHSR 2003, p. 6)

Enforcement

All Australian OHS Acts give inspectors from the relevant OHS administrative body broad powers to issue improvement and prohibition notices, and to prosecute duty holders found to be in breach of the legislation.

An i*mprovement notice* can be issued to persons contravening the relevant OHS Act and regulations, requiring that the notice be complied with within a specified period of time. A failure to comply is an offence under the relevant OHS Act.

Prohibition notices are issued where there is an immediate risk to health and safety. Essentially, a prohibition notice requires that an activity which poses an immediate risk ceases until the identified hazard is controlled.

Inspectors also have an important informational and advisory role. Box 3.2 provides an example of the hierarchy of enforcement policies in South Australia. All jurisdictions operate a similar hierarchy.

Box 3.2 **Enforcement policy in South Australia**

Workplace Services' enforcement policy reflects a deliberate strategy based on motivation of employers to achieve healthy workplaces by:

- *Providing information and education*. This may be achieved through information sheets and other guidance material. This strongly preventative first-step approach acknowledges the primacy of preventing any injury or sickness, minimising the need for the Act to be enforced by inspectors. An example is the Major Workplace Hazards Strategy which has identified and addressed the six major recurring workplace hazards that exist in South Australian industry.
- *Providing verbal directives* where a risk is identified. This requires an inspector to identify risks and make a request for immediate rectification, and suggest a very practical approach to achieve the desired outcome. It should be noted that identified risks would be considered to be of a less serious nature.
- *Issuing improvement notices* where action has not been taken to achieve compliance. This may address a risk that does not present an immediate threat to safety, but may develop into a more serious threat if the risk is not remedied. An improvement notice may also be issued when there is a perception that safety may be further contravened.
- *Issuing prohibition notices* to address serious breaches. This strategy would be adopted where a serious and immediate risk is identified, and the only option is to eliminate the risk by prohibiting the operation of, or access to, the site.
- *Prosecution* where serious breaches have occurred and/or resolution has not been achieved via other means.

Other mechanisms adopted by Inspectors include letters of warning and letters of statutory obligation. These are designed to draw attention to the obligations under the legislation. Letters of warning may function as a precursor to prosecution, or support for prosecution, where a breach has been detected and action has not been taken to address the risk.

Source: Stanley et al. (2002, vol. 3, pp. 88–9).

Penalties under OHS Acts

All of the OHS Acts provide for fines to be the principal penalty for offences. The maximum fines vary considerably by jurisdiction, ranging from $125 000 in the Northern Territory, to $550 000 in New South Wales ($825 000 for repeat offences). In New South Wales, sanctions also include adverse publicity court orders, and a court order that requires the offender to participate in an OHS-related project (NRCOHSR 2003, pp. 4–5).

In the recent review of OHS arrangements in Western Australia, Laing commented:

> The penalties presently in the WA *Occupational Safety and Health Act 1984* are out of step with those applying in other jurisdictions and should be amended. The comparatively low maximum penalties and the even lower actual penalties [maximum fine levied so far in the case of a workplace fatality is $35 000 (p. 133)] imposed by the Courts have contributed to an undermining of the authority of the Act. It is imperative that notional and actual enforcement penalties be strong enough to act as an effective deterrent against failing to meet acceptable occupational safety and health standards. (Laing 2002, p. 135)

Similarly, in Queensland, the issues paper published in association with the recent review of OHS arrangements in that State commented on the low average level of penalty, saying:

> ... the averages represent approximately 6% of the applicable maximum for individuals and corporations [Section 28(1)]. The highest fine imposed for a breach of this section was $40 000 in two cases where the breaches caused death. The penalty of $40 000 represents just 13% of the maximum. ... The size and nature of the penalties are so low that the whole court process must be seriously questioned. (Department of Industrial Relations (Queensland) 2001, pp. 19–20)

and:

> The reasons for the low penalties are well documented in the enforcement literature and include the following:
>
> - Industrial Magistrates do not see many breaches of workplace health and safety obligation cases, and if they do it is usually the obligation holder's first offence;
> - the Courts tend to view health and safety breaches as quasi-criminal in nature and therefore somewhat of a lesser crime than other offences;
> - the obligation holders usually plead mitigation by showing remorse and demonstrating any steps they may have taken to prevent such occurrences from happening again;
> - the nature of the offence 'is transformed, decontextualised, and individualised so that the emphasis on systems of work is lost' (Johnstone 1994, p. 79); and
> - the defence adopt isolation techniques such as blameshifting to the worker, the inspector, and the manufacturer to mitigate the obligation holder's role in contravention. (Department of Industrial Relations (Qld) 2001, p. 20)

The ACTU, in this inquiry, noted that recent reviews had recognised the need to broaden the scope and range of penalties. It went on to advocate:

- increasing actual penalties imposed for OHS breaches by corporations and individual employers;
- imposition of criminal sanctions, including imprisonment, for corporate recklessness or negligence;
- establishing and enforcing the accountability of corporations, their directors and senior officers;
- prosecution of government agencies;

- increased sanctions for repeat offenders;
- prosecution of both host and agency employers;
- non-monetary penalties, such as removal of licences; and
- public exposure, including requiring employers to publicise breaches. (sub. 133, pp. 14–15).

A number of commentators have noted an increase in the enforcement activities of inspectors, and in the level of penalties. CCH noted:

> While traditionally the penalties for breaches of OHS obligations have generally been monetary and relatively small, it appears that this is changing. Provisions for criminal proceedings against individuals, particularly directors and executive officers of companies, appear much more likely. Throughout the various States and Territories, the maximum penalties and average penalties are creeping upwards. (2003a, p. 134)

Consistent with this perspective from CCH, the Australian Chamber of Commerce and Industry noted:

> A review of the compliance and enforcement data reveals that there has been an increase in the issue of improvement and prohibition notices by the jurisdictions with a resultant increase in prosecutions, convictions and fines awarded by the courts. This trend over the past four years clearly demonstrates that the jurisdictional focus is on regulation, compliance and enforcement. This strategy has not been effective as an incentive or motivator for employers and is not supported by hard evidence.
>
> A more personalised non-threatening approach to small business is required to bring about improved OHS performance. (sub. 81, pp. 14, 16)

In this inquiry, and in the wider debate on OHS, there is considerable divergence of views on whether greater information, assistance and persuasion will be more productive than a greater emphasis on penalties and enforcement. The Commission notes that the balance between enforcement and education has gone through long cycles in the various jurisdictions. There have been, and should continue to be, differing emphases between the two approaches in response to the particular circumstances facing a jurisdiction, the differing behaviours and levels of risks between industries and the different capacities of firms, particularly small and medium enterprises, to effectively identify and manage those risks.

The Cole Royal Commission came to a similar view when it concluded that:

> Most experts in regulatory theory now agree that the answer to the punish or persuade debate lies in a judicious mix of the two approaches. The challenge is to develop enforcement strategies that punish the worst offenders, while at the same time encouraging and helping employers to comply voluntarily [attributed to Richard Johnstone 2001, *Enforcement of Occupational Health and Safety Statutes: Issues and Future Directions*]. (RCBC 2002, p. 20)

Organisational arrangements

Under the Australian Government and in New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory, responsibility for OHS and workers' compensation are administered together under one authority. In Queensland and Western Australia, separate organisations are responsible for each (table 3.1). The South Australian system is more complicated involving the separation of enforcement responsibilities.

Views on the linkages between OHS and workers' compensation arrangements varied markedly. Some participants argued for much closer linkages than currently exist, while others argued for clear separation. There was general support for some coordination and for feedback links between the two areas to be strong. For example, the Labor Council of New South Wales said:

> Clearly, Workers Compensation and Occupational Health and Safety should be treated as interrelated fields. After all, failures to act in relation to OHS directly lead to outcomes with regard to workers' compensation for the affected worker. For these reasons there is a great deal of merit in combining the areas of OHS and workers' compensation into one framework.
>
> WorkCover in NSW has combined OH&S and Workers' Compensation. This has proved to be a very effective module. In the past workers' compensation and OHS were dealt with by two separate organisations. This impeded proactive prevention as the Inspectorate only focused on major industrial accidents and never used Workers' Compensation data. The NSW WorkCover inspectorate uses workers' compensation data to target and assist poor performing employers. They have a number of industry programs in place. (sub. 147, p. 25)

While there was support for continuing links between OHS and workers' compensation arrangements, in particular for cooperation between the agencies involved in each area, other participants argued that the two arrangements have different objectives, and thus should remain essentially separate.

The South Australian review of the occupational health, safety and welfare arrangements referred to comments by Johnstone in a paper presented to the Queensland Enforcement Forum in 2002:

> On the other hand, support for having separate administration of occupational health and safety and workers' compensation comes from the perception that there is at least a potential conflict of interest in having both these functions administered by the same body and, more specifically, a fear that the insurance perspective of the workers' compensation part of the agency will come to dominate the occupational health and safety section. Along with loss of independence such dominance, and a perceived greater closeness of the insurance section to employer rather than worker interests, is seen to carry with it a real risk of dilution of the compliance function in favour of

consensus resolution of occupational health and safety issues. (Stanley et al. 2002, vol. 3, p. 18)

Table 3.1 **OHS administering organisations**

Jurisdiction	*Administering organisation and its accountability*
Commonwealth	SRCC/Comcare [WC and OHS]. Responsible to the Minister for Employment and Workplace Relations
Seafarers	Seacare Authority [WC and OHS].
	Reports to the Minister for Employment and Workplace Relations
New South Wales	WorkCover Authority of NSW (WorkCover NSW) [WC and OHS].
	Responsible to the Minister for Commerce.
Victoria	Victorian WorkCover Authority [WC and OHS]. WorkSafe Victoria is the VWA's OHS arm.
	Responsible to the Minister for WorkCover who is also the Minister for Industrial Relations (Department of Industry and Regional Development).
Queensland	Division of Workplace Health and Safety [OHS] – a division of the Department of Industrial Relations.
	Responsible to the Minister for Industrial Relations.
Western Australia	WorkSafe Division [OHS] of the Department of Consumer and Employment Protection (IR is included in the portfolio).
	Responsible to the Minister for Consumer and Employment Protection.
South Australia	WorkCover Corporation [WC and OHS].
	Responsible to the Minister for Industrial Relations.
	Enforcement by Workplace Services [OHS] division of the Department of Administrative and Information Services (Workplace [industrial] Relations is included in the portfolio).
Tasmania	WorkCover Tasmania [WC and OHS].
	Responsible to the Minister for Infrastructure (Industrial Relations is included in the portfolio).
	Enforcement is by Workplace Standards Tasmania [OHS] within the Department of Infrastructure, Energy and Resources.
ACT	ACT WorkCover [WC and OHS].
	Responsible to the Minister for Industrial Relations.
Northern Territory	Northern Territory Work Health Authority [WC and OHS]. NT WorkSafe is the OHS arm of the Authority.
	Responsible to the Minister for Employment Education and Training

Note: Abbreviations used: WC: workers' compensation; OHS: occupational health and safety; IR: industrial relations.

Sources: WRMC (2002b, p. 54), and information from the respective websites.

The Workers' Compensation and Rehabilitation Commission (Western Australia) (WCRC) commented that:

> There is consensus within the WCRC that the primary aim of a workers' compensation system (as distinct from an OHS authority) is injury and claims management, rather than prevention, and the Commission supports separate structures on this basis.

> Notwithstanding the formal separation, the WCRC supports cooperation between the workers' compensation and health and safety agencies in the pursuit of accident prevention through appropriate data sharing arrangements. (sub. 111, p. 5)

Similarly, the Department of Consumer and Employment Protection (Western Australia) – WorkSafe Division said:

> WorkSafe sounds a word of caution in that there are very different objectives of various systems and the ramifications of moving away from concepts embodied in individual statutes would be extensive. (sub. 58, p. 2)

The Housing Industry Association (sub. 35, pp. 4, 6) and Australia Meat Holdings (sub. 96, p. 10) argued that workers' compensation and OHS should be separate as they cover different issues, while the Minerals Council of Australia (sub. 141, p. 6) urged caution when seeking to integrate workers' compensation and OHS arrangements and the relevant regulators.

The Commission's recommendations in relation to the administration of the Australian Government's OHS regime and workers' compensation arrangements are presented in chapters 4 and 5 respectively.

Changing working arrangements

One of the issues facing Australian OHS regulators is the changing composition of the Australian labour market. In pursuit of more flexible working arrangements, many firms have increasingly resorted to management decentralisation, subcontracting, outsourcing, franchising, home-based work and downsizing, leading to more casual, part-time and contingent forms of work, self-employment and small business. The Department of Industrial Relations in Queensland noted:

> There is increasing evidence that labour market changes and new forms of work organisation are having detrimental effects on the health and safety of workers ... For example, the competitive pressures that induce businesses to turn to outsourcing also encourage sub-contractors to cut costs by underbidding on contracts, using cheaper or inadequately maintained equipment, reducing staffing levels, speeding up production or working longer hours. Organisational forms relying on sub-contracting create fractured, complex and disorganised work processes, weaker chains of responsibility and 'risk-passing', and a lack of specific job knowledge (including knowledge about health and safety) among workers moving from job to job. (Department of Industrial Relations (Qld) 2001, pp. 4–5)

The issue was also identified in the issues paper relating to the South Australian review (Government of South Australia 2002, pp. 26, 29), and in the final report. The South Australian final report noted:

> ... overall, available scientific evidence indicates that the growth of precarious labour negatively affects injury and illness, reporting propensity, treatment and rehabilitation, and requires adjustment in regulatory regimes and the use of different preventative strategies. (Stanley et al. 2002, vol. 3, p. 43)

The National Research Centre for Occupational Health and Safety Regulation noted that there:

> .... is the need for OHS regulators to pay greater attention to work relations outside the traditional employment relationship. With the dramatic changes that are taking place in the Australian labour market, mirroring changes taking place elsewhere in the world, regulators need to develop standards, guidance material, inspection programs and enforcement strategies that accommodate subcontracting, labour hire, home-based work and franchise arrangements. Particularly important is the need to think more flexibly about health and safety representatives. Currently the provisions are limited to employees, and exclude sub-contractors and the like. European development in relation to regional health and safety representatives should be examined. (NRCOHSR 2003, p. 6)

After a literature search of international experience, and an analysis of workers' compensation claims in Victoria, Underhill (2002) found that labour hire employees were more likely to be injured than direct employees, their injuries appear more severe, and that this matches the international evidence. Labour hire workers were found to be more concentrated in semi-/unskilled high risk occupations and younger workers were disproportionately represented.

The reasons for the higher rate of injuries was attributed to:

- the intensity of tasks in unfamiliar settings;
- insufficient experience, training and supervision for the tasks performed;
- insufficient information exchange between employer, client and employees;
- lack of discretion in the way tasks are performed; and
- the potential offloading of high-risk tasks to labour hire employees.

Quinlan (sub. 93) has undertaken research into the effect of changing work arrangements on OHS. This included a review of 188 Australian and international studies, with almost 90 per cent finding non-traditional work arrangements, referred to as precarious employment, resulted in inferior OHS outcomes like higher injury rates, hazard exposures, disease and stress. Quinlan stated that:

> The evidence collected in the report … indicated that precarious employment and job insecurity were creating serious problems for existing OHS regulatory regimes in Australia. (sub. 93, p. 13)

Quinlan pointed to the following issues associated with non-traditional work arrangements as contributing to poorer OHS outcomes:

> ... lower knowledge of or compliance with legislative requirements amongst subcontractors, temporary workers and those engaging them and less willingness to raise OHS issues …
>
> Subcontracting … , labour leasing and much home-based work … introduce third parties in the work arrangement as opposed to the relatively simple and direct employer/employee relationship that have been the overwhelming focus of OHS regulatory regimes in the past. … the introduction of third parties creates more complicated and potentially attenuated webs of legal responsibility that place heavier logistical demands on the inspectorate.
>
> … growth of these work arrangements increases the potential risk of ignorance or misunderstandings in terms of meeting legislative requirements.
>
> … existing laws and guidance material on worker involvement largely presume a permanent work arrangement between employer and employees … (sub. 93, p. 12)

Laing, in the review of the Western Australian OHS arrangements, made the comment that:

> In general the Act is able to address the changing work environment because the general duties of care and consultative processes under the Act are not dependent upon any particular workplace structure or set of technologies. (Laing 2002, p. 54)

but:

> The increase in non-traditional forms of employment, particularly those associated with the trend towards the use of contracting, sub-contracting and out-sourcing within workplaces may well impact on the future effectiveness of the Act. (Laing 2002, p. 55)

OHS and industrial relations

Two issues have arisen concerning the links between OHS and industrial relations. The first relates to the inclusion of OHS provisions in awards or similar agreements between workers and employers, with the consequent involvement of industrial relations tribunals in dispute settlements on OHS issues. The second relates to the abuse of OHS provisions relating to work stoppages.

The inclusion of OHS conditions in awards has been raised in earlier inquiries. For example, the Review of OHS arrangements in Western Australia noted that:

> ... the existing legislative proscription in the *Industrial Relations Act 1979* preventing the Western Australian Industrial Relations Commission (WAIRC) from hearing matters arising out of safety and health has been repealed. This will enable the WAIRC as necessary to again deal with industrial disputes arising from safety and health matters. (Laing 2002, p. 105)

The review also noted that this development made redundant the earlier recommendation to permit disputes over OHS matters to go before the Western Australian Industrial Relations Commission, and that a number of employers and employer associations objected strongly to that earlier recommendation (Laing 2002, p. 108).

Under the current duty of care system, firms and industries are free to meet their duty in the fashion that is most appropriate to their circumstances, so long as the duty is met and any mandatory requirements under the relevant OHS act are adhered to. Even where more prescriptive regulations are in force, they are, in effect, a set of minimum standards and firms are able to operate with a higher set of standards consistent with those legislated. Employers and employees are free to reach agreements on the processes by which performance-based regulations are met. Including OHS provisions in arrangements with workers, is simply one way in which a firm or industry formalises its OHS arrangements and, so long as it is not used to undermine obligations under OHS legislation, this behaviour is quite consistent with the broad structure of the OHS system in Australia.

The matter of the abuse of OHS issues in industrial relations disputes is more complex. In relation to the construction industry, the Cole Royal Commission noted that a substantial number of submissions to it said that:

> ... health and safety is frequently used as an industrial relations tool. Much evidence has been given that unions have either manufactured or exaggerated safety issues, or linked the resolution of a genuine safety issue to industrial relations questions. (RCBC 2002, p. 37)

One factor that encourages the misuse of OHS is that workers continue to be paid for stoppages over OHS matters, while stoppages in relation to an industrial dispute are unpaid. Cole recommended changes to dispute settlement and payment arrangements to try to address this problem.

Similarly, the Review of OHS arrangements in Western Australia said that

> It was submitted that in the construction industry in particular, occupational safety and health is regularly used as leverage for industrial campaigns. Examples were given of workplace stoppages for allegedly unsafe work. However, when other issues were resolved, it is argued that the safety issues often evaporated and work recommenced. (Laing 2002, p. 108)

Laing recommended:

> ... that the Commission investigate and develop recommendations to Government to remove the use of occupational safety and health as a bargaining instrument in relation to other industrial claims. (2002, p. 109)

These are clearly important issues. While the inappropriate use of OHS matters in industrial disputes is undesirable, such situations are difficult to identify or legislate

effectively against without threatening the legitimate right of workers to negotiate over OHS matters or to react to workplace safety risks.

3.3 National coordination

Recognition of the common issues in OHS faced by all jurisdictions, and the benefits of greater consistency between the jurisdictions, led to the establishment of NOHSC in 1985 *(National Occupational Health and Safety Act 1985)*. It is an Australian Government statutory authority with an 18 member board comprising representatives of Australian, State and Territory governments, employers and trade unions (box 3.3). The chairperson and the chief executive officer are appointed by the Australian Government Minister for Employment and Workplace Relations. Funding is provided by the Australian Government. NOHSC reports to the Workplace Relations Ministers' Council (WRMC).

Box 3.3 **Membership of National Occupational Health and Safety Commission**

The Commission has 18 members:

- an independent chairperson, the chief executive officer, and one representative nominated by the Australian Government Minister for Employment and Workplace Relations;
- one representative nominated by the Australian Government Minister for Health and Ageing;
- one representative nominated by each State and Territory government;
- three representatives nominated by the Australian Chamber of Commerce and Industry; and
- three representatives nominated by the Australian Council of Trade Unions.

Members are appointed for up to three years and the chief executive officer for up to five years.

The Commission was supported by a staff of 89 and a budget of $16.2 million in 2002-03.

Sources: http://www.NOHSC.gov.au/AboutNOHSC/OrganisationalStructure and NOHSC (2003c).

Essentially, NOHSC develops national standards and codes of practice which are forwarded to the individual jurisdictions for implementation. Typically, this then involves consideration by further tripartite bodies in each of the States and Territories where they may be accepted in total (rarely), accepted with modifications (ranging from significant to trivial) relating to individual State and Territory circumstances, or rejected.

The objects of NOHSC, as set out in section 7 of the Act, are:

- the development among the members of the community of an awareness of issues relevant to OHS matters and the facilitation of public debate and discussion on such issues;
- the provision, in the public interest, of a forum by which representatives of the governments, employers and employees may consult together in, and participate in, the development and formulation of policies and strategies relating to OHS matters; and
- the provision of a national focus for activities relating to OHS.

The NOHSC Act sets out 28 functions for the Commission. They include formulating workplace health and safety strategies, recommending actions to facilitate cooperation between jurisdictions, acting as a means of liaison with other countries on occupational health and safety matters, publishing reports, assisting training, assisting research and encouraging the use of research results. In this role, NOHSC has given priority to developing nationally consistent regulation of occupational health and safety through developing and declaring model advisory standards and codes of practice. NOHSC also acts as a forum for consultation with employers, the trade unions, and the States and Territories.

NOHSC has issued 13 national standards and 18 codes of practice. They are intended to provide a foundation for national consistency and best practice in Australian OHS arrangements. National standards need to be adopted by State and Territory governments before they have any legal force. Of the seven priority areas (involving 11 standards and 15 codes) agreed over a decade ago (table 3.2) only one (on certification) has been fully adopted, although some of the major elements of most of the others have now been adopted in most jurisdictions.

Participants commented on the inconsistent uptake of draft national standards and codes, and on the resulting variation in provisions between jurisdictions. Levels of inconsistency vary, however. The RiskNet Group commented that regulatory consistency has been achieved in manual handling, noise, hazardous substances, asbestos etc, but that there is a high degree of jurisdictional inconsistency in relation to penalties and in relation to the use of plant (sub. 120, p. 8).

Table 3.2 **Status of adoption of priority National Standards, June 2002**

	Extent of adoption by jurisdiction[ab]								
National Standard	*NSW*	*Vic*	*Qld*	*WA*	*SA*	*Tas*	*ACT*	*NT*	*Cwlth*
Manual handling	Y	M	Y	M	M	Y	M	M	Y
Occupational noise	Y	M	M	Y	P	M	N	M	Y
Plant	M	M	N	M	Y	Y	P	M	M
Certification	Y	Y	Y	Y	Y	Y	Y	Y	Y
Major Hazard Facilities	N	Y	Y	N	N	N	N	N	N
Hazardous substances[c]	M	M	M	M	M	M	N	M	Y
Dangerous goods	N	Y	Y	N	N	N	N	N	N

[a] Adoption is assessed against key elements of the national standard (which are defined as aspects of the standard for which national consistency is considered important). [b] Y: the key elements have been fully adopted. M: most of the key elements have been adopted. P: only a proportion of the key elements have been adopted. N: the key elements have not been adopted. [c] There are 5 national standards in relation to hazardous substances.

Source: NOHSC (2002b, p. 39).

The Plastics and Chemicals Industries Association (PACIA) provided several case studies in inconsistent adoption of national standards. That relating to the Dangerous Goods Storage and Handling National Standard is set out in box 3.4. In the case of the 1996 NOHSC Major Hazard Facilities (MHF) National Standard, (which took five years to develop by a tripartite NOHSC committee and a formal public comment processes), PACIA stated that:

> ... in June 2003, seven years after the National Standard was declared, there are still only two jurisdictions (Victoria and Queensland) which have adopted the 1996 NOHSC standard into regulations. Clearly those very long delays in adoption by the jurisdictions (after lengthy expert, consultative development processes through NOHSC) will not achieve the safety outcomes sought by industry, unions and the community. (sub. 114, p. 8)

PACIA also said that differences exist between the MHF Regulations in Victoria and Queensland (and the legislation currently being drafted in New South Wales and Western Australia) — differences as fundamental as the definition of what is a MHF and also the scope of the regulations.

National OHS Strategy 2002–2012

In April 2002, NOHSC agreed to the National Occupational Health and Safety Strategy 2002–2012 (NOHSC 2002c) which establishes minimum national targets for reducing the incidence of work-related fatalities and injuries over its ten year period of operation. The strategy was endorsed by the WRMC in May 2002.

Box 3.4 **Adoption of the 2001 NOHSC Dangerous Goods Storage and Handling National Standard by jurisdictions**

The Plastics and Chemical Industries Association made the following comments on the adoption of the national standard for dangerous goods storage and handling.

> The NOHSC process of developing the National Standard for the Storage and Handling of Workplace Dangerous Goods took place over a ten year period. This new performance-based standard was a major shift in the approach to regulation of dangerous goods, and was endorsed by the NOHSC stakeholders and declared in March 2001. However, despite this very lengthy tripartite development process, we have seen delays in implementation of the standard by the jurisdictions, and also inconsistencies in application of the standard.
>
> **Delays in adoption by the jurisdictions**
>
> Despite commitments given by WRMC to consistent adoption of the DG [dangerous goods] National Standard, in June 2003, only two jurisdictions (Victoria and Queensland) have adopted the standard. Currently, in both NSW and WA there are consultative working groups set up by the relevant agency to develop state DG regulations. These parallel and sequential national and state processes are costly, lead to delays in implementing legislation and also lead to inconsistencies at the jurisdictional level.
>
> **Inconsistency in adoption**
>
> While both Victoria and Queensland have developed new DG regulations which are performance based and broadly consistent with the National Standard, the actual implementation and administration is quite different. Victoria is implementing the performance based regulations through WorkSafe. On the other hand, Queensland is implementing the DG regulations through 125 local councils in a more prescriptive manner, often not consistent with the national standard.
>
> NOHSC, through its Dangerous Goods Implementation Reference Group, has developed a number of initiatives to support and facilitate consistent implementation in the jurisdictions (a series of Frequently Asked Questions (FAQs) and a Dangerous Goods Ready Reckoner). Sadly, both these initiatives have been undermined to an extent by the inconsistency either currently in place, or anticipated by the jurisdictions. NOHSC has had to focus its FAQs to a generic set of questions relating to the National Standard, leaving specific FAQs to the states and territories to develop. Further, the Dangerous Goods Ready Reckoner prototype, rather than being developed for use across Australia, is having to be developed as a core by NOHSC, for the jurisdictions to vary at the state level, to reflect the specific state regulatory requirements.
>
> This complexity of requirements across Australia adds unnecessary costs to business and makes compliance with the different requirements more challenging.

Source: Plastics and Chemical Industries Association (sub. 114, pp. 8–9).

The national targets are:

- to sustain a significant continual reduction in the incidence of work-related fatalities, with a reduction of at least 20 per cent by 30 June 2012, and with a reduction of 10 per cent being achieved by 30 June 2007; and
- to reduce the incidence of workplace injury by at least 40 per cent by 30 June 2012 (with a reduction of 20 per cent by 30 June 2007 (NOHSC 2002b, p. 11).

Implementation of action to achieve these targets rests with the individual jurisdictions. The NOHSC is to report annually on progress.

The Strategy involves five priorities (box 3.5). In addition to these five priority areas, a 10 year framework established in 1999 identified nine areas where national action is required to underpin improvement (box 3.6).

Box 3.5 **The five priorities under the National Occupational Health and Safety Strategy 2002–2012**

Reduce high incidence/severity risks involving:

- the better use of data and research to improve jurisdictions' targeting of high risk situations;
- identification of national priority hazards, injuries, industries or occupations; and
- more effective use of targeted enforcement and incentives;

Develop the capacity of business operators and workers to manage OHS effectively, involving;

- building the motivation and ability of employers to manage OHS risks and of workers to work more safely and participate in OHS consultations;

Prevent occupational disease more effectively, involving;

- the development of the capacity of authorities, employers, workers and other interested parties to identify risks to occupational health and to take practical action to eliminate or otherwise control them;

Eliminate hazards at the design stage involving;

- building awareness and observance of this approach and giving people the practical skills to recognise design issues and ensure safe outcomes [NOHSC Safe Design Action Plan]; and

Strengthen the capacity of government to influence OHS outcomes, involving;

- sharpening the effectiveness of governments in securing better OHS outcomes (for example, through procurement procedures) and providing examples of good practice.

Source: NOHSC (2002c, p. 5).

The third national action area (box 3.6) is 'a nationally consistent regulatory framework'. It involves:

- monitoring adoption of national standards;
- reviewing national standards and codes;
- developing new national standards where need is demonstrated; and

- repealing superseded regulations.

The Commission considers that this third national action area should focus on developing a nationally uniform regulatory framework.

Box 3.6 **Areas for national action**

The nine areas for national action are:

- comprehensive OHS data collection (consistent definitions, timely reporting);
- a coordinated research effort (priorities, partnerships and communication);
- a nationally consistent regulatory framework;
- strategic enforcement;
- effective incentives;
- compliance support;
- practical guidance;
- OHS awareness; and
- OHS skills development.

Source: NOHSC (2002c, pp. 10–12).

Recent reviews of State and Territory OHS arrangements have identified a number of features that may contribute to poor OHS performance. In particular, they have focussed on information-related problems. For example, the recent Western Australian review noted that:

> ... the failure to consult in respect of occupational health and safety issues under Part III of the Act and the failure to appoint and to develop safety and health representatives and committees has resulted in a less effective system than should be the case. They are important in improving safety and health in the workplace and in part help to explain why many organisations have failed to identify hazards, reduce risk, and develop workplace safety and health policy and safe work systems. The small and medium size business sectors in particular have been slow to take up these issues. (Laing 2002, p. 27)

The Cole Royal Commission drew on the final report of the Queensland Building and Construction Industry (Workplace Health and Safety Taskforce), reporting:

> One of the key reasons for non-compliance identified by the Taskforce was the lack of understanding among obligation holders in relation to their health and safety obligations. There are a number of reasons that contribute to this general lack of understanding. Foremost is the complexity of the health and safety obligations and information already discussed. The second reason concerns the lack of formal mandatory training for every obligation holder. (RCBC 2002, p. 33)

The Cole Royal Commission also noted that the Safety Building New South Wales, 2001 identified similar issues:

> Training among subcontractors' supervisors tasked with OHS&R responsibility was identified as poor. Research indicated improvement in this key area was essential to safer work practices. (RCBC 2002, p. 34)

The 2002 report into the South Australian OHS arrangements identified that getting small business involved in OHS was a particular challenge:

> Submissions and consultation suggest that SMEs [small to medium enterprises] are less likely to have access to OHSW [occupational health, safety and welfare] information, less likely to engage OHSW expertise, and less likely to have an on-site Health and Safety Representative. (Stanley et al. 2002, vol. 3, p. 35)

The South Australian report proposed that SafeWork South Australia Authority focus on providing information on OHS matters to small business.

It is not only the employers who are unaware of their full duty of care. There is also strong evidence that employees are not in a position to fully assess the risks that may be associated with accepting a particular job. The RiskNet Group said that:

> ... approximately 30 per cent of employers are unaware of their legal responsibility to provide a safe place of work. Training in safe work practices is only given to 54 per cent of new employees and supervisors in 40 per cent of workplaces did not receive any health and safety training. (sub. 120, p. 9)

3.4 Some definitional issues

The terms of reference ask the Commission to identify and report on definitions of employer, employee, workplace and work-related injury and illness relevant to both workers' compensation and OHS that could be adopted consistently across Australia. As a generalisation, definitions of employee, workplace and the work-relatedness of injuries, illnesses and fatalities are not as critical in the OHS area as they are in workers' compensation. In view of their importance to workers' compensation, definitions for that purpose are discussed separately in chapter 6.

The various OHS Acts are couched in terms of employers, and others in control of aspects of the work environment, and their duties to employees and other people who may be affected on or near a worksite. Cole noted in the recent construction industry review that, in relation to the Victorian Act, there is an obligation on employers and the self employed to:

> ... ensure so far as is practicable that persons (other than the employees of the employer or self-employed person) are not exposed to risks to their health or safety arising from

> the conduct of the undertaking of the employer or self-employed person. (RCBC 2002, p. 15)

Cole commented that:

> Categories of people protected by section 22 in the context of a building or construction site include:
>
> - sub-contractors and their employees;
> - suppliers; and
> - visitors and passers-by. (RCBC 2002, p. 16)

While the problem of definition of worker has not been seen as a fundamental problem with OHS legislation, largely because of the broadness of the duty to others who are not employees, recent reviews have, nonetheless, suggested that definitional changes could be considered. For example, in an issues paper for the review of the Queensland Workplace Health and Safety Act, the Queensland Department of Industrial Relations (2001) noted:

> One possible solution to avoid the complexity of 'deeming' and any associated issues is to abolish the concept of imposing an obligation on an 'employer' and substitute instead the notion of placing an obligation on all 'persons' to ensure the health and safety of the person's workers [more broadly defined] in the conduction of the person's undertaking. (p. 7)

Similarly, Laing (WA) noted:

> A reasonable question arising from all the foregoing is perhaps why each category of person (employee, contractor, employee of contractor, etc) needs to be referred to at all when it is intended that all those in the workplace be protected. By specifying each category of person it leaves open the possibility for the creation of other (work) arrangements, which could be entered into in order to avoid the obligation. It seems the most effective course is to protect everyone and provide them with duties to protect themselves and others at the workplace. In that regard the employer might be specified as the co-ordinating agency or principal. (2002, p. 89)

The various State reviews, however, did not go so far as to recommend changes of this magnitude.

The duty of care specified in OHS legislation is broadly defined, and rightly so, to go well beyond simply a duty to employees. It would be highly undesirable if the definitions developed for the compensation of injured workers had the effect of diminishing or restricting the duty that those in charge of workplaces have to all who could reasonably be expected to be affected.

Clayton et al. provided a comprehensive review of the various provisions in OHS legislation in Australia which refer to employees and workplaces (2002, pp. 33–45). While these definitions do not appear to undermine the essentially broad nature

of the duties under OHS legislation there were, nonetheless significant differences in detail between jurisdictions. This resulted, in particular, in different 'boundaries' to the general duties (particularly to those other than employees) and differences in the information collected on work-related injury and disease.

For example Clayton et al. said;

> In summary, the Victorian and Queensland duties to persons other than employees are far-reaching, whereas the NSW, Commonwealth and ACT provisions are limited to persons at the workplace in NSW, and at or near the workplace in the ACT. (2002 p. 44)

The provisions in South Australia, Western Australia and Tasmania also appear to be narrow. In the case of South Australia, the duty refers to 'at work', in Western Australia, when work is actually being performed; and in Tasmania, in relation to 'work being carried on at a workplace'. The NRCOHSR also commented on aspects of the differences between jurisdictions (box 3.7).

Box 3.7 National Research Centre for Occupational Health and Safety Regulation: Comment on differences between jurisdictions

The NRCOHSR said:

> The recent Stanley Review of OHS and Workers Compensation in South Australia, in examining the "general duties to non-employees" canvassed both the Victorian (section 22 of the *Occupational Health and Safety Act* 1985) and the New South Wales provisions (sections 8(2) and 9 of the *Occupational Health and Safety Act* 2000 (NSW)). These provisions are essentially the same except that the New South Wales provisions are far narrower because they limit the scope of what is otherwise a significant and extensive duty to persons who are "at the employer's place of work." The South Australian Review suggested a combination of these duties which, as the description of the duties suggests, is not really possible, and might show a misconception of the scope of the duties. In any event the provision in the recently released South Australian *Occupational Health, Safety and Welfare (SafeWork SA) Amendment Bill* 2003 reproduces neither of the Victorian or New South Wales provisions, but appears, in paragraph 22(2)(a), to be a *paraphrase* of sections 8(2) and 9 of the OHSA (NSW) and, in paragraph (b), to *paraphrase* section 22 of the OHSA (Vic), although in a way that seems to reduce the scope of the latter duty. As a result the South Australian Bill produces a provision which *resembles* provisions in two other State OHS statutes, but which is uniquely worded, quite distinct and difficult to interpret.

Source: NRCOHSR (sub. 22, pp. 3–4).

The recent review of the South Australian legislation recommended strengthening the employer's duties to others at the workplace, saying that 'Section 22 of the Act be amended to reflect a combination of s8 of the NSW *Occupational Health and Safety Act 2000* and s21 of the *Victorian Occupational Health and Safety Act 1985* in order to better protect others at the workplace' (Stanley et al. 2002, vol. 3, p. 48).

The recent Western Australian review noted that the narrow application of the WA provision was not originally the intention of the legislation and recommended that the duty to non-employees '…extends to all aspects of work including systems of work, and hazard arising after direct work activity has ceased' (Laing 2002, pp. 77,79).

An important factor in the 'boundary' issue is that OHS legislation simply codifies, in one particular area, the general duty of care that all persons have to all other persons under common law in the relevant circumstances. If a situation falls outside the boundaries of the OHS statute, it does not mean that no duty of care applies. Instead, it means that action would need to be taken under common law, at the expense of the plaintiff, rather than by an OHS inspectorate at the expense of the taxpayer or other funding agency.

The Issues Paper for the review of the Queensland legislation questioned the role of obligations to 'others' in OHS legislation, saying:

> The primary focus of the legislation is to set out the obligations of employers toward workers at a workplace. While there is widespread agreement that third parties must be protected from workplace activities, there is less agreement when workplace activities cannot be easily separated from the provision of services to members of the public. ... The threat is that by extending the scope, the overall effectiveness and impact of the legislation is reduced. The resources required to enforce legislation are already stretched without broadening the scope to include peripheral matters beyond the core purpose of the legislation. The major employer groups and peak councils of employees strongly support the main focus on workers at the workplace and are generally reluctant to commit resources for the exclusive application to protecting the health and safety of members of the public. (Department of Industrial Relations (Qld) 2001, p.10)

The issue was also raised in the issues paper prepared for the recent South Australian review, which asked whether the Act is adequate in achieving this goal [public safety], and how far it is appropriate for it to do so (Government of South Australia 2002, p. 42). The WA review noted that ' ... there is real potential for confusion between public and occupational safety' (Laing 2002, p. 52).

The National Research Centre for OH&S Regulation was of the view that the broader provisions in Victoria and Queensland '… should be the national model in this regard' (sub. 22, p. 2). This view is widely held. Both the review of the South Australian legislation (Stanley et al. 2002) and the review of the Western Australian legislation (Laing 2002) recommended that the provisions in their states be modelled on those in New South Wales and Queensland.

In the area of reporting of incidents, Clayton et al., noted that:

> Much of the work of the inspectorates is reactive, principally in relation to reports, incidents and complaints about unsafe conditions from workers and others. Aggregated statistics from incident reports also provide OHS agencies with data to guide their

> inspection and enforcement programs. Hence these statutory reporting requirements are an important component of the 'discovery systems' of the inspectorates. (2002, p. 34)

Clayton et al. also noted that the definition of employee also impinges on reporting requirements, identifying South Australia as limiting immediate notification of work-related injuries and fatalities to those suffered by 'employees'. Similarly, Western Australia only requires injuries or diseases suffered by 'employees' to be reported. Other jurisdictions refer more broadly to 'persons' or do not qualify the reporting requirements.

The Commission considers that it would be highly desirable that all jurisdictions mandate the same set of reporting requirements and that all work-related injuries, fatalities, disease and 'dangerous occurrences' should be reported to the relevant authorities and that this information should not be restricted to 'employees'.

In this inquiry, an issue raised by a number of participants related to clarifying who has duties to whom, and in what particular circumstances is that duty owed. For example, there is debate over the duty that labour hire companies have to the people they place into a workplace over which they have no effective control. For example, BDS Recruit, a labour hire company operating in all states, said that:

> All OH&S legislation places obligation for workplace safety on employers. One problem this imposed on labour hire companies is that while we are employers, as defined, we lack any great control over the workplace and what happens in it. ….
>
> In recent years labour hire companies have been correspondents in a number of WHS prosecutions and have received fines up 40% of the total for failure to meet OH&S obligations at host companies' workplaces. While not wishing simply to avoid fines and obligations it is hard to justify fining a company that does not have full control over the workplace. (IRsub. 213, pp. 3–4)

BDS Recruit suggested that:

> Provisions to be included in these definitions for labour hire companies to meet their obligations for safety at a host workplace by the use of an audit tool such as safety map in conjunction with workplace inspection prior to placement and employee feedback following placement. (IRsub. 213, p. 4)

The Stanley review of the South Australian OHS legislation noted that:

> The growth of labour hire and 'contracting out' may in part be due to the perception amongst businesses that their responsibility for occupational health, safety and welfare is also 'contracted out'. (Stanley et al. 2002, vol. 3, p. 45)

The review recommended that the OHSW Act references to 'employee' be amended to provide a broader definition consistent with the definitions proposed in the reviews of the Workers' Compensation System and the Industrial Relations System (Stanley et al. vol. 3, p. 48). In relation to labour hire companies the proposed standard definition states:

> An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client. (Stanley et al. vol. 2, p. 14)

The issue is not whether a labour hire company has a duty of care for those it places into employment, even into an area where the labour hire company has little or any control. Rather, it is a question of what are the reasonable and practicable steps that the labour hire company can take to meet its duty. In a situation where control is limited, it would seem reasonable to expect labour hire companies to undertake reviews of the type mentioned by BDS Recruit, which noted that:

> To meet our OH&S obligations in all states meant BDS Recruit, and all other compliant labour hire companies, conducted full safety audits of host companies to:
>
> - Ensure their compliance with state OH&S legislation.
> - Conduct hazard identification on the work site.
> - Inform our employees (Casual Workers) of these hazards.
> - Not supply or withdraw our employees from sites that did not comply or changed their procedures until we could reassess them.
>
> This has led in some cases to our company losing business and clients because we do the right thing. (IRsub. 213, p. 3)

The Commission considers that definitions of employer, employee, and workplace are not presenting significant problems in the OHS area. Certainly differences between jurisdictions create some difficulties for multi-state firms and problems for data collection. However, these matters can be resolved in the review of legislation proposed earlier in this chapter as part of the recommended program for achieving national uniformity.

4 National occupational health and safety frameworks

This chapter develops a national framework for occupational health and safety (OHS). It identifies and assesses suitable models and presents the Commission's recommendations.

4.1 Issues for developing a national framework

There was a general view among participants that there could, and should, be a much greater degree of consistency in OHS regulation between jurisdictions within Australia, and that many of the existing differences are unnecessary. The Victorian Employers' Chamber of Commerce and Industry was one of many to say:

> The existence of multiple jurisdictions in Australia for both Worker's Compensation arrangements and Occupational Health and Safety law is becoming increasingly absurd in a globally focused business economy. (sub. 66, p. 6)

The Housing Industry Association (sub. 35, p. 7), Woolworths (sub. 98, p. 3) and the Business Council of Australia (sub. 143, p. 7) saw no need for any divergence between acceptable OHS standards, arguing that the same general classes of risks apply to most workplaces and working environments across Australia, and that an unsafe practice in one State would also be unsafe in another. The Business Council considered that there is no evidence that industrial conditions or risks vary so much across Australia that occupational health and safety standards need to be tailored to suit local conditions.

At the same time, participants considered that the current mechanism for achieving greater consistency within Australia has not been a success. The Housing Industry Association (sub. 35), Westpac Banking Corporation (sub. 75, p. 9), The Master Builders Australia (sub. 79, p. 6), the Business Council of Australia (sub. 143), and the Association of Road Freight Operators (IRsub. 236) expressed the view that the current cooperative OHS model has failed to achieve uniformity of work practice throughout the country. The Business Council commented:

> Over the last 20 years there have been a number of attempts to develop and implement national standards on the basis of cooperation between the Commonwealth, States and Territories. None of these have been fully successful. This is itself a compelling reason for the adoption of a national regulatory scheme. (sub. 143, p. 1)

Similarly the Master Builders Australia said:

> From the outset, we reject the idea that the current form of "co-operative" federalism will advance OH&S. A better model based on a new level of co-operation will advance OH&S. The necessary consistency and reduced complexity that would follow if the Commonwealth and the States determined to regulate via one set of consistent rules, far exceeds any progress that would occur under any current model. ... This does not mean that improvement cannot occur within the current framework – merely that improvements will be less than optimal. (sub. 79, p. 6)

The view that the current arrangements have failed to deliver significantly greater uniformity of workplace safety regulation is not unique to this inquiry. The Cole Royal Commission reported the Australian Government as submitting to its inquiry that:

> Despite agreement in 1991 by the Heads of Australian Governments to implement nationally uniform safety standards (National Standards), in practice the adoption of standards by the jurisdictions remains inconsistent in manner, content and progress. (RCBC 2003a, vol. 6, p. 28)

The Royal Commission commented:

> Since at least 1984, attempts have been made to achieve national uniformity, and then national consistency, in the laws or regulations governing occupational health and safety generally. ... It must be accepted that those attempts have so far been a failure. (RCBC 2003a, vol. 6, pp. 19–20)

Changes to National Occupational Health and Safety Commission's (NOHSC's) role, from early pursuit of national uniformity to one of seeking 'consistency' between jurisdictions, and to its level of funding, were the source of criticism by participants. These changes were seen as contributing to the failure to achieve national uniformity, and the slow progress towards achieving greater consistency in OHS regulation. The National Research Centre for Occupational Health and Safety Regulation made the following observations on progress towards national uniformity, saying:

> A notable development in standard setting in Australia during the 1990s was the movement towards national uniformity in standards in regulations and codes of practice. The process was overseen by NOHSC, which in 1991 established a tripartite National Uniformity Taskforce, which identified several key first order priorities for achieving national uniformity ... The national uniformity process was not complete when the Howard government came to power in 1996, and that government has significantly down-sized NOHSC, with the result that the move towards national uniformity has slowed dramatically since mid-1996. Lack of uniformity in Australian standards remains a significant problem. (NRCOHSR 2003, p. 4)

The ACTU was also critical of the changes made in the late 1990s saying that:

> Following the decisions of the Federal Government and the WRMC [1997], NOHSC moved from a national focus to a jurisdictional, optional approach to adoption or variation of these standards and codes of practice. The ACTU and ACCI opposed that

> decision. The ACTU supported completion and declaration of all those standards and codes of practice. The tragedy of these decisions is manifest in the construction industry.
>
> The ACTU has continued to advocate national standards and codes of practice, which should be adopted by governments in a consistent way, within a defined time frame. (sub. 133, pp. 8–9)

There have been many independent reviews of various jurisdictions' OHS regimes over the years. However, these have not lead to a common national framework of regulation or enforcement, nor have they addressed the compliance concerns and associated costs of multi-state employers. DEWR commented that the States have continued to frame the design of their regulatory regimes in isolation, with an emphasis on perceived local issues or on fostering State-focussed policy objectives of the government of the day (sub. 166, p. iv).

As mentioned in chapter 2, the inconsistencies between jurisdictions impose a number of costs on business, particularly multi-state businesses. These costs arise from:

- the need to ensure that all appropriate personnel have a working understanding of the regulatory regimes of all relevant jurisdictions and of their regular changes;
- the accommodation of different inspection regimes and hierarchies of penalties;
- providing those staff who move to a different jurisdiction with training specific to that new location; and
- difficulties in moving equipment between jurisdictions where regulations and codes vary.

It is arguable that the costs imposed by differences between the jurisdictions in the area of OHS is less than for workers' compensation. The Victorian Government considered that the differences between jurisdictions in their OHS regimes has been overstated, saying that a high level of consistency already prevails and that:

> The performance-based nature of OHS standards and an outcome-oriented regulatory system has meant that superficial differences in the wording and structure of legislation and regulation have been mistakenly perceived as major differences between the States and Territories. (IRsub. 256 p. 31)

To the extent that this is accurate, particularly in relation to the fundamental structures and objective underlying OHS regulation in Australia, the differences between jurisdictions are considerably less fundamental than those in the workers' compensation area. Consequently, the hurdles faced in moving to gain the benefits of national uniformity are easier to overcome and thus the desired outcome should be more readily achievable. In addition, there is a more widely held belief that a single national regime is desirable. The Law Council of Australia stated that:

> …there is greater likelihood for achieving commonality in relation to occupational health and safety than in relation to workers' compensation; and that commonality in OHS does not depend on commonality in workers' compensation. (IRsub. 250, p. 3)

4.2 National framework models

The Commission has assessed a number of possible models for establishing national frameworks for OHS, recognising that the almost universal support for common OHS regulation across Australia was expressed in several ways. The spectrum included: calls for a single national regime administered by the Australian Government; a uniform set of rules applying, by way of template legislation, equally in all jurisdictions; and a greater effort under the current institutional arrangements to improve the consistency of regulations enacted and administered by each jurisdiction.

Even those participants who opposed a nationally uniform scheme, and argued for the right of each jurisdiction to determine standards on a case-by-case basis, supported a national body, such as NOHSC, to provide advice based on best-practice models and to encourage greater consistency in the approach to OHS regulation.

The Commission has assessed five models, or approaches, to developing a national framework for OHS regulation in Australia. These are:

- a single national OHS regime to replace those operated by the States and Territories;
- an alternative national regime operating in parallel with State and Territory regimes;
- template legislation and regulation;
- mutual recognition; and
- progressive development of national uniformity through strengthening aspects of the existing cooperative approach.

While national uniformity is desirable it should not be achieved at the expense of workplace safety levels. Indeed, a national framework should set the foundation for improved outcomes through more coordinated and speedier mechanisms for best-practice standards and methods to be adopted nationwide.

A single national OHS regime to replace State and Territory regimes

There was considerable support among the larger, multi-state firms and some business organisations for a single national regime. For example, the Business Council of Australia indicated that it:

> … strongly supports the adoption of national legislation regulating occupational health and safety and workers' compensation (with universal application). As an alternative, the BCA supports enactment of uniform legislation in each State and Territory. (sub. 143, p. 1)

A number of individual firms, (Woolworths (sub. 98, p. 3), the Master Builders Australia Inc (sub. 79, p. 6), Optus (sub. 57, p. 4), and Centennial Coal Company (sub. 145, p. 9)), called for the establishment of a single national OHS regime administered by the Australian Government. The Self Insurers' Association of Victoria conducted a survey of its members, and reported that a majority supported OHS administration at a national level (sub. 163, p. 15).

The Commission notes that the recent Royal Commission into the Building and Construction industry concluded that a single national regime would be the best outcome saying that:

> From the perspective of the building and construction industry, there could be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating occupational health and safety throughout Australia. (RCBC 2003a, p. 15)

However, the Commission notes that a single national regime was not supported by all participants. State and Territory governments and a range of unions were of the view that OHS legislation and regulation should be managed at the State and Territory level, responding to the individual needs of their own jurisdiction. This position was restated following the Interim Report, although they recognised the benefits from greater consistency and the national development of best-practice models.

If the Australian Government was to consider that a single national OHS regime is worth establishing, an important consideration is the extent to which it would have the constitutional power to act in relation to the matter. This is by no means certain. For example, the Cole Royal Commission considered it would take an imaginative use of the trade and commerce, corporations, external affairs and incidental powers of the constitution for the Australian Government to create a single national OHS regime. It did, however, note that there were ways in which the existing constitutional limitations could be overcome, saying:

> Any limitations that may exist would, in all likelihood, be remedied by the ratification by the Commonwealth government of International Labour Organisation Convention No. 155 (*Occupational Safety and Health Convention*) and the subsequent enactment of legislation relying on the external power section 51(29) of the constitution.
>
> … Another means by which federal parliament could be clothed with sufficient constitutional power to enact comprehensive national laws would be a transfer by the States of their powers pursuant to section 51(37) of the Constitution. In 1996, the Victorian parliament transferred the bulk of Victoria's powers in respect of industrial

> relations to the Commonwealth although no other State has done so since. (RCBC 2002, p. 25)

The Cole Royal Commission assessed the prospects of referral as remote, saying:

> There is no prospect that all of the States would voluntarily co-operate in creating a single national scheme. ... The Queensland Government, for example, categorically told me that it 'is not prepared to cede the legislative responsibility for health and safety and workers' compensation to the Commonwealth'. This attitude puts paid to any hope of a voluntary national scheme. Other States were not so frank as Queensland, but I do not doubt that some of them have similar attitudes. (RCBC 2003a, p. 21)

In this inquiry, the Department of Employment and Workplace Relations was of the view that the Constitution of the Commonwealth provides the Australian Government with the heads of power necessary to enact a single workers' compensation scheme and OHS scheme (sub. 166, p. 18).

To assist its understanding of this issue, the Commission requested the advice of the Australian Government Solicitor (appendix C). The Australian Government Solicitor advised that the corporations head of power would be sufficient to enable the Australian Government to cover most businesses, saying:

> The corporations power in paragraph 51(xx) of the Constitution would, in our view, provide scope for ... Commonwealth occupational health and safety laws to extend to trading or financial corporations. (appendix C)

However, the Australian Government Solicitor noted that:

> ... it is likely that, even with a combination of powers, legislation implementing the options could not be comprehensive in scope (that is, in terms of the categories of employers and employees to whom the options would apply). For example, the legislation could not extend to all individual (that is, non-corporate) employers or partnerships that carry on businesses only within States. A reference by the States under paragraph 51 (xxxvii) of the Constitution would probably be necessary for this purpose. (appendix C)

The Australian Government Solicitor also noted that ratification of ILO conventions could support Commonwealth legislation but noted that:

> The Conventions [including ILO 121 on workers' compensation] appear unlikely to provide any particular constitutional assistance in relation to Options 1 or 2 beyond that already provided by the corporations or insurance powers, unless some more comprehensive coverage was desired. (appendix C)

An additional consideration in introducing a single national regime is the extent to which differences between the States and Territories could be accommodated within a single national regime. This need not be an insurmountable problem. General duties of care and performance-based regulations underpin OHS regimes in all jurisdictions, leaving, in most

cases, flexibility on how this is achieved to the individual duty holder. Differences between States and Territories in industry structures or workplace relationships could well be accommodated within any national legislation, regulations or codes of practice, in much the same way that their own codes currently accommodate regional variation within their jurisdiction. In particular, the ability to respond to local conditions would be retained through the continued use of a wide range of voluntary codes of practice, and of guidance material that can be adapted and modified as required by particular circumstances.

The Commission's view

A single national regime established and administered by the Australian Government, overriding and replacing those currently run by the States and Territories, would be the most direct way of achieving national uniformity in OHS arrangements. It would eliminate the costs, complexities, inefficiencies and inequities resulting from different regimes in each jurisdiction. It was the approach adopted by the United States Government, through the Occupational Health and Safety Act of 1970, which established federal control of OHS regulation.

However, the Commission considers that it would be unlikely that a single national OHS regime to replace those operated by the States and Territories, whatever its merits, could be achieved in any realistic timeframe. A process of referral of powers would be the most comprehensive means of ensuring complete national coverage, but this is unlikely given the States' and Territories' continuing protection of their power to act in relation to workplace safety. A national regime without such referral runs the risk of providing incomplete coverage, requiring residual State and Territory legislation, which would undermine some of the benefits envisaged by a national regime.

Further, the Commission holds that effective implementation of OHS relies on a significant level of grass roots acceptance and cooperation — between the administering authority, employers, employees and others to whom the employer or owner of a workplace has a duty of care. The Victorian Employers' Chamber of Commerce and Industry noted that:

> VECCI has always expressed a concern that there was considerable distance between the floor of the panel beating shop and the state authority developing and implementing legislation, regulation and guidance material. The distance between the shop floor and a national authority would be even greater. OHS compliance falls mainly to those without expertise in the area. Legislation and information therefore must be geared to that audience. World best practice legislation is of little benefit if it is largely technically precise and not translatable by those it is aimed at. (sub. 66, p. 8)

In the Commission's view, the cooperation and participation of the States and Territories is essential in the process of developing effective national frameworks. The imposition of overriding national OHS legislation to replace the current State and Territory

arrangements, in the face of opposition from those jurisdictions, and from some significant stakeholders, would be an undesirable option to pursue.

An alternative national OHS regime

An alternative model would involve establishing a national OHS regime which would operate in parallel to those administered by the States and Territories, with firms having the choice of the national regime or continuing under their state regime. It would be particularly beneficial for multi-state firms which could operate under one set of national rules, thereby avoiding the costs of operating under different regimes in different jurisdictions. In addition, the choice of regime, albeit a limited one, would introduce a greater degree of competition into the OHS system in Australia.

Developing an alternative national OHS regime does, however, require three particular matters to be addressed. These are:

- constitutional limitations;
- managing parallel OHS rules; and
- ensuring full coverage by the national regime.

Constitutional matters

As mentioned in the previous section, establishing an alternative national regime would require the Australian Government to use its various powers under the constitution to extend its activity into an area currently administered by the States and Territories. The degree of uncertainty as to the extent of these powers, and the coverage of firms involved, was set out above — the Australian Government Solicitor (appendix C) advising the Commission that the legislation could not extend to all individual (non-corporate) employers or partnerships that carry on businesses only within States. However, unlike the preceding option of a national regime to replace those in the States and Territories, the existing OHS regimes in those jurisdictions would remain for those businesses not eligible for coverage under, or choosing not to join, the national arrangements.

Managing parallel OHS rules

The second issue is a more practical one. This involves managing situations where different firms are operating under different OHS regimes within the one jurisdiction — one firm operating under the Australian Government's OHS regime and another firm operating under a State or Territory regime. A number of participants were concerned by such a possibility. For example, the ACTU commented:

> Health and safety protection would be undermined if different employees at a worksite or related worksites in the same state or territory are subject to different legislative provisions of different governments. The Royal Commission into the Building and Construction Industry argued that: "the confusion that inevitably would arise from having two systems on one site would compromise and undermine safety on that site". (Final Report, vol. 6, p. 22)
>
> Such different regimes would escalate the complexity as well as undermining the effectiveness of OHS arrangements. Under doubled regimes, for example:

- different employers interacting at the same workplace would have responsibilities under different regimes;
- different employers would be prosecuted under different regimes for offences associated with the same OHS failure; and
- workers would be subject to different legislative regimes at different times, and to different legislation to others in the same workplace. (IRsub. 86, pp. 9–10)

Similarly, the Chamber of Minerals and Energy of Western Australia (CME) noted:

> In general, CME is supportive of the introduction of a system whereby organisations which operate in more than one jurisdiction can consider obtaining coverage under a national system. However, concern is expressed regarding the proposal to create circumstances whereby there is the option for national coverage in addition to state specific requirements. Rather than streamlining systems, this may result in the potential for added complexity and confusion, with different procedural requirements applying to various employers and employees on one site given the extensive use of contractors in the resources industry. (IRsub 237, p. 1)

CME further commented that:

> An additional area in which this recommendation introduces complexity is that of enforcement. CME considers that on worksites where potentially both state and commonwealth statutes apply under the proposed new system, confusion will exist over which legislation is being enforced by which regulators. Clarification needs to be provided on the scope and jurisdiction of the inspectors from both the state and commonwealth schemes to prevent uncertainty and any misunderstandings. (IRsub 237, p. 4)

Having different firms operating under different OHS regimes and operating alongside each other already exists in relation to Australian Government employees, Australian Government authorities and members of the Australian Defence Force. Much of this employment is located in the various States and Territories, resulting in overlap with the operation of firms under a State or Territory regime.

Comcare has advised the Commission that the OHS laws which apply to employees of the Australian Government or Australian Government authorities at work in a State or Territory are:

- the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS(CE) Act), the OHS(CE) Regulations 1991 and the OHS(CE) (National Standards) Regulations 1994; and
- except where directly inconsistent with any of the foregoing or another applicable Commonwealth law, the OHS laws of the relevant State or Territory (except where those laws apply to State employees only).

These apply irrespective of the ownership and occupation of the premises at which the employee is working.

Enforcement of Australian Government OHS legislation is currently undertaken by Comcare's own inspectors. Comcare also uses contract investigators, both by way of memorandum of understandings with State or Territory OHS regulatory authorities for the use of their inspectors, and through the engagement of private consultants who are appointed as investigators. In addition, a State or Territory OHS regulator can seek to enter Australian Government sites (with appropriate agreement from the Australian Government) to investigate the activity of contractors to the Australian Government where those contractors are covered by the relevant State or Territory OHS legislation.

Comcare has advised that cross-jurisdictional issues may arise where an employer/employee owes different OHS obligations under different regimes. Although this can present legal difficulties in relation to investigations and prosecutions, these issues have largely been managed administratively. Memoranda of Understanding between Comcare and the State OHS authorities provide for, or facilitate, cooperation over issues where both regulators have an interest.

Comcare further noted that these cross-jurisdictional issues would remain the same with an extension of the Australian Government's scheme. Although the issues may arise more frequently if more employers were covered by the OHS(CE) Act, the current systems would continue to apply.

Developing comprehensive industry coverage under the national regime

The third issue relates to the coverage of the existing Australian Government OHS regime. Concern was expressed that, having been developed primarily to cover government employees in the services sector, it is not comprehensive in industry coverage, notably in areas such as mining.

The Chamber of Minerals and Energy of Western Australia (IRsub. 237) and the CFMEU Mining and Energy (IRsub. 257) noted that a number of jurisdictions maintain mining-specific legislation governing health and safety requirements, rather than including them under the scope of the principal OHS statutes. The CFMEU made the point that generalist

Australian Government OHS legislation was never developed to regulate the mining industry and is incapable of safely doing so (IRsub 257, p. 2). It said that:

> While CFMEU Mining and Energy admits that this [some mechanism by which the federal law could integrate or refer to the more-developed State law in this area] is theoretically possible, we do not know of a mechanism by which that can be readily achieved and we doubt that it can be done in the near future in a manner that does not result in a degradation of mine safety. (IRsub. 257, p. 4)

Under existing arrangements, there would be no gap in coverage of workplace safety requirements. In this respect, Comcare has advised the Commission that there are a number of areas of OHS regulation which are not addressed in detail by the Australian Government legislation. For example, in relation to Major Hazard Facilities, Dangerous Goods and electrical safety, the State OHS laws apply to Australian Government employers and employees as the only applicable detailed legislation. Essentially, the current OHS laws of the State or Territory would continue to apply, unless they were directly inconsistent with Australian Government law.

The NSW Minerals Council took a different view to that of the CFMEU, saying:

> A new national piece of OHS legislation would need to be created as an overarching standard for all companies in Australia to operate under. Regulations from that legislation would then need to be created to address industry specific requirements, such as coal mining, etc. to regulate the additional criteria for that industry to comply with. … In general, coal companies seek access to modern, mainstream, outcomes based OHS legislation and believe coal mines can be effectively regulated under mainstream provisions just like any other heavy industry. (IRsub. 235, p. 3)

The Council considered that it would not be difficult for the Australian Government to develop OHS standards in areas where they do not now operate. This would involve establishing what was considered best practice in other jurisdictions and tailoring it for national legislation (IRsub. 235, p. 4).

The Commission's Interim Report proposal

In the Interim Report, the Commission proposed a progressive introduction of an alternative national OHS system. That is, that the Australian Government provide to those employers who are accepted into a national workers' compensation scheme (chapter 5), the choice of being covered by the Australian Government's OHS legislation, or remaining with the individual State or Territory regime.

A number of participants, principally businesses and business groups (the Institute of Actuaries of Australia, (IRsub. 182); Sing Tel Optus Pty Ltd, (sub. 189); the Housing Industry Association, (IRsub. 193), ACCI, (IRsub. 196); Skilled Engineering, (IRsub. 202); the National Insurance Brokers Association, (IRsub. 204); and Australian

Industry Group (IRsub. 240)) supported the interim report proposals for a national scheme for both workers' compensation and OHS. For example, ACCI said:

> The suggestion to allow self-insurers under the Commonwealth workers compensation laws to elect to be covered by the extending the Occupational Health & Safety (Commonwealth Employment) Act is, in principle, a sensible one, which will help to achieve national consistency at least amongst some self-insurers with consequent cost and efficiency benefits. The recommendations need further explanation and expansion to address a number of issues including:

- The position of national companies, which are not eligible to elect the Commonwealth OHS option.
- Complications of interpretation and lack of consistency where businesses are operating on the same site but are subject to different OHS regulatory frameworks. …

> Whilst this would increase the number of workplaces covered by Commonwealth OHS regulations vs state/territory based regulations in any one jurisdiction, the number would actually be quite small as we are talking of a relatively small number of major corporations spread across Australia. (IRsub. 196, p. 10)

As mentioned earlier, the ACTU opposed the introduction of a choice of a national OHS regime for multi-state firms, for the practical reasons outlined above and because they consider that it is inconsistent with the objective of leaving responsibility for OHS with the states (IRsub. 186, p. 8). The Queensland Council of Unions (IRsub. 241, p. 12), expressed concern that allowing companies the choice of a national or state OHS regime would result in firms choosing the lowest imposition option.

Template legislation and regulations

A third model involves pursuing uniformity in workplace safety regimes within Australia through the development of template legislation and regulations for adoption in each of the jurisdictions. The template legislation and regulations would be drawn up by a national body (a successor to NOHSC), and adopted without modification. Template legislation has been used in several other policy areas including the regulation of non-bank financial institutions, consumer credit and, until recently, companies and securities. It is a model being proposed for the regulation of cooperatives. Such a system has also been developed in relation to transport and food standards.

In the road transport area for example, the National Road Transport Commission developed template legislation which was submitted to the Australian Transport Council. A related intergovernmental agreement specified that, once accepted by the Council, the template legislation would be adopted by all the jurisdictions. The particular mechanism involved agreed legislation being passed in one jurisdiction (the ACT), with the other jurisdictions passing legislation via reference to the template legislation. Administration of template legislation rests with individual jurisdictions.

The 2002 review of the *National Road Transport Commission Act 1991*, recommended a move away from template legislation saying:

> The method of delivery of reforms in future should be through 'model legislation' rather than 'template legislation' which has been the NRTC's legislation since 1991 and has proved unworkable. 'Template' legislation requires referencing in Commonwealth, State and Territory legislation (rarely done), while model legislation allows jurisdictions to enact the substance of reforms, or to reference if they choose. (ATC 2002, p. 12)

The recommendations of the review were endorsed by the Australian Transport Council in February 2003.

In the area of food standards, Food Standards Australia New Zealand (FSANZ) is responsible for developing and maintaining uniform food standards for adoption in Australia and New Zealand. It reports to the Australia New Zealand Food Regulation Ministerial Council. Once a standard is accepted by the Council, it must be gazetted. Under the Food Regulation Agreement 2002, the States and Territories will take such legislative or other steps as are necessary to adopt or incorporate the agreed standard into the food legislation of the State and Territory without variation. This remains the situation in this area of interstate cooperation.

In its 1995 report into Work Health and Safety, the Industry Commission recommended the development of template legislation for the core elements of OHS legislation, together with consistency in enforcement across jurisdictions (IC 1995, vol. 1, pp. 162–6).

In this inquiry, the National Research Centre for Occupational Health and Safety Regulation said that template legislation had the most potential for achieving national consistency, saying:

> There are three key strategies for achieving genuine consistency: template legislation, national legislation and referral of state/territory powers to the Commonwealth. We consider that the strategy with the most potential for achieving national consistency is template legislation. ... In other areas there are successful examples of template legislation, for example the nationally consistent road transport legislation and uniform companies and securities legislation. (sub. 22, pp. 4, 5)

The Centre gave specific examples of preferred template models (box 4.1).

Similar support for template legislation was included in the submission of the Plastics and Chemical Industries Association (sub. 114, p. 9), which considered that it would result in improved OHS performance and safety outcomes, improved compliance, and reduced costs to government, industry and unions. The Association also pointed to examples in the transport sector where template legislations has been successfully adopted (pp. 6–7). Similarly, the Housing Industry Association supported national uniformity in OHS standards developed by NOHSC, that, '… once adopted, are automatically picked up by

the States in the same manner as the Building Code and the State building laws' (sub. 35, p. 4).

The Business Council of Australia (sub. 143), and Westpac Banking Corporation (sub. 75, p. 12), expressed concern that a national framework based on template legislation enacted at the State and Territory level would still allow the development of differences between jurisdictions. For example, the Business Council said:

> There is, for example, a risk that States and Territories would make ad hoc changes to legislation, thereby compromising national uniformity. It is also likely that the States and Territories would adopt different approaches to administration and enforcement of legislation, even if there was general agreement on common approaches. (sub. 143, p. 12)

Box 4.1 National Research Centre for Occupational Health and Safety Regulation: suggested template

In developing a template model for uniform OHS Regulation in Australia, we suggest that a starting point be a model OHS statute that adopts the best provisions from current OHS statutes (ie a "race to the top"). Anticipating the obvious question begged by this suggestion, this would, in our opinion, entail adopting:

- The employer's duty to employees in sections 26, 28, 29B and 37 of the Queensland Workplace Health and Safety Act 1995, supplemented by section 21(4)(c) of the Victorian Act (which requires employers to engage persons with OHS expertise);
- The duty to non-employees in section 22 of the *Occupational Health and Safety Act* 1985 (Vic) (perhaps bolstered by section 29A of the Queensland Act, and adopting the Queensland approach to absolute duties with specific defences (ie section 37 of the Queensland Act));
- Section 10 of the Occupational Health and Safety Act 2000 (NSW); and
- The duties on designers, suppliers etc in the Occupational Health and Safety Act 1985 (Vic) and/or Occupational Health, Safety and Welfare Act 1986 (SA);
- The Victorian provisions for workplace arrangements (ie *Occupational Health and Safety Act* 1985 (Vic), sections 26, 29 to 37 and 54);
- And the New South Wales inspection and enforcement provisions.

This composite Act would provide a starting point for the template statute. Gaps and inconsistencies could then be identified, and filled by thoughtful drafting and/or adoption of provisions which have been shown to work well elsewhere.

Source: Sub. 22, pp. 6–7.

The Victorian Government considered that template legislation would be an inflexible and inefficient means of achieving consistency, saying:

Structural flaws undermine the timely introduction of template legislation. For example:

- there is no capacity to adapt an overarching legislative framework to the local conditions of the different States and Territories; and
- gaining stakeholder agreement to the detailed wording of template provision is significantly more challenging than gaining agreement on 'common essential requirements'. (IRsub. 256, p. 32)

The NSW Government (IRsub. 255) also indicated that it does not support the use of template legislation in relation to OHS regulation, arguing for the need to tailor any national frameworks to suit local conditions and protect the socio-economic interests of New South Wales employers and workers.

Despite the apparent problems of enacting template legislation, it remains the most robust vehicle for achieving uniformity, as distinct from consistency, within Australia's federal structure, short of the overriding national approach. The 'duty of care' foundation of the legislation, together with the performance-based nature of much of the regulations, means that regional variations can be accomodated within a uniform system. As outlined in relation to food standards, the template model can be successfully followed over the longer term with the cooperation of the parties involved. Workplace safety warrants such a level of commitment.

Mutual recognition

Mutual recognition is a model that has been widely used to overcome the costs of differing regulations or standards between jurisdictions within Australia, without the need to establish national legislation.

Current mutual recognition arrangements cover regulation of the sale of goods and the registration of occupations, but exclude regulations affecting the nature of delivery of a service, or manner of sale. For example, the qualifications of a nurse would be recognised in all jurisdictions (the qualifications are mutually recognised), but the nurse must operate in any particular jurisdiction according to the procedural rules of that jurisdiction — the procedural rules are not mutually recognised.

Extending mutual recognition to cover OHS regulation would go further than the current Mutual Recognition Agreements in that it would, in effect, involve the 'nature of delivery of the service' as OHS is primarily about workplace practices and procedures.

The key advantages of mutual recognition of OHS regulations are that:

- it would allow multi-state firms to choose a single set of OHS legislation and regulations under which to operate, and under which to train its staff and OHS personnel, throughout the country; and
- it would introduce a significant degree of competition between jurisdictions in the regulations they introduce, and likely limit the extent to which the States and Territories diverge in their OHS regimes.

Mutual recognition would involve each jurisdiction passing legislation to allow recognition and could include the option of progressive introduction. That is, rather than having widespread recognition across all activities, it may be useful to begin with a form of modified mutual recognition involving:

- agreement on a category of activities (or particular industries) that would be open to mutual recognition;
- limiting the option to choose the OHS regime to multi-state firms, requiring them to choose the OHS regime of one of their existing facilities and applying this to their whole business (the option to pick and choose different regimes for different branches of the business would not be offered);
- a 'safety valve' option involving the jurisdiction invoking a temporary exemption clause where a particular problem arises (such as where the chosen OHS regime does not cover a situation particular to the state, or where the boundaries of responsibility are unclear); and
- inspection being the responsibility of the inspectorate of the State of the chosen OHS regime, with the cost of inspection in another jurisdiction being on a cost recovery basis levied on the firms involved. This would avoid the need for each jurisdictions inspectorates to be trained in and familiar with nine different sets of rules, but, by increasing the geographical spread of inspections, it would increase enforcement costs.

There are, however, various potential problems. Mutual recognition of differing OHS regimes would lead to different worksites within a jurisdiction operating under different OHS rules and regulations. This issue has been covered in the preceding section and, while this situation appears to be manageable with two parallel regimes, the problems would multiply considerably if there were eight different sets of rules within the one jurisdiction.

The introduction of such a model would involve considerable legislative and administrative effort by all jurisdictions, both in establishing mutual recognition and in administering it over time. While it would be possible for a smaller number of jurisdictions to negotiate bilateral agreements, for a national framework, it would require the agreement of all States and Territories to pass the necessary mutual recognition legislation. If the necessary support were to be available to introduce such a system, the Commission considers that such support would be better harnessed promoting other options towards national frameworks that do not involve the same degree of implementation and

administration costs, and do not result in the same level of jurisdictional complexity and overlap.

Strengthening the existing cooperative approach

Under the current cooperative model, responsibility for legislation, regulation and enforcement rests with the States and Territories. National consistency is pursued through the tripartite NOHSC process, providing draft standards and codes to the jurisdictions via the Workplace Relations Ministers' Council. Central to the success of this model in developing consistent workplace safety requirements is the role and effectiveness of NOHSC, both in developing relevant best-practice standards and codes in a timely manner, together with their adoption by jurisdictions with minimal modification.

The role of State and Territory governments in OHS legislation and administration was acknowledged in the terms of reference for this inquiry, which said that:

> Ideally, a national framework for workers' compensation and OHS would encompass a cooperative approach between the Commonwealth and State governments while still leaving primary responsibility for these systems with the States. Moreover, any national frameworks would provide the States with adequate flexibility to address local conditions, encourage competition and facilitate competitive neutrality.

In part, this reflects the current division of responsibilities between the Australian Government and the States and Territories, while acknowledging that there are benefits from a greater degree of national coordination of OHS arrangements.

The voluntary, cooperative nature of this model is reflected in the tripartite structure of NOHSC, comprising representatives of the States and Territories, the Australian Government, employers and unions. The individual jurisdictions are free to implement, not implement or modify any national standards and codes developed by NOHSC as they see fit.

The current regime received support from particular groups of participants as a model to progress a national framework for OHS regulation in Australia. This was particularly evident among the State and Territory Governments, the union movement and some sections of the business community. This is not to say that there were no criticisms of the current arrangements, with the Victorian Government commenting:

> Victoria continues to support the National Occupational Health and Safety Commission (NOHSC) in its current terms, form and role. Victoria continues to maintain that the following is needed:

- better funding by the Commonwealth to allow it to assume a stronger role in the development of National Standards to deal with a range of key hazards;

- better drafting of National Standards by NOHSC to enable jurisdictions to incorporate these Standards into state-based legislation and regulation; and
- a higher level of commitment by jurisdictions to adopt National Standards consistently and within a reasonable period of time. (IRsub. 256, p. 30)

Similarly, the SA Minister for Industrial Relations, the Hon Michael Wright MP, commented that:

> The National Occupational Health and Safety Commission Act 1986 (the Act) should be strengthened to leave States and Territories less room to amend national standards within their own jurisdictions once they have be approved by the WRMC. (IRsub. 233, p. 2)

ACCI noted that the pursuit of greater consistency could extend beyond the current focus on regulations and codes into the area of basic legislation, saying:

> The one key issue not addressed in the NOHSC review or in the ACCI proposed packaged approach is the subject of the individual jurisdictional OHS Acts. The OHS Acts are different in each jurisdiction and ACCI would prefer to see consistency in this area also but recognises that there are political and states rights issues and difficulties.
>
> Whilst their considerations are real-politic, it is important to recognise that the concept of 'competitive federalism' has very little, if any, role to play in competitive OHS systems between jurisdictions. (IRsub. 196, p. 7)

Funding of NOHSC

A number of other participants (the ACTU, (sub. 133); the Labor Council of New South Wales, (sub. 147); the Australian Nursing Federation, (sub. 70); the Hon Michael Wright MP, (IRsub 233); and the ACT Government, (IRsub. 234); among others) also supported the national body, seeing a need to strengthen the processes involved and, in particular, seeing a need for a greater commitment to funding by the Australian Government. The Labor Council of New South Wales commented:

> The Commission has produced excellent standards, which have all been adopted by all of the States in their legislation in relation to plant, noise, hazardous substances etc. However, the Federal Government reduced funding, resources and ultimately the Commission's capacity to fulfil its role of providing a proper and consistent national framework. (sub. 147, p. 17)

The Australasian Meat Industry Employees Union (sub. 117, p. 11) commented that the NOHSC budget had been cut by $6.6 million and argued that funding should be restored. The ACTU (sub. 133) and the Australian Manufacturing Workers Union (sub 119) expressed similar concerns about the reduction in funding. The funding of NOHSC in recent years is presented in table 4.1.

Table 4.1 **NOHSC revenue from the Australian Government, 1993-94 to 2002-03**

$ million

	1993-94	*1994-95*	*1995-96*	*1996-97*	*1997-98*	*1998-99*	*1999-00*	*2000-01*[a]	*2001-02*	*2002-03*
Revenue from government	22.0	21.7	21.4	14.3	18.5	15.7	18.6	22.1	18.6	14.5

[a] In 2000-01 NOHSC secured an increase of $3 million to help fund the relocation from Sydney to Canberra. The increase is to be repaid through reductions in NOHSC appropriations of $1.2 million in 2001-02, $1.1 million in 2002-03, and $0.8 million in 2003-04.

Source: NOHSC, *Annual Reports*, (various issues).

While much of the reduction in funding was manifest in a reduction in staff costs, another significant area of declining spending was in the area of grants, principally research funding (table 4.2).

Table 4.2 **NOHSC grant expenditure, 1993-94 to 2002-03**

$ million

Grants	*1993-94*	*1994-95*	*1995-96*	*1996-97*	*1997-98*	*1998-99*	*1999-00*	*2000-01*	*2001-02*	*2002-03*
Research	0.8	1.2	1.1	0.5	0.4	0.1	--	--	--	--
Total	2.9	3.2	2.9	1.2	0.8	0.5	0.3	0.3	--	--

Source: NOHSC *Annual Reports*, (various issues).

This reduction in research funding attracted criticism, both outside and within this inquiry. Quinlan commented:

> Since 1996 there has been a substantial and sustained decline in research activity undertaken directly or indirectly (through grant funding) by the National Occupational Health and Safety Commission (NOHSC). This decline has now reached a point where it is arguable whether, with some minor exceptions, the agency has any capacity left to undertake meaningful research ... . (Quinlan 2000, p. 213)

At the same time, there is a general view that statistics in the area of OHS, particularly national data on OHS incidents, have been, and remain, inadequate, and that data based on workers' compensation claims were not an adequate substitute in the OHS field. For example, the Labor Council of New South Wales commented:

> A continuing frustration with current occupational health and safety and workers' compensation schemes is the inadequacy of data collection. All three national inquiries noted that data collection is inadequate in all state and federal territory jurisdictions. Further inquiries into NSW Workers Compensation and OHS Schemes have found that there are great inadequacies in the data.

> … Inadequate data collection results in inadequate data on which to base research that might lead to improved occupational health and safety outcomes. It clearly makes identifying trends impossible and it is likely that many issues are simply missed. For instance, the Labor Council is aware of a number of accidents to fingers (including fingers being cut off) in the film industry in the past three years caused by removing guards when working with electric saws, none of which are reflected in WorkCover data. Many of the incidents involved sub-contractors. Whether lodgement of a workers' compensation claim was always appropriate is not known, as some were self-employed rather than employees of an incorporated company. However, all the incidents should have been reported as an occupational health and safety occurrence. (sub. 147, p. 13)

An adequately resourced national body is essential if any national framework is to be successfully pursued, particularly if even greater reliance is to be placed on the national body to develop national standards in a timely fashion — the matter of the time taken to develop national standards being the subject of some comment in this inquiry.

The need for timely development of national standards

The SA Minister for Industrial Relations, the Hon Michael Wright MP (IRsub. 233), identified a need for a faster and more efficient decision making process, involving both NOHSC and the WRMC. Both the Western Australian Department of Consumer and Employment Protection (IRsub 219), and the ACT Government also noted the consequences of any undue delay in the NOHSC processes, the ACT Government saying:

> The ACT submits that there would be greater take-up within jurisdictions of existing national standards developed through the National Occupational Health and Safety Commission (NOHSC) if the standards were reviewed more frequently and kept up-to-date. Many of the existing standards are simply not suitable bases for modern legislation, and do not provide a template for legislation that can be adopted with minimal modification. (IRsub. 243, p. 4)

The point raised by the Western Australian and ACT governments is a valid one. Unless any centralised system of developing national standards is timely, it is difficult to ask the individual jurisdictions to put off change that may be needed to improve OHS outcomes.

The role of stakeholders

The tripartite structure of NOHSC was seen by many (ACCI, (subs. 81, 196); the ACTU, (IRsub. 186); the Australian Manufacturing Workers' Union, (IRsub. 231); the ACT government, (IRsub. 243); the Victorian Government, (IRsub. 256); the Queensland Council of Unions, (IRsub. 241); and WorkCover New South Wales, (IRsub. 255) among others) as an essential ingredient in involving stakeholders in the development and acceptance of workplace safety standards. For example, ACCI said:

> Occupational Health & Safety is a workplace issue in which employers and employees work closely together to achieve a safe and healthy workplace. Much of the regulatory framework and guidance materials to assist the parties is derived from national standards developed in close consultation with industry representatives in the NOHSC tri-partite forum.
>
> The current tripartite process whilst sometimes criticised as slow and time consuming provides an effective mechanism for a wide and genuine consultation and a 'reality check' on bureaucratic decision makers and for a 'buy in' of all the parties who have an interest in and responsibility to implement national policies and strategies. (sub. 196, p. 4)

A consequence of the tripartite structure, however, is that NOHSC has a very large membership of 18, who are there primarily to represent the interests of their stakeholder group, rather than to progress the objectives of NOHSC. This has consequences for the workability of the organisation. The IC's 1995 inquiry noted:

> With 18 members, NOHSC is simply too large to be an effective board of management. (IC 1995, p. 304)

Similarly, Working Armour saw problems with consensus decisions involving diverse groups saying:

> The criticism that often emerges is that standards developed by a committee process reflects the lobbying abilities of member of that committee as opposed to the degree of risk posed by a specific hazard. (IRsub. 251, p. 2)

At the same time, such representation must inevitably be selective, with some groups missing out on a seat at the table. This issue was raised in the previous Industry Commission inquiry, and in this inquiry, in relation to small business and the mining industry.

Other participants supported the Interim Report's proposals to place tripartite involvement at the advisory level rather than involvement via representation on NOHSC. For example, Housing Industry Association said that:

> HIA strongly supports this [a national OHS framework] as well as a smaller NOHSC Board and the development of template legislation. Obviously the issue of State/Territory acceptance needs to be addressed and HIA has genuine concerns about whether there will be universal acceptance of a national framework. (IRsub. 193, p. 3)

Stakeholder involvement in other jurisdictions

The Commission notes that other countries addressed the issue of stakeholder involvement in OHS in a variety of ways. New Zealand has recently introduced (2003) a National Occupational Health and Safety Advisory Committee to provide expert independent advice on major occupational safety and health issues. The Committee comprises five members

with a balance of research and professional expertise in the area of OHS. Responsibility for OHS in New Zealand rests with the Department of Labour (Wilson 2003; Department of Labour [NZ]).

The British Health and Safety Commission is comprised of nine members with expertise in a range of OHS areas including members drawn from (but not representing) the union movement and industry. It is advised by 15 'Industry Advisory Committees' covering particular industry groups or activities and eight 'Subject Advisory Committees' covering such areas as dangerous substances and nuclear safety. The Commission said:

> HSC's Advisory Committees encourage the joint participation of all representative organisations in the improvement of health and safety at work; draw on the expertise and advice available from both sides of industry and elsewhere; give the problems of particular industries closer and more detailed attention than the Commission itself is able to do; and allow an industry focus on general issues … . (HSC 2003, pp. 136–140)

In the United States of America, there are two federal agencies established under the Occupational Safety and Health Act of 1970. The National Institute for Occupational Safety and Health (NIOSH) is responsible for conducting research and making recommendations for the prevention of work-related injury and illness. The Occupational Safety and Health Administration (OSHA) is responsible for creating and enforcing workplace safety and health regulations. Both agencies are located within US federal government departments: NIOSH is part of the Centers for Disease Control and Prevention in the Department of Health and Human Services, while the OSHA is located within the Department of Labour.

Canada operates an OHS system with some parallels to Australia. Responsibility for OHS rests with the Canadian provinces. At the federal level the Canadian Centre for Occupational Health and Safety (CCOHS) is governed by a tripartite council of 17 members representing governments (federal, provincial and territorial), employers and labour. CCOHS's role is to facilitate consultation and cooperation among jurisdictions; to facilitate participation by labour and management, and to serve as a national centre for information relating to OHS. Each province and territory has a workers' compensation board or equivalent and these boards typically comprise clearly identified worker, employer and public representatives. Some provinces combine their workers' compensation and OHS functions under the same organisation and thus the tripartite nature of the organisation will apply to their OHS responsibilities. However, where workers' compensation and OHS functions are separate, the OHS functions typically reside within a provincial department, rather than with any tripartite oversighting structure.

The Commission's view on the role of stakeholders

Certainly the development of OHS legislation and regulation cannot be undertaken without the commitment and involvement of employers and employees, as well as those with particular expertise in the field. However, there is a significant difference between a consultation process, and a situation where those being regulated have direct control over the drafting of that regulation. Where stakeholder interests diverge significantly and where agreement or consensus becomes a major consideration, the chance that necessary change will be introduced in a timely fashion is put at risk. It also introduces the likelihood that compromise will result in something well short of best-practice.

As referred to earlier, the current requirement for a wide range of stakeholders to be represented results in a very large NOHSC 'board', leading to problems of workability. At the same time, not all stakeholders are represented with, for example, all three of the current employer representatives being provided by one employer organisation. A broader consultative process would allow other stakeholders to be involved and to be on an equal footing with those currently favoured by a position on NOHSC.

The 1995 review of national OHS regulation

Essentially the same issues arose in the Industry Commission's (IC) 1995 review of a national framework for OHS in Australia. That review identified a number of concerns:

- the limited impact and adoption of NOHSC outputs;
- resistance to complete adoption of NOHSC decisions at the State level;
- unclear responsibilities and accountabilities; and
- ineffective board of management (size and composition — with both jurisdictional and tripartite representation).

The IC recommended that the NOHSC be restructured to consist of no more than five persons selected on the basis of their expertise and skills.

Tripartite involvement was to be accommodated via an occupational health and safety advisory council with representatives from the peak employer organisations, the Australian Council of Trade Unions, the relevant Commonwealth agencies and experts in occupational health and safety. In addition the IC recommended that the Standards Development Standing Committee be retained to advise the NOHSC on the development of standards — the Committee to comprise equal numbers of nominees of the Ministerial Council, the ACTU and the peak employer organisations.

A national framework was to be pursued by the use of template legislation to achieve a nationally consistent regime for occupational health and safety. The template was to be incorporated in the principal OHS legislation in each jurisdiction.

These recommendations were not accepted, and notwithstanding the changes made to NOHSC in 1997 and subsequently, which in particular reduced its role in relation to research, the duties and organisation of this body are largely the same as when the IC reported in 1995.

Implementation of national standards and codes

Discretionary implementation at the State and Territory level also received support, particularly from State and Territory governments and the union movement. For example, Worksafe Western Australia Commission argued that the detail of implementation should be the responsibility of individual jurisdictions:

> The Commission strongly supports national arrangements that achieve national consistency for OHS but not rigid uniformity. ... Notwithstanding its commitment to national standards, the Commission reserves the right to consider and assess each standard on a case-by-case basis within its tripartite forum. Where adoption of a particular standard is considered appropriate, implementation will be through whatever instrument or instruments best meet the needs of the State. (sub. 51, pp. 3–4)

Similarly, the Community and Public Sector Union/State Public Services Federation Group also supported the decentralisation of OHS (and workers' compensation) arrangements saying:

> These [State] legislators are closer to the day-to-day concerns of workers and their families than the Federal government can ever be. It is the State legislators that focus on the very practical concerns of health, education, public safety and so on. These legislators are more accessible to organisations, including unions, that represent the employment based interests of their members. (sub. 52, p. 2)

The SA Minister for Industrial Relations, the Hon Michael Wright MP noted that, in moving to develop nationally consistent approaches for incorporation in the relevant South Australia legislation, the South Australian Government applies (among other listed in the submission) the following principles:

- consultation must occur with key stakeholders at a local level prior to adopting any national standard or complementary legislative amendment;
- the implementation of any national approach should not pose an undue burden on sectors of the South Australian industry and/or employees working within that sector; and
- there needs to be flexibility in any national approach so that this can be easily adapted to emerging needs at a local level. (IRsub. 233, p. 1)

Nonetheless, most participants, including those who supported the current arrangements, considered that greater efforts towards increased consistency were both desirable and achievable. For example, the Western Australian Department of Consumer and Employment Protection considered that the overall objective of greater national consistency is desirable, saying that:

> This does not mean that the States should not be expected to work toward consistent (and even uniform) outcomes. For instance, as the States have fairly consistent general duty of care legislation, NOHSC should be able to develop a template duty of care legislation, with consistent definitions and with consistent penalties to be incorporated into law into each of the States. (IRsub. 219, p. 4)

Similarly, the ACTU reported that the OHS Policy adopted by the ACTU Congress in 2000 contains a range of provisions, including that:

> TLCs [trades and labor councils] and unions will advocate that state and territory governments adopt national standards in a consistent way to provide Australian workers with equal protection irrespective of where they work. (sub. 133, p. 11)

The challenge in trying to improve the effectiveness of the current cooperative model is in accommodating issues such as stakeholder involvement and acceptance of outcomes, and the need for any national framework to accommodate regional and industry differences without resulting in different requirements applying in different jurisdictions to essentially the same workplace situation.

Related models in other sectors of the economy

As prefaced earlier in this chapter, the institutional structures to develop uniform national standards in other areas of the Australian economy are quite different from that of NOHSC. They involve a different mechanisms for involving stakeholders and more formal standard making and adoption processes.

Transport

In the area of road, rail and intermodal transport, the National Road Transport Commission (NRTC) has been set up with five members appointed on the basis of relevant expertise and skills. The NRTC became the National Transport Commission (NTC) in January 2004 in recognition of the recent addition of rail and intermodal transport to its regulatory responsibilities. The NTC develops and maintains national standards and codes in the transport area. The NTC is funded 65 per cent by the States and Territories and 35 per cent by the Australian Government. The NTC reports to the Australian Transport Council (ATC) which is a ministerial forum for Australian Government, State and Territory cooperation.

Tripartite involvement in the decision making process is accommodated by way of advisory bodies reporting to the ATC and to the NTC.

The ATC is supported by two advisory bodies:

- the *Standing Committee on Transport*, comprising chief executive officers of transport agencies (administrative and policy advisers to ATC Ministers); and
- the *National Transport Secretariat*, which provides advice on strategic priorities and directions.

In addition, a National Transport Advisory Council is to be established, comprising public and private sector experts, to provide the ATC with strategic analysis and advice.

The NTC is supported by a number of bodies including:

- an *Industry Advisory Group*, comprising representatives of transport groups, vehicle manufacturers, the Transport Workers Union, and the National Farmers Federation;
- a *Bus Industry Advisory Group*, comprising representatives of state, territory and national bus associations, manufacturers, and representatives from related industries; and
- a number of specialist technical committees and groups.

Implementation of the national framework developed by the NRTC/NTC is via a number of intergovernmental agreements covering heavy and light vehicles and rail transport. Once approved by ministers (at the ATC), all governments are expected to implement the reforms. Initially, the NRTC focused on developing template legislation, but since 1998, a greater range of implementation options has been used.

Food standards

In the area of food standards, Food Standards Australia New Zealand (FSANZ) has been set up with a 12 person board, including members with expertise in small business and consumer affairs. FSANZ is responsible for developing and maintaining uniform food standards for adoption in Australia and New Zealand. FSANZ is funded by the Australian and New Zealand Governments and from fees for services it performs. It reports to the Australia New Zealand Food Regulation Ministerial Council, and has clear timetables for decision making at each level.

Tripartite involvement in the decision making process is accommodated by way of advisory bodies reporting to the Ministerial Council. Assisting the Council are the:

- *Food Regulation Standing Committee*, comprising heads of Department for which the respective members of the Ministerial Council have responsibility, as well as the Local

Government Association. The Committee provides advice on the development of policy relating to the regulation of food;

- *Development and Implementation Sub Committee*, comprising heads of the appropriate Australian and New Zealand inspection and enforcement agencies, and the Australian Local Government Association. The sub committee is responsible for developing implementation policy and oversees the development and implementation of a consistent approach across jurisdictions in enforcing food regulations and standards; and
- *Technical Advisory Group*, comprising senior food officers from the jurisdictions. The Group provides technical advice to assist in the development of standards and in the coordination, surveillance and uniform interpretation and enforcement of the Food Standards Code.

Implementation of the national framework developed by FSANZ is via the Food Regulation Agreement 2002 where, once a standard is accepted by the Council it is to be adopted by States and Territories without variation.

The Commission's view

While progress in the development of national uniformity in road transport and food standards has been slower than would perhaps have been expected, the NRTC/NTC and the FSANZ have a number of potential lessons for OHS institutions, (some already identified in the IC's 1995 report). These are:

- smaller boards appointed on the basis of relevant expertise and skill rather than as 'representatives' of particular groups or organisations;
- the accommodation of stakeholder involvement by way of formal advisory committees, either to the Ministerial Council or to the relevant standard developing institution;
- clear lines of responsibility, including prescribed procedures for developing and implementing standards, including timetables;
- a formal commitment by all jurisdictions, via intergovernmental agreements to adopt standards approved by the Council — in the case of food standards, without variation; and
- in the case of the NTC, part funding by the States and Territories (65 per cent).

In the case of workplace safety, differences between jurisdictions in the characteristics of workplaces, or in the nature of the risk faced, can be accommodated by the use of performance-based regulations supported by voluntary codes of practice which can reflect legitimate differences between regions and/or industries.

However, the Commission does not consider that simply changing organisational structures or the wording of acts or memoranda will lead to a sudden rush of improved outcomes. The experiences in both the transport and food standards areas demonstrate the magnitude of the task. The achievement of national frameworks in any area is challenging within a federal structure, even where there is strong agreement with its desirability.

4.3 The Commission's proposals for a national OHS framework

The Commission considers that a single uniform national OHS regime which is focussed on preventing workplace injury and illness should be the medium term reform objective for OHS. It would build on the initiative of the recently agreed national strategy.

To achieve this. the Commission is proposing two broad approaches, to operate in parallel. The first approach adapts the current cooperative model by strengthening the national institutional structure based on NOHSC and the WRMC — emphasising the timely development of best-practice national OHS standards and their implementation uniformly throughout Australia. Such an approach should be commenced immediately. The second approach is to progressively open up access to the existing Australian Government OHS regime, giving firms the choice of a single set of national OHS rules. The two approaches are not dependant on each other. Each has merits that would warrant their independent introduction.

The cooperative approach

There are two key elements involved in this proposal: a restructuring of NOHSC; and the introduction of an intergovernmental agreement aimed at the uniform adoption of legislation and regulation developed by a restructured NOHSC.

Restructuring NOHSC

The Commission considers that the current tripartite structure of NOHSC, where members are chosen by, and represent the interests of, particular stakeholders, is not conducive to the development of timely and best-practice workplace safety provisions. As the body charged with implementing a national framework for OHS, NOSHC needs to be able to investigate, focus on, and develop the most appropriate set of workplace safety rules without these being beholden to the compromises inherent in obtaining consensus from a wide range of interested parties.

Stakeholder involvement in the development of national workplace safety provisions is nonetheless appropriate. It can be accommodated through formal consultative mechanisms and advisory bodies, as operate in other areas of regulation development.

This is particularly important in the approach being proposed by the Commission which envisages that NOHSC's role will expand beyond its current focus on national standards and codes, to include the development of model OHS legislation for adoption by the Australian, State and Territory governments.

The Commission proposes that NOHSC be restructured to become a smaller, expert body, (with supporting consultative mechanisms) which would recommend national legislative provisions, regulations and standards for approval by the Workplace Relations Ministers' Council. NOHSC would comprise five to nine members selected on the basis of their expertise and skills including, but not being limited to: the management of health and safety risks; experience in the application of OHS requirements in the workforce; the development of OHS policy; and knowledge of recent developments in OHS regulation in Australia and overseas. Members of NOHSC would be appointed by the relevant Australian Government portfolio minister, subject to the appointments being approved by the Ministerial Council.

The role of stakeholders

Stakeholder input into the development of OHS regulation is an essential component of the development of national provisions. The Commission proposes that NOHSC be given the power to establish relevant advisory committees, to assist NOHSC in its work, drawing their membership from employers, unions, experts in the field of implementation, and from Australian, State and Territory organisations responsible for administering OHS.

The Commission has taken into consideration comments by participants that the Interim Report proposals for various committees to report directly to the WRMC would be unworkable. Participants such as the ACCI (IRsub. 196), Business SA (IRsub. 187), the ACTU (IRsub. 86) supported by a number of individual unions, and the Victorian Government (IRsub. 256), considered that the introduction of three committees to provide assistance to WRMC would appear to remove the authority of NOHSC in providing advice to WRMC on OHS and related issues. It would mean that NOHSC standards could be reworked, introducing delays. In addition, it would impose an unworkable burden on the Council which did not have the capacity or technical expertise to undertake the assessment of advice from the various bodies. ACCI noted that the WRMC meets only twice a year and that '…its agenda is predetermined as are largely its outcomes' (sub. 196, p. 8). Other participants also noted the predominance of industrial relations matters on the WRMC agenda.

The Commission acknowledges these concerns, and considers that the advisory functions should rather report to NOHSC, and be part of NOHSC's formal consultative process. These would be similar to those existing in the area of road transport where the NRTC/NTC is advised by: a group of transport agency chief executives from each of the jurisdictions; a number of industry advisory groups containing both employer and union representation; and by a number of technical advisory groups.

Whether NOHSC needs to go as far as establishing a large number of formal industry-specific or subject-specific technical and advisory committees, as is the situation in the United Kingdom, is debatable, but this should not be precluded if the development of best-practice legislation, regulations and codes warrants it.

While each of the States and Territories would no longer be represented directly on NOHSC, they would retain involvement in the NOHSC consultative process and more importantly, they retain their positions on the WRMC, which would be the ultimate arbiter for the flow-on of any proposed legislation and regulations to the jurisdictions. The WRMC would continue, as at present, to be serviced by the Departments of Workplace Relations Advisory Committee, comprising heads of industrial relations departments in the jurisdictions, and the National Workplace Relations Consultative Council comprising representatives of employers, unions and the Australian Government, though, as with the WRMC itself, industrial relations are the primary focus of these bodies.

An intergovernmental agreement

The second key element of this approach is the negotiation of an intergovernmental agreement, whereby the jurisdictions agree to adopt, without modification, the legislation, regulations and codes developed by NOHSC and approved by the Ministerial Council. Similar agreements have been central to the mechanisms aimed at achieving uniformity in other areas of national regulation in Australia's federal system, and provide models on which such an agreement could be developed in relation to OHS.

A number of participants commented that the problem with non-uniform adoption of NOHSC-developed regulations does not lie with NOHSC or its structure, but rather with the commitment of the individual jurisdictions to adopt the standards developed. ACCI commented:

> The criticisms of the current tri-partite mechanisms and NOHSC relate in the main to the lack of delivery of the agreed outcome of national consistency. This is not so much a fault of the process but a lack of commitment, in the main, by the bureaucracy in the jurisdictions to implement polices and standards which they have assisted in developing and which have been endorsed by their own ministers at WRMC. (IRsub. 196, p. 6)

A willingness to adopt nationally developed regulation is central to the achievement of national uniformity and the gradual elimination of differences in OHS legislation and

regulation across Australia. The recommended intergovernmental agreement is central to achieving this, but it is also likely to be one of the more difficult changes to introduce.

A timetable for review

One of the major criticisms of the current mechanism for developing national standards and codes is the time that has been taken for what many see as limited progress towards convergence in OHS regulation within Australia. NOHSC has been in operation for some 18 years. An important element in providing a discipline on progress is for a timetable for achievement to be agreed to and spelled out early in the process.

The Commission is not in a position to recommend on the appropriate timetable, though two participants (the Commonwealth Safety Management Forum (IRsub. 258, and United Group Limited, IRsub. 238)) did so — suggesting a 10-year time frame. Any timetable depends, in part, on an assessment of the amount of work involved and the level of resources governments are willing to provide to achieve the outcome.

In commending the discipline of an agreed and announced timetable for achievement, the Commission notes that, among other specified time periods relating to the presenting of a standard to the food regulation ministerial council, it requires that the council must respond within 60 calendar days to proposals placed before it. A similar set of specified time lines in the review procedures would be a desirable feature of the NOHSC/WRMC review of OHS matters.

Going beyond national standards and codes

For national uniformity in workplace health and safety requirements to be fully achieved, the work program of NOHSC should include the review of all aspects of OHS regulation in Australia, covering legislation, regulations and any mandatory standards and mandatory codes, with the objective of developing model provisions to be adopted uniformly in each jurisdiction. Voluntary codes of practice could still be developed by NOHSC, but would not be included in any program of template adoption. Variations in codes are an important means by which differences in regional or industry situations are accommodated within a single national framework.

The source of funding for NOHSC

In the Interim Report, the Commission proposed that funding for NOHSC be shared by the jurisdictions. Some concern was expressed by participants over this proposal. ACCI considered that primary funding for NOHSC should remain with the Australian Government, saying:

> The current funding arrangement whereby the Commonwealth funds NOHSC direct has many advantages … Industry believes that it is important that the federal government demonstrates its commitment to OHS at the national level by allocating federal funding in this way.

- A level of independence from the jurisdictions.
- Isolation from the possible vagaries of political change and possible conflict on the levels of funding and payment arrangements of shared funding arrangements.
- Equality of representation by the members, which is not affected or perceived to be affected by different levels of financial funding arrangements between the jurisdictions.
- A level of certainty over funding arrangements from one source, the Commonwealth. (IRsub. 196, p. 9)

In the Interim Report, the Commission also considered that individual jurisdictions could be charged with developing, on behalf of NOHSC, regulations and codes in areas that are of particular relevance to that jurisdiction.

The submission from ACCI in response to the Interim Report raised the option of linking funding from other jurisdictions to the 'outsourcing' of projects suggested above. ACCI said:

> There are however some NOHSC initiated projects and/or programs, which cannot be funded within the NOHSC budget and are consequently not included in the annual business plan. Under these circumstances special shared funding arrangements may be a necessary and effective way of developing a particular product or program. (IRsub. 196, p. 9)

The Commission considers that a variety of means should be developed to ensure an adequate level of funding for NOSHC, involving contributions from the States and Territories as well as the Australian Government, together with the 'outsourcing' of particular projects to the States and Territories where they have a particular interest or area of expertise. This would give the States and Territories a direct interest in NOHSC, and remove its dependence on funding from only one of the jurisdictions involved in workplace health and safety in Australia.

The Commission also considers it worthwhile to develop a program to trial innovations, as appropriate, in a jurisdictions or jurisdictional sub region under strictly controlled circumstances and time frames.

The Commission's recommendations

The Commission considers that streamlining the process of developing a nationally uniform OHS regime in Australia is essential if best-practice OHS legislation, regulations and codes are to be introduced in a timely fashion and adopted uniformly in each

jurisdiction in Australia. A focus on technical 'best-practice' underlies the proposed restructuring of NOHSC, without losing stakeholder input. In addition, the proposed intergovernmental agreement would eliminate the unnecessary re-evaluation, at the individual State and Territory level, of already exhaustively evaluated proposals.

RECOMMENDATION

The Commission recommends that the following features be included in a cooperative occupational health and safety national framework model in Australia:

- ***a National Occupational Health and Safety Commission (NOHSC) made up of five to nine members appointed by the Minister on the basis of their expertise and skills, the appointment to be approved by the Workplace Relations Ministers' Council (the Council);***
- ***clear specification of the objective of achieving uniform national occupational health and safety legislation and regulation in all jurisdictions in the NOHSC enabling legislation;***
- ***agreement by all jurisdictions to adopt, without variation, the legislation and regulations prepared by NOHSC and approved by the Council;***
- ***NOHSC have the ability to appoint advisory bodies, noting the importance of consulting with employers, unions and all jurisdictions;***
- ***specified timetables for Council review of proposals from NOHSC, similar to those applying in relation to food standards — the process to be prescribed in the legislation; and***
- ***funding of NOHSC shared by the jurisdictions together with a commitment to funding the research and data collection necessary to ensure the development of a best-practice national occupational health and safety system.***

The alternative national OHS approach

In the area of workers' compensation, the Commission is proposing in chapter 5 that a progressively expanded number of employers could apply for coverage under a national scheme. This would be restricted initially to a self-insurance option for larger (typically multi-state) firms in competition with Australian Government or former Australian Government organisations as an alternative to the schemes operated by the States and Territories.

The Commission considers that these same employers should be able to opt for coverage under the Australian Government's OHS legislation — the OH&S(CE) Act. This would increase the administrative savings for multi-state firms, and enable greater coordination and feedback between the workers' compensation and OHS regimes. By providing choice for firms, it would also introduce an element of competition with the State and Territory

OHS regimes, strengthening the incentive for reform and encouraging greater national uniformity under the arrangements outlined earlier.

In addition, having firms operate under an OHS regime and a workers' compensation scheme with the same jurisdictional coverage, and with related administrations, would enable improved data monitoring, feedback and reform.

The introduction of coverage under the Australian Government's OHS regime would be on the same progressive basis as outlined in relation to workers' compensation in chapter 5, being initially confined to firms in competition with Australian Government organisations, followed by firms that would be eligible to self insure (typically larger firms).

Such a phased model of a national framework would allow some testing of implementation issues to occur in a limited environment amongst major firms who were committed to the success of the new arrangements. The States and Territories would also retain primary responsibility for the majority of firms in their jurisdiction. A strengthened NOHSC would operate in parallel.

The Commission does not consider that the lack of complete coverage of the corporations power, as advised by the Australian Government Solicitor, represents a significant constraint on the ability of the Australian Government to act effectively in this matter. Individual State and Territory OHS regimes would remain in place for those not eligible for national coverage for constitutional reasons, and many employers operating only within a single jurisdiction would have little reason to move to a national scheme.

While it is envisaged that this OHS proposal would generally operate on the same time path as the progressive opening up of an Australian Government workers' compensation insurance scheme, it would require an immediate amendment to the *Occupational Health and Safety (Commonwealth Employment) Act 1991* to enable 'non-Commonwealth' entities to be covered. The Commission considers that the Australian Government should seek to make the necessary legislative changes as expeditiously as possible, but that the proposed progressive opening up of the Commonwealth's workers' compensation insurance scheme should not be dependant on achieving related change in OHS.

While there will be some difficulties arising from firms operating under different OHS regimes in the same location, the Commission does not consider this to be significant enough to preclude this option. The progressive opening up of the Australian Government's OHS regime provides the opportunity to evaluate whether this problem is likely to loom large in the future, and provides the opportunity to undertake changes and to develop appropriate implementation protocols between the Australian Government and the States and Territories.

Similarly, the lack of complete industry coverage of the Australian Government's OHS regime is not a barrier to any firms inclusion under national rules. As advised by Comcare, the individual State and Territory provisions would continue to apply where they did not exist in the Australian Government's regime. The Australian Government would be able to expand its regime, drawing on best-practice provisions operating in the States and Territories until all sectors, and all activities, in the economy are covered by appropriate provisions.

RECOMMENDATION

The Commission recommends that the Australian Government amend the* Occupational Health and Safety (Commonwealth Employment) Act 1991*, to enable those employers who are licensed to self-insure under the Australian Government's workers' compensation scheme to elect to be covered by the Australian Government's occupational health and safety legislation. This legislation would be extended to cover those insuring under any future alternative national premium paying insurance scheme.

Administration of the Australian Government's OHS regime

The Safety Rehabilitation and Compensation Commission (SRCC), established under the SRC Act, is broadly responsible for providing the regulatory framework for the Australian Government's workers' compensation arrangements and OHS program. The SRCC does not have its own staff and relies on Comcare staff to carry out its functions. Comcare (a statutory authority established under the SRC Act) administers and enforces the OHS (CE) Act in addition to its role of administering the Australian Government's workers' compensation arrangements.

In the discussion on expanding access to the Australian Government's workers' compensation arrangements in chapter 5, the matter of the most appropriate regulatory structure was reviewed. The broad conclusion outlined in that chapter was that:

- regulatory and service functions should be separated — that is, a clear separation of the SRCC and Comcare;
- it is appropriate to establish the regulator's independence by replacing the existing stakeholder composition with members appointed on the basis of their skill and expertise; but
- some elements of functional separation and regulator independence need not be undertaken until step 2 and possibly later with step 3 of the recommended arrangements for workers' compensation.

With such a separation of regulatory and service functions, the question arises as to where the regulation and enforcement of the Australian Government's OHS regime should rest.

There are different views and practices among the jurisdictions in Australia as to whether the regulation of workers' compensation and OHS should be separate. The use of a single regulator is seen to provide benefits through greater coordination and feedback between workers' compensation and OHS matters. Conversely, the different aims and issues of workers' compensation and OHS were seen as reasons as to why they should be separated, but with strong links on information sharing.

If the recommended increased access to the Australian Government's workers' compensation and OHS arrangements is adopted, it is unlikely, at least initially, to attract the number of employers to warrant the creation of separate workers' compensation and OHS regulators. Responsibility for both functions would rest with the SRCC.

In the short term, it would be reasonable to continue the situation where the enforcement of the Australian Government's OHS regime rests with Comcare. Further, as is currently the arrangement, much of the OHS enforcement and inspection tasks could continue to be undertaken by State agencies on behalf of the Australian Government. However, as progress is made towards step 2 of the Commission's recommendations, the number of firms covered by the Australian Government's OHS regime will increase. Comcare will, in time, become one of many organisations oversighted by the SRCC, albeit the largest, with responsibility for managing the Australian Government's workers' compensation insurance.

The question of separating the enforcement of the OHS regime from Comcare should then be considered — that is, whether to establish a separate dedicated inspectorate. The AMWU noted that this issue has arisen in the past saying:

> Comcare is the OHS regulator: the trade union movement has consistently complained about the lack of a well resourced dedicated Commonwealth inspectorate … (IRsub. 231, p. 4)

One option would be to incorporate the OHS enforcement function into the Department of Employment and Workplace Relations. In a number of states, such as Queensland, Western Australia and Tasmania, OHS administration and enforcement is undertaken by the relevant industrial relations department. An alternative option would be to establish an Australian Government inspectorate reporting directly to the SRCC consistent with its role of regulating both workers' compensation and OHS for the Australian Government.

In conclusion, the long-term establishment of a separate Australian Government OHS inspectorate would be desirable, either as an independent agency or as part of the Department of Employment and Workplace Relations — but this is unlikely to be necessary until step 2 of the Commission's workers' compensation recommendations. In the interim, enforcement should remain with Comcare.

5 National frameworks for workers' compensation

This chapter identifies and assesses suitable models of national frameworks for workers' compensation and presents the Commission's proposals. The chapters that follow deal with particular workers' compensation matters that the Commission has been asked to report on by its terms of reference.

5.1 Issues for developing a national framework

There are a number of national framework issues arising from the differences in various jurisdictions' workers' compensation schemes. The most significant arise from the added compliance burdens and costs borne by multi-state employers as illustrated in chapter 2. They include for:

- self-insured employers, the different prudential requirements, employees coverage, statutory benefit structures, injury management requirements and access to common law settlements; and
- for premium-paying employers, the different and complex rules of employee coverage, remuneration base for the payment of premiums and injury management requirements.

For mobile workers, national framework issues arise from differences in coverage, and from differences in the allocation of liability for degenerative injuries and illnesses of long latency.

The lack of uniformity amongst workers' compensation schemes can spill over to several Australian Government programs. Ignorance or confusion about eligibility of coverage (because of the differences in the definition of employee) can mean an injured worker becomes the responsibility of the Australian Government (under its Medicare or social security programs). Purposeful action by one of the parties, say to avoid reporting an injury or lodging a claim, could have the same effect (with ABS data suggesting significant under-reporting of work-related fatality, injury and illness).

The various statutory benefit structures have differing effects on Australian Government programs. Injured or ill workers may resort to social security in those jurisdictions where the statutory benefit structures do not cover long tail claims. In Victoria, for example,

payments for some end at 104 weeks and, in Queensland, all benefits cease at five years. Premature exhaustion of a lump sum can leave others with no alternative than to fall back on the Australian Government's social security programs.

5.2 National framework models

There was widespread support amongst participants for a national framework for workers' compensation. However, participants differed as to what they considered would constitute a suitable model. Some favoured a model centred on cooperation amongst the jurisdictions. Some favoured a nationally available scheme which was offered to employers as an alternative to existing State and Territory schemes. And some called for a single national workers' compensation scheme which could draw on best practice elements of existing schemes.

As noted in chapter 2, the Commission identified several models of national frameworks for both occupational health and safety (OHS) and workers' compensation. In response to participants' comments and its own analysis, the Commission has confined its assessment of models for workers' compensation to the following four:

- self-insurance under the Australian Government's Comcare scheme (model A);
- an alternative national self-insurance scheme (model B);
- an alternative national insurance scheme (model C); and
- a new national cooperative body (model D).

Self-insurance under the Comcare scheme (model A)

The Australian Government could, as of now, allow the limited number of employers, who meet the competition test, to self-insure under its Comcare scheme, subject also to meeting prudential, claims management, OHS and other eligibility requirements (appendix E). State and Territory workers' compensation schemes would continue to operate unchanged, except for the impact of those few who could leave to join Comcare. An example of this model can be found in the road transport policy area when the Australian Government established the Federal Interstate Registration Scheme (box 5.1).

Box 5.1 **Federal Interstate Registration Scheme**

The Australian Government established the Federal Interstate Registration Scheme in 1987 as an alternative to State and Territory-based registration for heavy vehicles. That Scheme was designed to provide uniform charges and operating conditions for heavy vehicles engaged solely in interstate operations. The Scheme included standards in relation to vehicle construction, equipment and performance as well as a requirement for mandatory third party insurance. To establish the Scheme, the Australian Government relied on section 92 of the Constitution which requires that trade amongst the States and Territories be absolutely free.

Source: (Australian Government) Department of Transport and Regional Services (2002).

Currently, the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), which establishes the Comcare scheme, enables Australian Government authorities and eligible corporations to apply for a licence to self-insure and/or manage claims. Section 100, gives the Minister discretionary power to declare as 'eligible' for a self-insurance licence a corporation that:

- is, but is about to cease to be, a 'Commonwealth authority';[1] or
- was previously a Commonwealth authority; or
- is 'carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority'.

The last category, effectively a competition test, could apply to a range of corporations in such sectors as banking, telecommunications, air transport, postal, defence and broadcasting.

If the Minister declares a corporation eligible under section 100, then the granting of a licence is subject to approval by the Safety, Rehabilitation and Compensation Commission (SRCC). The SRC Act and Ministerial Directions specify the criteria and procedures the SRCC is to follow when granting licences.

[1] The SRC Act defines 'Commonwealth authority' in section 4(1). It includes a body corporate in which the Australian Government has a 'controlling or substantial interest'. A 'controlling interest' is defined in the same section as meaning 'an interest in the body corporate that enables the person holding the interest to: a) control the composition of the board of directors of the body corporate; or b) cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the body corporate; or c) control more than one-half of the issued share capital of the body corporate (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital).

The Minister has published some public policy principles that he may consider in exercising his discretionary power in relation to private corporations in competition with previous or existing Commonwealth authorities *(Commonwealth's Workers' Compensation Scheme Eligibility for Coverage for Non-Commonwealth Corporations)*. While not an exhaustive list, the principles include the likely impact of the grant of a self-insurance licence on:

- employees of the corporation;
- the corporation;
- the integrity of the Australian Government scheme of workers' compensation (Comcare) under the SRC Act; and
- the operations of the State and Territory workers' compensation schemes.

In the eleven years since section 100 and its predecessor (section 108C) have been in operation, no private corporation has been declared eligible by the Minister for issue of a self-insurance licence, except in circumstances where it was previously a Commonwealth authority. The Australian Government Department of Employment and Workplace Relations reported that, in recent times, there has been a number of employers seeking to self-insure under Comcare (sub. 166, p. 22). Private corporations including Sing Tel Optus, Westpac Banking Corporation, Manpower Services (Australia) and Skilled Engineering advised the Commission that they have applied, or investigated the possibility of applying (subs 57, 75; IRsubs 178, 202).

Private corporations self-insured under the Comcare scheme would still be subject to State and Territory OHS arrangements. There is currently no provision for these corporations to elect to be subject to the Australian Government's OHS legislation (primarily the *Occupational, Health and Safety (Commonwealth Employment) Act 1991*). However, a self-insurance licence would incorporate conditions pertaining to OHS which would be established and monitored by the SRCC, which itself would be guided by the Australian Government's OHS legislation.

To deal with this situation, legislation could be introduced to enable all corporations self-insured under the Comcare scheme to elect to be covered by existing or modified Australian Government OHS legislation. Such corporations would also continue to come under the relevant State or Territory legislation for matters not covered by Australian Government legislation (as is currently the case for Australian Government agencies).

The Australian Government Solicitor has advised the Commission that the Australian Government could rely on its corporations power under the Constitution to enact the relevant legislation (box 5.2 and appendix C). This would extend the current OHS inspection and enforcement arrangements (including cooperation of the States and Territories) to this wider group of employers.

Box 5.2 **The Australian Government's constitutional powers**

Corporations power. Under section 51(xx) of the Constitution, the Commonwealth has power to make laws for the peace, order and good government of the Commonwealth with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The power enables the Australian Government to regulate a wide range of matters relating to constitutional corporations after their formation, including their trading and financial activities. But it would not cover sole traders or partnerships. In order to be within the scope of the corporations power, the Australian Government law must have a sufficient connection with the subject matter of the power. The power could be used to extend existing Australian Government OHS legislation, or enact new OHS legislation, and to enact new national schemes of self-insurance or insurance.

Recent legislative examples of the use by the Australian Government of the corporations power are the *Therapeutic Goods Act 1989* and the *Gene Technology Act 2000*. The *Workplace Relations Act 1996* also relies on the corporations power for certain of its provisions (for example, governing Australian Workplace Agreements).

Insurance power. Under section 51(xiv), the Commonwealth has power to make laws with respect to 'insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned'. The power applies to the activity of insurance, the essential characteristic of which is a relationship of indemnity between an insured and an insurer. The power cannot be used to make laws governing self-insurance, or insurance carried on by a State or Territory as an insurer (apart from State or Territory insurance operating beyond the State or Territory). Accordingly, the power could only be used to enact a new national insurance scheme.

Other powers. The Commonwealth also has powers to make laws in respect of OHS and workers' compensation under:

- section 51(i) with respect to 'trade and commerce with other countries, and among the States' (interstate and overseas trade and commerce power);
- section 122 'for the government of any territory surrendered by any State to and accepted by the Commonwealth' (territories power); and
- section 51(xxix) with respect to 'external affairs' (external affairs power). This power could support Australian Government legislation which discharges an obligation imposed on Australia by an international treaty or instrument. The 1981 International Labour Organisation Convention 155 (Occupational Safety and Health Convention) could, if Australia became a party, support reasonably comprehensive Australian Government legislation concerning OHS. Similarly, the 1964 Convention 121 (Employment Injury Benefits Convention) could support an Australian Government workers' compensation scheme prescribing particular entitlements if Australia became a party.

(Continued next page)

Box 5.2 (continued)

Once new Australian Government laws were in place, section 109 of the Constitution would operate such that the laws would over-ride State and Territory legislation to the extent that there is any inconsistency between them.

Source: Appendix C.

The Australian Government does not have specific constitutional power over OHS and workers' compensation. There are, however, a number of constitutional powers that it could rely upon to implement a new national self-insurance or insurance scheme, and a related scheme for OHS. The chief power would be the corporations power. This would enable Australian Government legislation to achieve a high level of coverage of employers and their employees. Reliance on other constitutional powers would lead to legislation that was relatively less comprehensive in scope.

Support by participants for the model was mixed.

Participants such as the Plastics and Chemicals Industries Association (IRsub. 222, p. 2), Manpower Services (Australia) (IRsub. 178, p. 2) and Sing Tel Optus (sub. 57, p. 3) unequivocally supported the model. Sing Tel Optus considered that there would cost savings from self-insuring under the Comcare scheme, even in its existing state:

> Though there are weaknesses in the Comcare system — and some of the coverage they provide and some of the structures behind it seem at times to be overly generous and other times not necessarily consistent — by having one consistent scheme Australia-wide, the defects associated with the system, we believe, are far outweighed by the advantages. (trans., p. 301)

For quite a number of participants, support was conditional on changes being made to the Comcare scheme. These participants included national employers such as Westpac Banking Corporation (IRsub. 229, p. 1), the Insurance Australia Group (sub. 89, pp. 14–16), the Chamber of Minerals and Energy of Western Australia (IRsub. 237, p. 5) and the National Council of Self Insurers (sub. 168, pp. 21, 50; IRsub. 223, p. 2). Telstra (sub. 136, p. 3) held a similar view.

For example, a survey of self-insured employers by the National Council of Self Insurers indicated that, while there was little support for the scheme as it exists, there would be increased support if the statutory benefit structure was changed (sub. 168, pp. 21, 50). In a subsequent submission, the Council considered that entry to the scheme should be 'an optional choice' for self-insured companies, and that it would require 'significant modifications' to the scheme before recommending it as an option to members (IRsub. 223, p. 2).

Other participants did not support the model, or expressed strong reservations about it along the following lines:

- employers would be ‘disadvantaged’ by a move to the Comcare scheme (Australia Meat Holdings, sub. 96, p. 8);
- being primarily a white collar scheme, Comcare is not designed for heavy industry (Injuries Australia, sub. 125, p. 9; The New South Wales Bar Association, IRsub. 190, para. 17);
- there are problems with the way claims are managed under the Comcare scheme (Injuries Australia, sub. 125, p. 9);
- the model would create a ‘two level process within a State where workers and employers are dealt with differently when the same circumstances apply’ (Workers’ Compensation and Rehabilitation Commission (Western Australia), sub. 137, p. 4);
- self-insurance, whether under the Comcare scheme or another national scheme, should be a ‘privilege not a right and any model that would increase the density of self-insurers is not supported’ (ACTU, IRsub. 186, para. 61; the Australian Manufacturing Workers’ Union, IRsub. 188, para. 12);
- workers would not benefit from a move to self-insurance under the Comcare (or other national) scheme (ACTU, IRsub. 186, para. 63; the Australian Manufacturing Workers’ Union, IRsub. 188, para. 13);
- the model would not apply to small- to medium-sized employers or unincorporated employers (the ACT Government, IRsub. 23, para. 41);
- the Comcare scheme, a statutory benefits scheme, does not perform as well as other schemes against a range of performance indicators despite its limited coverage and generally white collar pool (The New South Wales Bar Association, IRsub. 190, p. 5), particularly against the Queensland scheme which has access to common law damages (the Queensland Law Society, IRsub. 245, pp. 1–2; the Australian Plaintiff Lawyers’ Association, IRsub. 252, pp. 8–9); and
- the model would have adverse impacts on the viability of State and Territory schemes as well as on employers remaining in those schemes (Victorian Government, IRsub. 256; WorkCover Queensland, IRsub. 205, 225; Workers’ Compensation and Rehabilitation Commission (Western Australia), sub. 137, p. 5; the ACT Government, IRsub. 243, para. 24;).

Many of these concerns were also raised about models B and C, which are outlined later in this chapter.

The Commission has assessed this model against each of the four public policy principles that the Australian Government Minister takes into consideration when considering the eligibility of an employer for self-insurance under the Comcare scheme. Much of this assessment is also pertinent to models B and C. This sub-section concludes with a consideration of other matters about the model.

Impacts on employees

All employees of a business which self-insured under the Comcare scheme would have the same legal entitlements regardless of the State or Territory they worked in. As the Department of Employment and Workplace Relations noted, 'all employees of an eligible corporation would have the same access to compensation and the same benefits' (sub. 166, p. 23).

The effects on employees from being subject to the Comcare scheme, particularly on their statutory benefits and workers' compensation coverage, would be relative to the particular State or Territory scheme in which they were employed. For the majority of employees, statutory benefits could improve from a move to the Comcare scheme. According to worked examples in the Workplace Relations Ministers' Council (WRMC) fourth Comparative Performance Monitoring report, the Comcare scheme ranked second amongst the schemes (behind the South Australian scheme) in terms of how its statutory benefits compared with pre-injury earnings, and the level of statutory benefits payable to injured high income employees (2002b, pp. 91, 94). Telstra noted:

> In comparison to the majority of State jurisdictions, the SRC Act has a generous weekly benefit rate for the first 45 weeks of incapacity, with 13 or 26 weeks being the usual period before reducing, notably in the two largest employing States, Victoria and New South Wales respectively. (sub. 136, attachment 2, p. 4)

However, statutory benefits should not be seen in isolation from other scheme elements. The Comcare scheme offers more restrictive access to common law settlements than a number of other schemes and they are capped at a relatively low level. WorkCover Queensland believed that there would be a 'loss of benefits' under any national scheme that restricted access to common law settlements and said 'the creation of a level playing field for statutory benefits comes at the expense of common law rights [in models A to C]' (IRsub. 225, p. 5).

Some multi-state employer participants considered that the model would enable greater attention to be given to the prevention of work-related injuries, illness and fatalities rather than, as currently, on compliance with different State and Territory schemes. As the Pacific National noted:

> Rather than being proactive and developing better prevention and implementation strategies, internal safety management staff must spend time training and researching jurisdictional differences. (sub. 169, p. 7)

On the other hand, some workers who were previously covered under an existing State or Territory scheme might not be covered under the Comcare scheme (and possibly vice versa) because of differences in the definition of employee and in the use of deeming provisions. Elsewhere the Commission has recommended action to coordinate definitions between jurisdictions (model D).

Also, some participants considered that there were elements of the Comcare scheme which would adversely affect employees. The Australian Manufacturing Workers' Union noted that:

> ... Comparative to other workers compensation systems, AMWU members covered by the Comcare system (Federal government employees e.g. Department of Defence) are generally treated more fairly and equitably. However, this is not necessarily the position of employees covered by self insurers under the Comcare system. The AMWU has required to be extremely active in supporting our injured members in those circumstances. With one of our large employers, union officials have been involved in negotiating arrangements additional to the provisions of the Act. ... the presence of an industrial agreement/policy on how claims are to be managed appears to be an essential factor in improving the claims management behaviour of self insurers. (IRsub. 231, para. 13)

It also noted difficulties :

> ... due to the lack of statutory time limits on the decision makers. Injured/ill workers have 30 days for reconsideration with internal review process and 60 days for an application to the external review process. No such time limits exist for the insurer, which is very unfair for those who are waiting for a determination on acceptance of liability. Financial hardship can be significant as workers use all their sick, annual or long service before having to rely on Centrelink payments. The system could be made more efficient by the introduction of time frames for the decision making processes. (IRsub. 231, para. 14)

These concerns would not necessarily limit organisational change. The impacts on employees, were the employer to move to the Comcare scheme, could be a matter for discussion during enterprise bargaining negotiations. Should there be adverse impacts from a move, the employer may wish to offer countervailing benefits.

Impacts on employers

Major considerations for employers in deciding between adopting the Comcare scheme (or any alternative national scheme) and continuing with their existing State and/or Territory scheme(s) would include: costs of achieving and maintaining self-insurer status; level of current premiums (and, related to this, the effects of any cross-subsidies); the benefits payable to workers; claims and injury management efficiencies; and savings from dealing with only one jurisdiction.

In self-insuring under the Comcare scheme, eligible employers could:

- avoid the costs and complexities of meeting different State and Territory scheme requirements. These include not only self-insurance requirements, but also situations where employers are currently self-insured under some State and Territory schemes, and pay into premium pools in other jurisdictions for various reasons, such as where

they do not meet the minimum employee criteria of particular jurisdictions (such as Queensland's threshold of 2000 local employees);

- introduce equality across the full spectrum of compensation, rehabilitation and return to work for their workers; and
- introduce one corporate OHS and workers' compensation culture and practice.

As an example of cost savings, Sing Tel Optus estimated that it would save approximately $2 million of its annual workers' compensation cost of $6 million, were it permitted to self-insure under the Comcare scheme (sub. 57, p. 11).

There would also be improved competitive neutrality between private and Australian Government (or previous Australian Government) employers. Sing Tel Optus considered that, were it permitted to be self-insured under the Comcare scheme, it would:

> … be on a level playing field with Telstra so we can achieve the same competitive advantages as Telstra by being subject to the same, more efficient, workers' compensation arrangements. (sub. 57, p. 3)

Telstra pointed out that, in respect of its total incapacity payments under the Comcare scheme, there would be overall reduction on weekly benefits of about 10 per cent or $1.4 million a year if it were to come under State and Territory schemes (sub. 136, attachment 2, p. 4).

However, there were various criticisms of the Comcare scheme, particularly of its statutory benefit structure (including its limited access to commutations), administration, licensing costs and dispute resolution processes.

The National Council of Self Insurers believed that:

> … the benefits provided by, and administrative arrangements associated with Comcare in its current form could make it more costly for national employers operating across several jurisdictions. (IRsub. 223, p. 2)

Among the concerns of the Westpac Banking Corporation about the Comcare scheme were the following:

- The need to adopt Comcare administrative policies and procedures are viewed as a constraint on Westpac's ability to develop and implement its own tailored management programs, particularly in the development of rehabilitation policies and procedures.
- The benefits structure of Comcare is such that it provides benefits that are more generous in both monetary amount and the period over which benefits are provided than the state-based schemes.
- The availability of payment of normal weekly earnings up to 45 weeks under Comcare is seen as providing a disincentive to employees to effect rehabilitation during that time.

- Without having performed an extensive cost/benefit analysis, it is questionable as to whether there is any financial benefit in terms of licence fees, bank guarantees, actuarial costs and audit costs. By way of example … Westpac's national self-insurance licence fees incurred for each State and Territory as at 30 September 2002 were a total of $881,655.00. It is Westpac's understanding that licence fees under Comcare would be for an amount between approximately $800,000.00 and $1,000,000.00. (IRsub. 229, p. 1)

The Insurance Australia Group argued that:

> It is also questionable whether Comcare's main dispute resolution forum — the Administrative Appeals Tribunal — is suitable for resolving private sector disputes. (sub. 89, p. 15)

Whether an individual employer will gain from a move to the Comcare scheme will depend on whether there is an overall increase in the costs of compensation and claims management for the employer and how this compares with any offsetting cost reductions (such as compliance cost reductions) and less tangible benefits such as those that derive from having a common OHS culture and uniform compensation arrangements. The outcomes of such a benefit–cost calculation is contingent on the circumstances of individual employers. In this vein, the Australian Chamber of Commerce and Industry expected that:

> … national companies, with operations in a number of jurisdictions and in competition with Commonwealth entities, particularly those currently holding individual state/territory self-insurance licences, would carefully examine this option in the light of their own circumstances, licensing fees, the licensing conditions, and the application of the Commonwealth OHS Regime. (IRsub. 196, p. 11)

As employers would have a choice as to whether they joined a national scheme using Comcare's existing conditions, they would only do so if they assessed that the benefits to them exceeded the costs. It they did not, they would continue with their existing arrangements.

Risk to the Australian Government

The Commission sought the advice of the Australian Government Actuary on the risk to the Australian Government of allowing private employers to self-insure under the Comcare scheme (appendix B).

The Australian Government Actuary advised that, if the self-insured employer meets its claims liability, there is no direct financial exposure to the Australian Government. However, there is a risk to the Australian Government if the licence of a self-insurer is revoked (say because of employer insolvency) and the bank guarantee fails to cover the claims liability incurred under the period of the licence. The bank guarantee:

- may be of an insufficient amount because of: 'expected insufficiency'; estimation error; failure of the reinsurer to cover certain claims; inadequate allowance for claims arising from insolvency or latent exposures; fraud; and higher than expected inflation; and
- is not accessible to the Australian Government (through Comcare) because the bank has failed, or because of fraud.

In the case of the bank guarantee being of an insufficient amount, the potential exposure to the Australian Government is the residual level of claims liability (the difference between the whole of the claims liability and that portion that is covered by the bank guarantee). However, in the case of concurrent bank failure or fraud, the Australian Government could potentially be exposed to the whole of the claims liability.

Whilst the Australian Government Actuary did not report directly on the size or probability of these risks (apart from noting that bank failure would be 'very unlikely'), the Commission notes that instances of schemes being exposed to the claims liability of an insolvent self-insurer have been very few. Details of those few Australian self-insurance failures and subsequent government responses are given in chapter 12, box 12.1).

To reduce the risk to the Australian Government, the Australian Government Actuary proposed that specific prudential requirements could be strengthened as follows:

- bank guarantee — requiring a minimum amount of $5 million, requiring catastrophe reinsurance retention (which the SRCC previously required), or imposing a blunter approach such as the central estimate of claims liability plus 40 per cent;
- reinsurance — providing for actuaries to advise on the entire reinsurance arrangement for approval under the scheme;
- financial capacity — requiring a different or additional hurdle such as a minimum level of net tangible assets, minimum wage roll, or some combination of these;
- actuarial valuation of liabilities — imposing an 'approved actuary model';
- reporting — improving the reporting requirements of self-insurers; and
- licence revocation — making more explicit the processes governing the revocation of the licence.

The Commission notes that a review by Bateup Actuarial + Consulting Services (Bateup) of the Australian Government Actuary report (as well as of the Taylor Fry report, see later) was commissioned by the Law Council of Australia. Bateup expressed the view that the report provided a 'sound discussion of the nature of direct financial risks to the Commonwealth'. She also considered that the areas of the prudential framework suggested for consideration of change also appeared reasonable but needed further investigation (2004, pp. 3–4 in IRsub. 250).

The Insurance Council of Australia expressed the view that prudentially regulating self-insurers under the Comcare scheme, which is a long tail scheme, poses an 'immense' obligation on the regulator:

> In addition to establishing the value of the liabilities, the prudential regulation of self insurers requires you continually assess the financial viability of their business … [and considered]
>
> One solution to this problem is through the appropriate use of insurance to either a low, or perhaps even ground, level of internal exposure, with cover being provided by APRA licensed insurers. As the law currently stands, it is only through APRA licensed entities that the Commonwealth Government can be assured of effective prudential regulatory oversight of the balance sheet of the organisation carrying long term financial risk. (IRsub. 260, p. 2)

In the Interim Report, the Commission expressed support for the Australian Government Actuary's proposals to strengthen the financial capacity requirements. This would reduce the probability of an employer collapsing under the Comcare scheme, as only financially sound employers would be eligible to self-insure. Further, in the unlikely case that they do fail to meet their claims liability, the strengthened bank guarantee requirements would minimise the probability of the guarantee being insufficient. Additional measures to those proposed by the Australian Government Actuary which could also reduce the residual risk to the Australian Government are described in chapter 12 on self-insurance.

The Commission notes that, since the Interim Report, the SRCC has reviewed its prudential requirements for self-insurers in consultation with the Australian Government Actuary. Its proposed new prudential conditions (box 5.3) are to apply to existing self-insurers after 1 July 2004 and to new self-insurers from the date of licence commencement. The SRCC also proposes to undertake additional monitoring of self-insurers under the scheme. The new requirements appear to exceed those proposed initially to the Commission by the Australian Government Actuary.

Impacts on the State and Territory schemes

The model would impose some competitive discipline on the operation of State and Territory schemes.

Several participants, particularly, State and Territory governments (for example, Tasmania, Western Australia, Queensland and the Australian Capital Territory) considered that there would be adverse impacts on their schemes if employers exited to self-insure under Comcare (or a national self-insurance or insurance scheme). In general, their concerns about this model (as well as models B and C) focused on the possible premium increases for employers remaining in State and Territory schemes, particularly, small- to medium-sized enterprises, rather than the viability of them.

The impact on premium rates in existing schemes should, in principle, differ according to whether those who exit are currently self-insured or premium payers.

Currently self-insured

If the exiting employer is *currently self-insured* and is paying the State or Territory scheme a licence fee and levy which reflects the administration cost of regulating it, then there should be minimal direct financial impact on the State/Territory scheme. The self-insured employer is already outside of the premium pool. Although the scheme would lose the financial revenue from the levies and fees, it would also forgo the administration cost.

The Australian Chamber of Commerce and Industry pointed out that:

> ... as many major corporations are already self-insured and pay only a licensing fee, rather than paying premiums to the WorkCover Authorities, ... the impact on jurisdictions financial viability and consequently premium rates would be minimal. The smaller jurisdictions already have a premium income based on SMEs and manage their business around their constituency. It could be argued that this is a management and efficiency issue rather than an issue of income stream. (IRsub. 196, p. 12)

Box 5.3 **New prudential requirements for self-insurers under the Comcare scheme**

The SRCC has introduced the following new requirements for self-insurers under the Comcare scheme. The requirements apply to existing self insurers after 1 July 2004 and to all new self-insurers from the time of licence commencement:

- The level of bank guarantee required of self-insurers will increase. Licensed self-insurers will be required to obtain bank guarantees for an amount which is the greater of their outstanding claims liabilities at the balance date of their projected outstanding claims liability in 12 months (for 6th year licensees), 18 months (for 4th–5th year licensees), or 24 months (for 1st–3rd year licensees) calculated at the 95th percentile, plus one catastrophe reinsurance retention amount. The minimum bank guarantee will be subject to a minimum of $2.5 million and must be obtained from a bank which has a credit rating of, or equivalent to, Standard and Poor's AA group or better.
- Licensed self-insurers will be required to advise the SRCC of any significant increase in employee numbers, any significant increase in the risk profile of the work undertaken, or any material change to its financial position.
- Yearly account must now be provided to the SRCC within seven days of the licensee having to produce them under the Corporations Act or Australian Stock Exchange listing rules.
- Requirements for licensed self-insurers to have liability reports prepared by suitably qualified and experience actuaries will be aligned with that of APRA. Actuaries must be a Fellow of the Institute of Actuaries Australia and have at least five years post-qualification experience as an actuary in general insurance. Furthermore, the actuary must not be an employee of a partner of the organisation which provides financial audit services to the licensee or who in any way has a material financial dependence on the auditor.
- Other requirements will include: ensuring greater sufficiency in the claims administration component of the bank guarantee amount; requiring actuaries to describe and comment on the suitability of licensees' reinsurance arrangements; and clarifying where a second liability report may be required.

The SRCC has also adopted a process of financial monitoring of self-insurers to alert it of any impending failure. The process will involve using media and ratings agencies as well as reviewing self-insurers' audited financial statements. The process, which will be outsourced, will be piloted prior to 1 July 2004.

Source: Comcare, pers. com.

There are, however, two caveats:

- the fixed costs of regulating self-insurers would have to be spread over fewer self-insurers and, accordingly, levies and fees for those that remain in the State and Territory scheme may need to be increased; and

- non-Australian Government employers self-insuring under the Comcare scheme would continue to be subject to State and Territory OHS legislation and, unless the Australian Government amended its own OHS legislation (as proposed in this report), this might necessitate the implementation by State and Territory governments of cost recovery mechanisms in those jurisdictions where OHS activity is funded from workers' compensation premiums. Some schemes (for example, New South Wales) already have provisions to levy employers exiting to self-insure under the Comcare scheme to recover the costs of regulating them for OHS purposes. However, other schemes, such as Tasmania, do not.

Currently premium paying

If the exiting employer is *currently a premium-payer* under a State or Territory scheme, then there could be higher premiums for the remaining employers. This could occur if there were cross-subsidies between risk pools and if the exit was from pools that paid higher premiums than the costs they brought to the scheme. It could also occur within a risk pool, if the exit was of employers with below average contributions of risk. This situation could exist between large and small employers as has been explained by the Victorian WorkCover Authority (VWA 2000). In addition, it could occur in risk pools where industry rates are affected by premium capping, as the capacity to provide such cross-subsidies from within a pool or the scheme could be compromised by the loss of firms paying uncapped premiums. Conversely, lower premiums may result if the exit was of employers who benefited from existing cross-subsidies. Thus, the influence of employers exiting to Comcare (as well as models B and C) on the premiums for those remaining in existing schemes depends on the nature and extent of cross-subsidies built into the schemes and the volume of insurance that would be lost. If the nature and extent of cross-subsidisation is small and the 'loss' of insurance business is small, then any influence on premiums for remaining employers would be very small.

As indicated above, only a limited number of participants expressed an interest in self-insuring under the Comcare scheme and many of those already self-insure in one or more jurisdictions.

Cross-subsidies and small business

In privately underwritten schemes, the nature and extent of cross-subsidies is likely to be limited by commercial considerations and competitive pressure among insurers. As the Insurance Council of Australia argued:

> … there would be few, if any, cross subsidies in a privately underwritten model unless forced upon insurers by some regulatory process. The reason for this is that the competitive dynamic of the market would act as an effective restraint on the "loading

> up" of certain policies so that others could effectively be underpriced. (IRsub. 260, p. 4)

In the publicly underwritten schemes, most governments have policies to limit the nature and extent of cross-subsidisation.

Information available on the nature and extent of cross-subsidisation in existing schemes is dated and fragmentary. The RiskNet Group, quoting data prepared in 1999 by PricewaterhouseCoopers for the NSW Rating Bureau on NSW Employers' Premiums Distributions averaged over seven years from the NSW scheme, provided the following indication of cross-subsidisation among premium bands during the 1990s:

- $1–$10 000 premium band, accounted for 26.3 per cent of premium, but 31.6 per cent of total claims costs (underpaying);
- $10 000–$100 000 premium band, accounted for 33.0 per cent of premium, but 30.9 per cent of total claims costs (overpaying);
- $100 000–$500 000 premium band, accounted for 20.9 per cent of premium, but 19.9 per cent of total claims costs (overpaying); and
- more than $500 000 premium band, accounted for 19.8 per cent of premium, but 17.6 per cent of total claims costs (overpaying) (sub. 120, p. 7).

The Economic Development Committee of the Victorian Parliament's *Inquiry into WorkCover Premiums for 2000/01* reported the Chief Executive of the Victorian WorkCover Authority stating in evidence that:

> ... since about 1995/96 or 1996/97 there has been a relatively constant level of cross subsidy [from large (payroll of $4 million or more) to small (less than 20 employees) employers] in the scheme. It is now [2000-01] sitting at around $73.3 million ...
> and that
> ... small business is paying 27 per cent of total premium, compared to their cost (to the scheme) which is 32 per cent. (2001, p. 55)

The Victorian WorkCover Authority submitted that the cross-subsidy was a legacy of the bonus and penalty system which had applied before 1993 and that it '… has progressively been removing this cross-subsidy, in 1999-2000, the cross-subsidy of small business still represented about 3 per cent of premium or $50 million' (2000, p. 25). Capping of premium rate increases was reported as one of the factors delaying its removal.

As noted in chapter 10 on premium setting, although some cross-subsidisation is unavoidable for small to medium-sized employers (these are typically charged industry

rates), large employers should, in principle, be charged premiums that more closely reflect the expected costs they bring to a scheme (that is, be experience rated).[2]

However, Bateup pointed out:

> ... not all components of claims costs and expenses [of large employers] are experience rated (for example, large claims). [And] ... even if the employer is "experience" rated, cross-subsidies exist in some jurisdictions. If large employers were to leave the State schemes, the extent of any such cross-subsidisation would directly affect scheme finances (and the remaining small to medium sized employers). (2004, p. 5 in IRsub. 250)

An example of how the mix of own claims expense (experience) and industry risk are changed with employer size in setting premiums is provided by the Victorian WorkCover Authority (2000, figure 7, p. 20). In that example, the contribution of experience is varied from 0 per cent at remuneration of $50 000 or less to a maximum of 90 per cent at remuneration of $1 billion. The relative contribution of claims expense is less with less riskier industries, but none-the-less contributes some 75 per cent of the total premium at a remuneration of $100 million. Different schemes use different schedules for defining the relative contribution of own claims expense and industry risk.

The ACT Government reported that:

> The ACT workers compensation regulations require that insurers minimise, as far as possible, the extent of cross subsidisation both across and within industries. However, the relatively small size of many industries in the ACT means that it is not possible to eliminate cross subsidisation ... The withdrawal of large employers would have an impact on the size of the premium pool within industries and potentially across industries, depending on an individual insurer's employer/risk profile. (IRsub. 243, para. 27)

It also considered that the loss of premium from large employers could lessen the incentive of insurers to offer coverage in the Australian Capital Territory, leading to a lessening of competition in the market placing '… upward pressure on prices, with a negative impact on those smaller businesses who are unable to self-insure … [and that this] … has the potential to exacerbate an already difficult situation for scheme participants' (IRsub. 243, paras 28, 33).

Bateup believed that the resulting increase in premium rates for small and medium sized employers from loss of premium revenue with increased self-insurance '… could be due to

[2] Whilst it is possible that an exiting multi-state employer has a policy covering a small number of employees in one or more State or Territory, for which it is not possible to eliminate cross-subsidies, removing a few policies of this size from the premium pool would have a minimal effect on the premiums of those employers remaining in the pool.

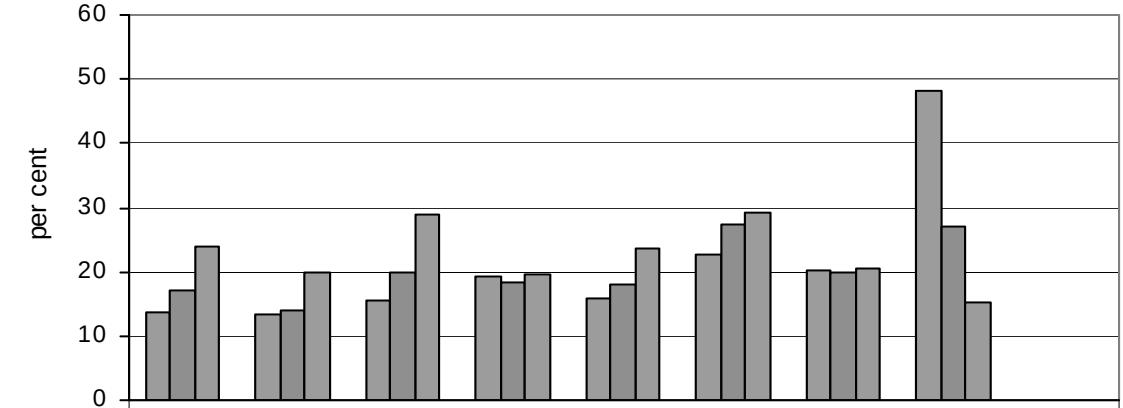
both loss of claims cost subsidies from the large employers and/or an increase in their share of expenses due to the loss of economies of scale' (2004, p. 6 in IRsub. 250).

Scale economies

One argument against allowing exit from State schemes is that the smaller pool may increase costs for the remaining employers by reducing the chance to exploit economies of scale (that is, reduce the chance to spread unavoidable fixed costs over a larger number of employers). This argument was advanced by a number of participants, including: Bateup (2004 in IRsub. 250); the Victorian Government (IRsub. 256); and WorkCover Queensland (IRsub. 225).

Figure 5.1, which shows the schemes' administration costs as a proportion of their income, suggests that there is no obvious correlation between administration costs and the size of the scheme.

Figure 5.1 **Administration costs**
per cent of total scheme income



	NSW	Vic	Qld	WA	SA	Tas	Com	Sea
1999-00	13.6	13.5	15.6	19.4	15.8	22.6	20.1	48.1
2000-01	17.0	14.0	19.8	18.3	18.1	27.3	20.0	26.9
2001-02	23.8	19.9	28.8	19.5	23.5	29.2	20.6	15.1

Source: HWSCA (2003).

The largest scheme (New South Wales) has higher costs than Western Australia and similar costs to South Australia. A number of other factors, such as whether the scheme is privately underwritten, may also influence administration costs. Economies of *scope* could be realised by insurers who were selling products other than workers' compensation insurance.

WorkCover Queensland reported that it maintains a regional presence in 24 locations throughout the State and that erosion of the premium pool could lead to downsizing and

centralisation of regional office functions, as had occurred with the progressive exit since 1998 of 24 self-insuring employers, representing 15 per cent of premium and claims costs (IRsubs 205, 225). It reported that its regional presence was highly valued by injured workers and employers in remote areas.

Premium volatility

Another possible impact of exiting premium-payers is that premium volatility could increase in State and Territory schemes. The Workers' Compensation and Rehabilitation Commission (Western Australia) said:

> There are concerns that the departure of large employers could have a negative impact on residual premium pools. Premium systems require industry premium pools of sufficient size to reduce the pendulum effect of large claims. (sub. 137, p. 5)

The Queensland Government said:

> Large national employers leaving a State workers' compensation scheme will directly contribute to increased risk and volatility in that scheme, increasing the burden for the other employers remaining in the scheme. It is not possible at this time to estimate the level of volatility, given the access points for any national scheme has not been determined. (sub. 154, pp. 16–17)

There would only be an increase in the volatility of premium rates if the premium pool became so small that the pooling effect of insurance is lost. However, this is not supported by the evidence:

- schemes that have a small premium pool do not have increased volatility in premiums. The South Australian scheme has a pool that is significantly smaller than New South Wales and Victoria, and South Australia has allowed a large number of premium-paying employers to exit the premium pool to self-insure;
- reinsurance policies can be taken out by the State or Territory scheme to reduce volatility; and
- privately underwritten schemes can involve very small markets (for example, the Australian Capital Territory) because insurers offer workers' compensation as part of their overall business with individual firms.

Impact on premiums

For the Interim Report, the Commission sought actuarial advice from Taylor Fry on the impacts on premiums in the State and Territory schemes of enabling eligible employers to self-insure under the Comcare scheme (appendix D). The focus of that report was on the impacts of the exit of premium payers, although the impacts of exiting self-insurers were also considered briefly.

There were difficulties in obtaining the necessary data from several of the States selected for the Interim Report analysis. Accordingly, Taylor Fry relied upon alternative sources of data — the ABS for average weekly earnings by industry and jurisdiction and Dunn and Bradstreet for the numbers of employees in large corporations — and extended the analysis to all States and Territories. The data were used to estimate remuneration and then premiums. A limitation with this information is that it is not related directly to the remuneration (and thus premiums) of an employer for workers' compensation purposes.

The following were among the notable impacts identified by Taylor Fry:

- the estimated reduction in premium revenue for the State and Territory schemes from exiting premium-paying employers eligible to self-insure under the Comcare scheme could range from a likely $154 million or 2.7 per cent (if one in five employers exited) to a maximum of $771 million or 13. 5 per cent (if all eligible employers exited); and
- as large premium-paying employers in existing schemes tend to be charged experience-rated premiums (and thus, should not in principle be cross-subsidising other employers), their exit should have a relatively neutral impact on the schemes.

Taylor Fry also noted that, using data provided by the Tasmanian Government, if the number of self-insurers reduced from the current 15 to four, as a result of all those eligible exiting to join a national self-insurance scheme, then there would be a significant increase in individual regulatory contributions required to cover the same level of services. It said that the impact on the larger schemes would not be as great as that indicated for Tasmania, provided sufficient self-insurers remain. However, a subsequent analysis using Victorian data by am actuaries indicates that there could be a similar proportionate eligibility to transfer to national self insurance in Victoria (appendix D).

However, those schemes with a small number of self-insurers (for example, the Northern Territory has six and the Australian Capital Territory has eight) have lower fees and levies for comparable self-insurers than imposed by schemes with more self-insurers. For example, a self-insurer in the Australian Capital Territory pays only $10 000 (plus GST) in licence application and administration fees over the three year period of the licence, which is considerably lower than the schemes with more self-insurers. This suggests that the fixed costs of assessing self-insurance applications and administering self-insurers on an ongoing basis, and thus the impacts of exiting self-insurers on those that remain, are likely to be very low.

In her commissioned review of the Taylor Fry report, Bateup agreed that there is uncertainty in the results produced stemming from the inability of Taylor Fry to access scheme data which necessitated reliance on alternative data and the making of a number of subjective assumptions (2004, p. 4 in IRsub. 250). Comment on Bateup's commissioned review by the principal author of the Taylor Fry report is provided at appendix D.

Subsequent to the Interim Report, am actuaries was asked to explore the sensitivity of the Taylor Fry results to varying levels of loss of premium revenue and levels of cross-subsidies provided by exiting employers (appendix D and table 5.1). The results indicate that, with 'plausible' estimates of loss of premium revenue and cross-subsidies, the impacts on scheme average premium rates of model A would be very small. For example, based on an estimated level of exiting employers' premium as a proportion of premium income falling between 2.7 per cent (if one in five employers exited) to 13.5 per cent (if all eligible employers exited); and cross-subsidies falling between 15 per cent to 25 per cent, the impact on average premiums would fall within the range of 0.3 per cent to just over 3.0 per cent. This represents an average percentage increase in premium rate and not an additional percentage point increase to the average premium. The impact on individual businesses would vary around the average.

Table 5.1 **Increase in scheme average premium rates for remaining employers**

per cent

Assumed level of cross-subsidy (per cent)	*Assumed level of premium exiting scheme (per cent)*									
	2	*4*	*6*	*8*	*10*	*12*	*14*	*16*	*18*	*20*
10	0.2	0.4	0.6	0.8	1.0	1.2	1.5	1.7	2.0	2.3
15	0.3	0.5	0.8	1.1	1.4	1.8	2.1	2.5	2.9	3.3
20	0.3	0.7	1.1	1.4	1.9	2.3	2.7	3.2	3.7	4.2
25	0.4	0.8	1.3	1.7	2.2	2.7	3.3	3.8	4.4	5.0
30	0.5	1.0	1.5	2.0	2.6	3.1	3.8	4.4	5.1	5.8

Source: Appendix D.

Am actuaries noted that, while the estimates of cross-subsidies were based on its experience, information to determine the level of cross-subsidies between employers exiting and those remaining is 'not readily available, mainly because of the difficulty in determining the "true" or expected cost for each employer'. The range of rates of cross-subsidy used in the analysis is substantially larger than the publicly reported rates cited above.

The recent availability to the Commission of Victorian data has enabled a check to be made on the previous analysis quantifying the impact that alternative national self-insurance could have on the Victorian scheme's remuneration base and premium pool. The data enabled more accurate classifications to be made of workplaces and of the ability to qualify for alternative national self-insurance, and hence a more accurate estimate of impacts. Using the same criteria for assessing a corporation's potential to self-insure, the analysis estimated smaller effects than indicated previously. For example, under model A, if it was assumed that one in five of potentially eligible corporations were to transfer to the Comcare scheme, then the estimate of the premium reduction to the scheme would be 1.6 per cent as opposed to the 2.7 per cent indicated by the Taylor Fry analysis. Similarly,

if it was assumed that all eligible corporate employers were to transfer to the Comcare scheme, then the estimate of the premium reduction would be 8.1 per cent as opposed to the 13.5 per cent indicated by the Taylor Fry analysis (appendix D).

Other matters

Outstanding claims liability

When an employer moves from a State or Territory publicly underwritten scheme to self-insure under the Comcare scheme, there would be an outstanding claims liability that needs to be managed. This would also arise when an employer moves between insurers in a privately underwritten scheme, or between paying premiums and self-insuring within a scheme.

Essentially, there are two existing methods for managing outstanding claims:

- The employer could take responsibility for the outstanding claims. For an existing self-insurer this would be a continuation of their current management of the claims. A premium-paying employer, however, would require a payment from the State or Territory scheme to cover the cost of managing the outstanding claims, as the premium it paid should have, in principle, covered the cost of those claims.
- Alternatively, the State or Territory scheme could manage the outstanding claims for a premium-paying employer from the premiums already paid.

Under both methods, schemes in deficit could consider obtaining deficit-funding contributions from exiting employers. This currently applies in New South Wales.

At present, there is no provision within the Comcare scheme to govern the situation where an employer were to exit and return to a State or Territory scheme. Amendments would need to be introduced to address this matter.

Data

A further effect of employers leaving a State or Territory scheme to self-insure under the Comcare scheme is that information about their claims may no longer be available to the State or Territory. The Queensland Government stated that:

> Queensland would be very concerned that a national scheme may undermine this comprehensive and consistent data record with various inclusions or exclusions of this States' workers. (sub. 163, p. 18)

The lack of data may hamper the scheme's ability to regulate the employer for OHS. To overcome this concern, the SRCC could increase the reporting requirements for self-

insurers and pass the data on to the relevant State and Territory. This increased data collection would be reflected in the increased reporting requirements recommended by the Australian Government Actuary.

An alternative national self-insurance scheme (model B)

Under this model, the Australian Government could draft legislation to establish a new national self-insurance scheme for which all eligible employers could apply for a licence. The new scheme would operate as an alternative to the insurance and self-insurance arrangements of the existing State or Territory schemes. Unlike model A, this model would not be limited by the competition test. The Australian Government Solicitor has advised the Commission that the Australian Government could rely on its corporations power to enact the new national self-insurance scheme (box 5.3 and appendix C).

The new scheme would need to have provisions for self-insurance licensing requirements (such as prudential and claims management requirements), definitions of 'employee', 'work-related injury or illness' and 'employer', statutory benefits, injury management (claims management, return to work and rehabilitation) and dispute resolution. In terms of scheme design, the Australian Government could offer the current Comcare arrangements, or redesign particular scheme elements, such as the current long tail benefit structure and the dispute resolution procedures along the lines recommended in the following chapters. Whichever course is taken, consultation with key stakeholders would be required to facilitate its implementation. However, should a 'blank sheet' approach be taken to scheme design, there is a risk that the model would be significantly delayed or not be implemented.

Either the Australian Government Actuary's proposals to strengthen prudential requirements or the SRCC's new prudential requirements (box 5.3 above) would address the Australian Government's concerns about being further exposed to risk. Instruments to deal with residual risks are discussed further in chapter 12.

However, because the new national self-insurance scheme would be based on the exercise by the Australian Government of its corporations power, it would not be available to non-corporate employers.

Smaller corporate employers may not, individually, meet the prudential tests. To deal with this, there may be scope within the new scheme to introduce provisions to enable smaller corporate employers to obtain a group self-insurance licence. Clayton observed:

> The prudential and size criteria which operate with respect to self-insurance preclude this option being open, on an individual basis, for small to medium size employers. However, especially in the United States from the 1950s, this barrier has been mitigated by the development of group self-insurance, an arrangement which allows employers engaged in similar industrial, commercial or professional area, or having a similar risk profile, to join together in a group which becomes a self-insured entity. It is thus a

> mechanism through which comparatively small employers may achieve self-insured status. (1997, p. 7)

In the United States of America, group self-insurance has become popular among certain groups of employers, such as local government, as workers' compensation has become more difficult to obtain. However, a contentious issue has been 'joint and several liability' under which each member of the group assumes legal responsibility for all other members.

As with model A, employers opting into this new national self-insurance scheme could also be covered by Australian Government OHS legislation.

Like model A, participant support for this model was mixed. A number of participants supported the establishment of a national self-insurance scheme. For example, the Institute of Actuaries Australia argued that:

> A national self-insurance framework is needed, which would allow at least large national employers to self-insure on a uniform basis across Australia. (sub. 88, p. 3)
>
> At a minimum, national self-insurance would be available to large national employers, in parallel with the existing arrangements. (sub. 88, p. 19)

The National Council of Self Insurers considered:

> A properly constructed national self insurance framework would lead to greater efficiencies, offer significant savings to companies operating in more than one state and contribute to the ability for companies to compete in the global market place. (IRsub. 223, p. 1)

However, given that the scheme requirements remain uncertain, support from a number of employers was conditional on the design of the scheme and subject to stakeholder negotiations. For example, the National Australia Bank argued that its 'preferred model would therefore be a national scheme that would be developed federally with all parties being involved' (sub. 42, p. 6).

Other participants were not supportive of this model. The Queensland Workers' Compensation Self Insurers' Association noted there were differing and diverse views among its members on a national scheme.

> Concerns have been expressed by a number of members in relation to the potential negative impact of a national scheme for Queensland based self insurers.
>
> A concern has been raised by some members on running two congruent schemes (one national optional scheme and one state based scheme), namely the confusion for service providers and workers if payment structures, costs and entitlements are different.
>
> As a matter of importance it is felt that any move towards national options or consistency should have primary regard for equality for national as well as state based self insurers.

> The financial performance of the Queensland Scheme should be considered at length if national consistency is an option thus ensuring stakeholders in the Queensland Scheme are not disadvantaged in any way. (IRsub. 253, p. 1)

The Australian Manufacturing Workers' Union supported the ACTU position that self-insurance is a privilege and not a right and considered that:

> 8. From the evidence provided by the Commission, it is clear that employers are supportive of a national self-insurance scheme, as long as its benefit levels and scheme structures are less than those under the current Comcare scheme.
>
> 9. As the Interim Report gives little time or discussion to benefit levels and support arrangements that provide incentives for injured or ill employees via "benefit step downs and caps", the AMWU assumes that the Commission itself is supportive of a benefit structure that would not see a replication of the current "comparatively high level of income replacement" under Comcare.
>
> 10. The AMWU represents employees who are currently covered by the Comcare scheme. We have many difficulties with the administration of this scheme; however we will not support processes that advantage large employers who wish to self-insure by reducing the benefits currently paid to our ill/injured members covered by the Comcare scheme. (IRsub. 188, p. 2)

And the NSW Minerals Council requested that coverage under model B (and model C) be 'broad and inclusive' of all industry sectors, including the coal industry in NSW, to provide equitable access to competitive mainstream workers' compensation arrangements' (IRsub. 235).

Comments on elements that would be desirable in a new scheme were provided by a range of participants and covered most elements. Most would have liked a more detailed proposal to comment on. Many based their comments on elements of the Comcare scheme that they considered should be changed to provide a better national scheme. Participants providing detailed comment on elements of model B included: the Australia Industry Group (IRsub. 240); Australia Meat Holdings (IRsub. 247); the Australian Chamber of Commerce and Industry (IRsub. 196); and the National Council of Self Insurers (IRsub. 223). Elements frequently mentioned by employers and employer organisations included benefit structures and dispute resolution.

The Commission's comments on individual elements of workers' compensation schemes are provided in the following chapters.

Most of the detailed comments on the implications of model A given above are applicable to this model. They differ in degree of impact on State and Territories to the extent that more employers would be able to avail themselves of the option of national self-insurance. The extent to which this would occur is a matter of conjecture and would depend in part on the detail of the scheme elements and how they related as a whole relative to the existing

schemes used by employers. However, analysis of Victorian data by am actuaries indicates that if it is assumed that one in five of eligible corporations were to transfer to national self-insurance, then it is estimated that 'both scheme remuneration and premiums would reduce by around 4% to 5%' (appendix D).

An alternative national insurance scheme (model C)

Depending on the performance of a nationally available self-insurance scheme and the nature of reform in the State and Territory schemes, the Australian Government may wish to consider an alternative national insurance scheme at a later date. An alternative national insurance scheme would require the exercise of the Australian Government's constitutional powers and the establishment of new provisions.

In the Commission's view, private underwriting of such a scheme would be desirable. Although research into the relative merits of public and private underwriting suggests that sound management can be more important than the form of underwriting, the characteristics of private underwriting which promote themselves to the Commission are:

- capital risk being accepted by the capital markets;
- competition in the marketplace, with incentives for efficiency and innovation; and
- greater transparency of any governmental influence over premiums.

Participants raised questions about the nature of the provisions of a national insurance scheme. Australia Meat Holdings Pty Ltd said:

> The most difficult issue will be achieving a workable national legislation. No doubt various elements will be taken from the existing schemes. However, which elements will be chosen? Will the elements most beneficial to employers be chosen? Will the elements most beneficial to employees be chosen? Will the elements most beneficial to multi-state employers be chosen? Will the elements most beneficial to single employers be chosen? (IRsub. 247, p. 2)

Irrespective of the provisions, the added competition and ability to be covered for inter-state operations under a single scheme would be welcomed by many small and medium businesses who operate inter state and would be too small to self-insure nationally. However, national employer organisation were varied in their views on this model. The Australian Industry Group said:

> We support the development of the model. We believe that the introduction of competitor scheme would have a positive impact for employers. However, there are a number of important concerns to be addressed before such a scheme could be implemented. (IRsub. 240, p. 17)

The concerns it nominated related to cross-subsidies, benefit levels, private underwriting and fraud prevention.

The Australian Chamber of Commerce and Industry, while supporting optional national self-insurance and more consistent State insurance arrangements, did not support the introduction of a national insurance option:

> On balance industry does not support the recommendations as many employers have concerns over the proposal and would oppose a move to a national workers compensation scheme. Whilst the proposal would ensure national consistency and a level playing field for all employers in terms of premium setting and conditions it does create its own problems and issue for employers and jurisdictions alike. (IRsub. 196, p. 13)

The issues and problems it identified related to: its belief that there would be a tendency to increase cross-subsidies to the disadvantage of small and medium enterprises; the difficulty of gaining political agreement on a range of issues, including its recommendations to reduce premiums and close benefits loopholes; and the potential for growth in a 'compensation mentality' (IRsub. 196, p. 13).

Australian Business Limited (ABL) did not support the model, saying:

> We can see no valid reason for competition between national and state based schemes within a single jurisdiction. The vast majority of Australian businesses operate within one jurisdiction, most are small businesses. Small businesses present workers' compensation schemes with particular challenges. For most small businesses workplace injuries are an unusual and irregular event. They do not and are unlikely to ever have the systems and approaches necessary for effective post injury management. As a consequence they are particularly reliant on the support available via the formal system, be that from the statutory authority, licensed service providers or others. We would be particularly concerned that this support, and the development of additional assistance to smaller businesses and their employees would be dissipated if spread across two jurisdictions.
>
> ABL would also be concerned that a competitive environment may result in unhelpful comparisons being made between the relative costs of the State and national schemes. As the Commission has noted the major determinant in scheme performance over time appears to be how the scheme is managed rather than the underwriting model. On balance we believe there would be a real risk that price differentials between the two systems will focus attention on the superficial differences between the schemes rather than the underlying cost drivers. (IRsub. 249, pp. 7–8)

The opening up of a national scheme to all corporate employers would have potentially significant impacts on existing State and Territory schemes compared with models A and B. Those public schemes with large unfunded liabilities may need to arrange cover for those liabilities through appropriate 'exit' arrangements. Some of the smaller schemes may ultimately become unviable on a stand-alone basis if a significant number of employers switch to the national scheme. Nevertheless, the operation of a number of private underwriters in small jurisdictions such as Tasmania, the Northern Territory and the Australian Capital Territory attests to the capacity of insurers to operate with small

premium pools for any one class of insurance. Further, it is unlikely that the changes would occur at a pace that precluded the steady rationalisation of existing arrangements.

Small and medium enterprises

For small and medium enterprises, insuring nationally as opposed to regionally offers the scope for the further development of cost-saving innovations, such as the specialised risk pool provided to it members by the Pharmacy Guild in New South Wales. It would also facilitate the development of specialist support organisations, such as the Professional Employers Organisations (PEOs) which originated in the United States of America in the early 1980s.

PEO's contract with small to medium sized businesses to manage employee related issues such as workers' compensation claims, payroll, payroll tax and OHS. The PEO hires the employees of a small to medium enterprise and leases them back to that company. They currently employ around 3 million employees in the United States of America and mostly deal with small employees with an average of 16 employees. PEOs also operate in Canada.

Liability for OHS is jointly shared between the worksite employer and the PEO, so an employee leasing agreement normally includes an undertaking on the part of the worksite employer to implement safety measures and procedures designed by the PEO. This is a solution to the claim that small and medium enterprises often lack the resources to properly instigate safety measures. PEO's also have better access to rehabilitation resources and a network of employment opportunities for injured workers who are unable to receive re-employment at the pre-injury workplace. As a large purchaser of insurance, the PEO may be able to access premium discounts on workers' compensation insurance that would not be available to individual small employers.

An issue in the United States of America which would also be relevant in Australia is whether both the host employer and the PEO are covered by the exclusive remedy provided under workers' compensation and therefore protected from common law action. In America, this is largely determined by statute in the relevant US State. In Australia, the corollary would be whether either the host employer or the PEO would be treated as a 'third party' and therefore liable for common law damages in jurisdictions which otherwise prohibit these actions against an employer (such as South Australia). One answer may be to deem both to be 'co-employers' and establish joint liability. Related issues of labour hire in Australia are dealt with in detail in chapter 6.

A national cooperative body (model D)

Many participants were in favour of a cooperative approach to a national workers' compensation framework. They included State and Territory governments (or their

agencies) as well as groups representing workers such as unions (with a bias to national consistency rather than national uniformity) and injured workers' associations, as well as employer representatives. Indicative of their comments is the following statement by the Australian Chamber of Commerce and Industry:

> … we do strongly advocate nationally consistent standards, regulations and systems managed and administered consistently by the jurisdictions, and the creation of mechanisms to make that happen. The objective should be for a co-operative approach between the Commonwealth and State/Territory governments while still leaving primary responsibility for these systems with the States. (trans., pp. 790–1)

Such a cooperative approach can be fostered by institutionalising cooperation among the Australian, State and Territory governments on workers' compensation matters. It would be independent of, and to operate in parallel to, the Australian Government's own initiatives as set out under models A to C.

The model would be developed differently from — but would, nonetheless, be broadly compatible with — that proposed for OHS in chapter 4. This reflects the Commission's view, based on feedback from participants, that OHS should proceed immediately to progressive development of uniformity, whereas for workers' compensation, there would be benefit in progressively developing greater national consistency.

In the Interim Report, the Commission identified the following specific features of the model as it would apply to workers' compensation:

- A national body established by Australian Government legislation. It would have a board of five to nine members with relevant expertise and skills in workers' compensation matters.
- The national body would be directly accountable to the WRMC which would determine the priority areas requiring attention, make decisions on recommendations made to it, appoint members to the national body and oversight its performance.
- The national body's main functions would be to develop standards for consideration by the WRMC, collect data and undertake/coordinate analysis and research, and monitor and report on the performance of workers' compensation arrangements.
- The Australian, State and Territory governments would retain responsibility for implementation, with a view to improving the performance of their respective schemes and, over time, achieving greater national consistency.
- Funding of the national body would be shared by the jurisdictions.

Initially, the national body for workers' compensation could focus on developing nationally consistent scheme elements over which there is common agreement or where agreement is likely (for example, definitions of employee, employer and

wages/remuneration), rather than on intractable matters (for example, common law and private underwriting).

It was envisaged that the national body for workers' compensation and that for OHS, as proposed in chapter 4, would cooperate in areas where the responsibilities for one body could influence the progress of the other. This cooperation could be formalised by a memorandum of understanding between the two bodies which outlined consultation protocols and/or overlapping representation (for example, on a decision making or advisory panel).

The national body for workers' compensation would provide a forum for the jurisdictions to share their ideas and experiences on workers' compensation matters, thus promoting some of the positive attributes of 'competitive federalism' as discussed in chapter 2. It would give a higher formality to the development of national consistency in workers' compensation arrangements than that which currently applies through HWCA.

There was considerable participant support for the basic thrust of the model as outlined in the Interim Report. Among the participants expressing unequivocal support were the Australian Industry Group (IRsub. 240, p. 6), the Insurance Council of Australia (trans., p. 1270), the National Association of Road Freight Operators (IRsub. 236, p. 4) and the Australian Meat Industry Council (IRsub. 234, p. 3).

Participants supporting some aspects of the model, or advocating modifications to it, included the Queensland Council of Unions (IRsub. 241, p. 3), the Law Council of Australia (IRsub. 250, pp. 2–3) and Australian Business Limited (IRsub. 249, p. 8).

However, participants such as the Australian Chamber of Commerce and Industry (IRsub. 196, p. 14), WorkCover New South Wales (IRsub. 255, p. 3), the ACT Government (IRsub. 243, para. 44) and WorkCover Queensland (IRsub. 255, p. 1) did not support the model as outlined, considering that existing arrangements through HWCA were adequate.

The following examines some specific issues about the model as well as participants' concerns in response to the Interim Report.

Is there a need for a new national body?

Some participants considered that the existing cooperative arrangements through HWCA were appropriate and working well and, accordingly, suggested that there was no need for a new national body for workers' compensation. The Workers' Compensation and Rehabilitation Commission (Western Australia) said that:

> … [the HWCA] model is not overarching but genuinely leaves primary responsibility for workers' compensation to the states and territories, relying on beneficial

> competition between schemes to drive scheme improvements and service delivery innovations. (sub. 137, p. 6)

The Australian Chamber of Commerce and Industry considered that the:

> The proposed interim arrangements [for a national scheme] overseen by a small expert board [with functions as broadly proposed by the Commission] will be an ineffective and cumbersome process, which would not operate any more effectively than the current processes under the more consultative jurisdictional processes of [the Heads of Workers' Compensation Authorities]. (IRsub. 196, p. 14–15)

Furthermore, it said that the model would 'lock in an expectation, even perhaps a pre-determined certainty, that a national scheme will be introduced some time in the future' (IRsub. 196, p. 14).

Some State and Territory government participants considered the model would duplicate, rather than replace, existing cooperative arrangements for workers' compensation. The WorkCover New South Wales was of the view that:

> The HWCA has been an effective body for jurisdictions to discuss and agree on consistent approaches to workers compensation arrangements. The establishment of a new body to oversight workers compensation, with funding shared by jurisdictions, is not supported on the basis that it would simply add another level of bureaucracy without any evidence of improved outcomes for either injured workers or employers. (IRsub. 255, p. 3)

The ACT Government did not support:

> .. the establishment of a new national body that would require additional funding to be provided by the States and Territories. These functions are already being performed by the Heads of Workers' Compensation Authorities … and no duplication or additional bureaucracy is necessary or desirable. (IRsub. 243, para. 44)

It also noted that the monitoring of schemes, including data collection is already undertaken through the WRMC, with the publication of outcomes in comparative performance monitoring reports (IRsub. 243, para. 43).

Attention was drawn by State and Territory government participants to the work facilitated through HWCA. WorkCover New South Wales observed that cross-border arrangements was an example of 'successful cooperation' between the jurisdictions (sub. 151, p. 2). Similarly, the ACT Government noted the:

> ... the recent agreement to resolve long-standing cross-border workers compensation issues, and the amount of work that has already been done to improve consistency between jurisdictions. This is particularly evident in jurisdictions that share borders, such as the ACT and NSW, where significant elements of injury management processes are identical. (IRsub. 243, para. 46)

Nonetheless, while not reflecting on the professionalism or goodwill of its members, there is good reason to doubt the effectiveness of HWCA. Since 1997, when it released its report *Promoting Excellence: National Consistency in Australian Workers' Compensation*, HWCA's momentum for national consistency has slowed. Its work is now confined to reporting on comparisons between the jurisdictions' workers' compensation (and OHS) arrangements. Also, although cross-border arrangements are now being put in place in some jurisdictions, discussions commenced some ten years ago and implementation resulted from action initiated unilaterally by Queensland. Moreover, as noted in chapter 2, although these cross-border arrangements are intended to reduce compliance costs for employers, there is still ongoing uncertainty and confusion amongst employers about certain aspects.

Several State and Territory government participants considered that formalising existing cooperative arrangements for workers compensation would be useful. The ACT Government considered that:

> The HWCA is already well progressed in identifying and prioritising key outstanding issues in national uniformity for workers compensation. It is submitted that formalising the role of the HWCA, and requiring this body to report to the WRMC would be preferable to establishing an additional body that will duplicate most of the HWCA's work. The HWCA should be asked to progress priority national policy issues, including significant areas not fully dealt with by the Commission's inquiry, such as cost-shifting associated with the loss of superannuation and retirement savings associated with work-related injuries. (IRsub. 243, para. 47)

WorkCover Queensland suggested that:

> The problem of consistency across jurisdictions would be far better addressed through the formation of a small, professional committee. The nucleus of this committee could emanate from the Heads of Workers' Compensation Authorities (HWCA) or the Workplace Relations Ministers. Ideally, legislation could be enacted to formalise HWCA, which currently has neither the formal mandate nor the power to make and implement recommendations. Clearly, this committee would need fair representation from each state, and should not be driven solely out of the New South Wales or Victorian arenas. (IRsub. 225, p. 1)

The Commission accepts the view that duplication of existing cooperative arrangements for workers compensation would be undesirable and unnecessary. It envisages that model D would incorporate these arrangements, including absorbing HWCA. However, the national body should not be purely a formalised HWCA, as suggested by some participants.

Specific features of the model

Participants expressed a range of views on specific features of the model — including the composition of the board of the national body, stakeholder representation, the role of HWCA, the appropriateness of the WRMC, and the relationship between the new body and the WRMC.

The Australian Chamber of Commerce and Industry expressed the view that:

> The proposal for an interim board is we believe an unworkable proposal and ACCI would not support the proposal for the following reasons:
>
> - There appears to be no effective role for industry as there is no designated industry representative.
> - Board members are subject to political appointment.
> - The function set out [as proposed by the Commission] would in effect create a new Commonwealth bureaucracy.
> - There are no cost or operational benefits articulated in the proposal. (IRsub. 196, pp. 15)

The Law Council of Australia envisaged that the national body:

> … would be a representative body including governments and key stakeholders (such as unions, employers and the legal profession), which would develop standards for implementation by individual jurisdictions. These standards would be the "national frameworks" for workers' compensation, and would be subject to continuous monitoring in terms of their take-up and effectiveness in individual jurisdictions. (IRsub. 250, p. 6)

Australian Business Limited expressed the view that any national body 'should ensure the representation of industry, as essential to achieving improved workplace safety and rehabilitation outcomes', be independent of government and free to conduct research that it deems relevant 'without having to take into account political and other pressures that arise from time to time'. It further considered that the body could generate sufficient support from industry and other interested parties to be self-sufficient, but would benefit from a 'reasonable level of seed funding which will also give it sufficient time to establish its credentials. This, in our view would be a legitimate application of public monies, particularly as the commitment would be limited both in quantum and time' (IRsub. 249, pp. 8–9).

The ACT Government said it was unclear that:

> ... the body proposed by the Commission would include any representation from the ACT, or whether there would be any mechanisms to ensure that the views of ACT employees, businesses and the community would be adequately represented. (IRsub. 243, para. 45)

While not commenting on the model specifically, the ACTU expressed the view that:

> National consistency objectives and policies should be developed through a tri-partite representative body of employer, employee and government members. (IRsub. 186, p. 12)

Several participants expressed concern that the WRMC, to which the national body would present advice and recommendations, would not be appropriate in relation to workers' compensation matters. Aon noted that:

> History and past performances indicate this council experiences division due to party politics and power politics, depending on electoral cycles and other government business being negotiated, such as trade-off opportunities. (sub. 73, p. 5)

The Tasmanian Government also expressed the concern that the Council:

> … is largely dominated by industrial relations issues, which may, at times, overshadow important OHS and workers' compensation issues. This may be accentuated in jurisdictions where industrial relations, OHS and workers' compensation are not within the same ministerial portfolio. (sub. 135, p. 3)

Many of these matters have been traversed, or are similar to those discussed, in chapter 4 in relation to the cooperative model proposed for OHS. In view of that discussion, as well as participants' comments above, the Commission considers it particularly desirable that:

- the national body should have appropriate and effective levels of independence, expertise and accountability;
- there should be minimal duplication of existing cooperative arrangements; and
- stakeholder input should be of an advisory nature only.

Accordingly, the revised features of the model would be as follows:

- A national body would be established by Australian Government legislation and would have an independent board of five to nine members with relevant expertise and skills in workers' compensation matters.
- Because the national body would be established by Australian Government legislation, members of the board would need to be accountable (and issue an annual report) in the first instance to the relevant Australian Government portfolio minister. The minister would appoint board members, subject to approval by the WRMC. The board could also issue an annual report to the WRMC.
- The national body's main functions would be to develop nationally consistent scheme elements for consideration by the WRMC, collect data and undertake/coordinate analysis of research, and monitor and report on the performance of workers' compensation schemes. It is envisaged that the current WRMC performance monitoring role would be transferred to the national body.

- The WRMC would decide on recommendations of the national body and determine priority areas for the national body's attention.
- The Australian, State and Territory governments would retain responsibility for implementation, with a view to improving the performance of their respective schemes and, over time, achieving national consistency.
- Funding of the national body would be shared by the jurisdictions.
- The national body would have the ability to appoint advisory committees. For example, it could appoint:
  - an advisory committee consisting of non-government stakeholders such as representatives of employers (including of small and medium enterprises), insurers, self-insurers, workers (including injured workers), lawyers, medical providers and allied health professionals, and rehabilitation providers, to formalise advice on stakeholder concerns; and
  - an advisory committee consisting of government regulatory officials from the Australian, State and Territory agencies responsible for administering workers' compensation arrangements to formalise advice on operational matters. This committee could absorb the existing HWCA. It could also include regulatory officials from the Australian Prudential Regulation Authority.

Progress towards national consistency

Progress towards national consistency through the national cooperative body alone would most likely be slow and inconsistencies would remain for a long time. The Victorian Employers' Chamber of Commerce and Industry said that establishing a national body to advance consistency (and uniformity) may not be a solution and drew attention to the slow progress made in road transport and the work of the (then) National Road Transport Commission (sub. 66, pp. 7–8). The Business Council of Australia noted in relation to workers' compensation (and OHS) that:

> Over the last 20 years there have been a number of attempts to develop and implement national standards on the basis of cooperation between the Commonwealth, States and Territories. None of these have been fully successful. (sub. 143, p. 1)

It may be difficult for a national body to reach meaningful agreements on a wide range of matters, given that workers' compensation arrangements need to be seen in their entirety, consisting of inter-related elements reflecting the unique trade-offs and bargains made among different stakeholders in each jurisdiction over time. The Northern Territory Government observed:

> A cooperative approach, which involves all jurisdictions in the process of developing nationally consistent workers' compensation standards appears reasonable. However, given the variety of workers' compensation schemes across jurisdictions, achieving

> consensus would be difficult and as such, would require substantial commitment by all jurisdictions. The Territory is committed to working towards nationally consistent standards where achievable and appropriate. (sub. 144, p. 14)

And Skilled Engineering said:

> … although Model D, a national cooperative model, is good in theory it is unlikely to happen as there are too many political agendas and too much compromise between the states and territories. (IRsub. 208, p. 8)

The Law Council of Australia recognised the concern that the cooperative nature of the model would 'produce only slow or minimal reform' and suggested the model incorporate mutual recognition (which it called 'model D+'):

> Mutual recognition would allow multi-jurisdictional employers of a minimum size (which would have to be decided upon) to obtain workers' compensation coverage in the employer's "home" State or Territory jurisdiction for its workers located in other States or Territories. This would allow for a degree of competition between States and Territories so as to encourage best practice, within the cooperative approach of Model D. (IRsub. 250, p. 9)

Indeed, it is envisaged that, model D would allow for agreements between governments that could facilitate mutual recognition of certain aspects of workers compensation arrangements, including if necessary, in relation to self-insurance licensing requirements. The agreements could be implemented through the new national body. The issues arising with such arrangements are discussed further in chapter 12.

The relationship between workers' compensation arrangements and other statutory compensation schemes, such as compulsory third party schemes, would add complexity to the model. The New South Wales Bar Association alluded to this and submitted that a 'co-operative model on peripheral issues such as journey claims is inappropriate whilst different compensatory regimes exist in third party insurance' (sub. 64, p. 4).

Concerns about slow progress towards national consistency suggest that the focus of a national body on workers' compensation may well be more successful, initially, on core technical and other matters, such as the definition of 'employee', 'employer' and 'wages' which are a source of added compliance costs for employers operating in more than one jurisdiction.

The Australian Industry Group was cognisant of the 'political obstacles' that are seen 'all too frequently in any co-operative forum between the Commonwealth and the States and Territories':

> We think these obstacles can be overcome by a concentration of the new body's energy on priority issues which are aimed at achieving consistency in the areas of workers' compensation that generate compliance costs for employers who operate in more than one state or territory. (IRsub. 240, p. 21)

It went on to identify the areas of priority for the immediate, medium and long term:

> We see the highest priority areas as:
>
> - The development of a national data set on workers compensation.
> - Uniform national definitions of "employer" and "employee". …
> - Uniform national definitions of "illness and injury". …
> - Uniform national definitions of "work relatedness". …
> - Uniform national definitions of attribution. …
> - A uniform national approach to notification of injuries and incidents.
> - A uniform national definition of pre injury weekly earnings.
> - A uniform national approach to the role of consultation with employees including the posting of policies and legislation.
>
> Issues for the medium term should include:
>
> - Given the weaknesses we have expressed earlier in having competing systems of benefit levels, uniform national benefit structures including dealing with the issues of common law, commutations and journey and recess claims. …
> - Dispute resolution.
>
> The other areas such [as] underwriting and premium setting should be considered in the longer-term context of developments in the workers' compensation area. (IRsub. 240, pp. 21–2)

The Commission is of the view that the proposed agenda of the new national body is a matter for the WRMC, on the advice of the new board, to determine. Further consideration of individual matters, including appropriate principles to guide the development of each, are set out in ensuing chapters.

If an alternative national self-insurance model were implemented, it may accelerate progress under this model towards national consistency amongst existing schemes. A possible national insurance scheme (model C) may eventually be necessary if there is little progress in other forums.

A new national approach for the catastrophically injured

A national approach to the funding of long term care of the catastrophically injured has been the subject of discussions among the Australian, State and Territory governments in ministerial meetings on insurance issues. The catastrophically injured are generally persons with spinal cord injury (paraplegia and quadriplegia), brain injury or other major trauma (for example, severe amputations) who require lifetime care of a specific type (for example, home nursing and personal care) (PwC 2003).

The total annual compensable cost of claims from the catastrophically injured is estimated at around $520 million to $600 million. An estimated 61 per cent of catastrophic injuries are caused by motor accidents (and thus funded predominantly by compulsory third party schemes), 15 per cent are due to public liability negligence, 13 per cent are due to the workplace (and thus funded by workers' compensation schemes), and 11 per cent are due to medical negligence (PwC 2003).

The interest in a national approach to the catastrophically injured arises because of various concerns about existing funding arrangements which include the following:

- services to the catastrophically injured are provided or purchased by many and varied organisations;
- coverage and benefits vary by injury type and compensation status (box 5.4);
- lump sum payments do not adequately provide for long term care; and
- there is very little consistency in the definition, entry points or eligibility criteria for the catastrophically injured (Institute of Actuaries Australia Long Term Care TaskForce 2003 and Moran 2002).

Box 5.4 **Varying approaches to the funding of long term care**

The funding of the care received by a catastrophically injured person varies considerably depending on the cause and type of accident — whether work-related, traffic-related, medical negligence, bad luck or misadventure. For example, a catastrophically injured person can receive under:

- *all workers' compensation schemes*, no fault periodic payments, with common law lump sums available in Queensland, Western Australia, Tasmania and the Australian Capital Territory;
- *public liability* (including medical indemnity), common law lump sums; and
- *compulsory third party schemes*, no-fault payments in Victoria, Tasmania and Northern Territory and common law lump sums in other jurisdictions.

Source: PwC (2003).

For an individual workers' compensation scheme, the catastrophically injured (which is a small sub-group of long tail claimants) accounts for only a small proportion of the total number of claims, but a larger proportion of overall scheme cost. For example, McKinsey & Company in its recent report of the New South Wales WorkCover scheme estimated that catastrophic injuries represented about 100 new claims a year or less than 1 per cent of all claims, but about 5 per cent of the scheme's outstanding claims liabilities (2003, p. 49). Claims can significantly impact on employers and on the financial cost of those schemes that do not shift a proportion of these costs to the Australian Government.

A national approach to the funding of long term care of the catastrophically injured has a number of advantages. A key advantage is that it would have the potential to ensure that a minimum standard of care could be provided to this group of injured persons regardless of the cause of accident. However, there would be challenges in devising an appropriate scheme, particularly in relation to its financial management (for example, sources of funding and asset management) and operation and administration.

The Commission accordingly supports the current review by the Australian, State and Territory governments of these matters.

5.3 The Commission's proposals for a national workers' compensation framework

Existing national coordinating mechanisms have proven ineffective in resolving the compliance complexities and costs for multi-state employers. Although an objective of HWCA is to develop initiatives which promote 'consistency' of scheme design and administration, the tangible outcome of its efforts over the last five years has been on providing comparative information about the schemes. The WRMC, whilst generating comparative performance monitoring information, is primarily concerned with industrial relations matters.

Each of the models set out above has merit and, taken as a package, would form an implementation strategy which could progressively reduce the compliance burdens and costs for multi-state employers and the mobile workforce.

In essence, the proposed strategy is for the Australian Government to introduce model A immediately, and commence drafting appropriate legislation for the alternative national self-insurance scheme under model B. The appropriateness and timing of implementing model C could be assessed at a later date. These schemes would operate in parallel to existing State and Territory schemes. The expectation from model D would be for an increasing level of consistency of schemes across Australia. In this respect, it must be recognised that a change to any one element of a scheme can have far reaching and unexpected impacts on overall scheme outcomes. Actuaries typically suggest that it takes up to five years to determine the outcome of any change.

The Commission has no evidence of support by the States and Territories for a single uniform national workers' compensation scheme. Many of the stakeholders at the individual jurisdictional level have suggested that concessions won in hard fought negotiations would not be willingly surrendered for the sake of national uniformity. For example, Australia Meat Holdings Pty Ltd said it:

> … opposes any move towards national uniformity in workers compensation. We support the retention of the state-based workers compensation jurisdictions. Employers who currently operate in Queensland would be drastically disadvantaged if they had to operate under a scheme that was more like any other jurisdictions. This is because in our view as a national based Queensland based business that this scheme is the most economically viable. (IRsub. 247, p. 1)

Importantly, the Commission does not support national uniformity of workers' compensation for its own sake. In arriving at this view, the Commission recognises that the majority of employers (who are predominantly small to medium enterprises) and their employees operate only within a single jurisdiction. To them, national uniformity has little relevance. Further, it is not apparent that there is any single perfect or best scheme. Best practice can be reflected in a number of different ways and schemes must constantly adapt to the wider socio-economic environment within which they operate. Innovation and learning should be encouraged. It is for these reasons that, when commenting on the various elements of workers' compensation schemes, the Commission has sought to highlight the important principles upon which individual elements should be based and indicate their implication for choice of appropriate measures, rather than focus on the choice of measures for individual elements of the scheme per se.

Implementation issues

To enable the early provision of some of the benefits to the economy from improved national frameworks for workers' compensation, the Commission considers that the initiation of models A and D could be undertaken immediately. For model A, as indicated above, the Minister should indicate his willingness to declare as eligible for self-insurance, corporations that qualified under the SRC Act. The prudential supervisory arrangements that have been discussed could be used to vet applications and provide ongoing monitoring.

Likewise for model D, the Australian, State and Territory governments could indicate their willingness to focus on developing and adopting nationally consistent scheme elements over which there is likely to be common agreement, such as in definitions of employee and employer, and the remuneration basis for premiums.

To facilitate decision making by employers about their possible uptake of model A, the Australian Government should also preface legislative action about extending the scope of its OHS regulatory regime to qualifying self-insurers. It could also preface, at an early stage, the consultative arrangements for determining individual elements of model B.

To minimise the costs of delay, the Commission considers that the development of the detail of model B should be based on consultation around an existing operational scheme, such as Comcare, rather than using a 'blank sheet' approach for its design. Such an

approach would focus the consultation process on rebalancing a few major elements of the scheme on 'best practice', rather than seeking to achieve a new balance over all elements at the one time. The latter has a higher risk of delay and of failure as it would be more difficult to determine a balanced outcome.

All the negotiations about future models should focus on the core objectives of workers' compensation — adequate financial compensation; appropriate rehabilitation and return to work; affordable premiums; and full funding by employers.

The Commission considers that the stepped implementation which has been recommended is a cautious approach which permits the impacts of improved national frameworks for workers' compensation to be revealed to all stakeholders in a controlled manner. Adjustments and reviews could be made along the way as and when required.

Institutional arrangements

The Commission considers that the exiting institutional arrangements for Comcare would require extensive modification and development to support the Australian Government's expanded role in providing better national frameworks for workers' compensation (and OHS). The existing operation of the regulatory framework provided by the SRC Act effectively results in the regulator, the SRCC, being a stakeholder body embedded within Comcare, rather than a stand-alone regulator. As was prefaced in chapter 4, what would be required for good regulatory governance is:

- the establishment of regulatory functions by statute;
- a separation of regulatory functions from service functions; and
- establishment of regulatory independence through (a) the appointment of Commissioners with the requisite experience and skills to direct the regulator's operations and be held accountable for them, and (b) appropriate funding and staffing of the regulator to undertake the specified regulatory functions.

In keeping with its stepped approach to expanding nation-wide provision of worker's compensation under a single scheme, the Commission considers there should be incremental growth and development of the institutional arrangements for its regulation. In part, this would be dependent on growth in the required regulation.

As the first step, model A, involves regulation of additional employers under the existing Comcare scheme, it could be undertaken with the existing regulatory arrangements. However, with increased regulatory demand and to avoid conflict of interest developing, or the appearance of the same, a minimalist option would be to provide the SRCC with dedicated resources from within Comcare to act independently and administratively 'ring fence' its regulatory functions from Comcare's operations.

The second step, model B, involves legislative action to establish an alternative national self-insurance scheme. It is anticipated that it would involve a substantial increase in regulatory requirement. Either at this stage or earlier, the Commission considers that legislation should be introduced to revamp the governance structure as well as operational independence of the existing regulator along the lines of that required for good regulatory governance, as indicated above.

The final step, model C, involves establishing an alternative national workers' compensation insurance scheme. This would involve a further substantial increase in regulatory requirement as insurers were approved to enter (and exit) the scheme. However, their prudential supervision would continue to be provided by the Australian Prudential Regulatory Authority.

Further details of the existing and revised institutional arrangements which would be appropriate to support an expanded Australian Government role in the provision of worker's compensation under an alternative national scheme are given in appendix E on institutional arrangement for national worker's compensation frameworks.

RECOMMENDATIONS

The Commission recommends that the Australian Government develop an alternative national workers' compensation scheme to operate in parallel to existing State and Territory schemes by taking the following steps progressively:

- ***step 1 — immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme, subject to meeting its prudential, claims management, occupational health and safety and other requirements;***
- ***step 2 — commence, at the same time, the development of an alternative national self-insurance scheme for corporate employers who wish to join such a scheme, and who meet prudential, claims management and other requirements; and***
- ***step 3 — in the longer term, consider the establishment of an alternative national premium-paying insurance scheme for corporate employers who so wish, including small to medium enterprises, which would be competitively underwritten by private insurers and incorporate the national self-insurance scheme established under step 2.***

The Commission recommends that the current regulatory framework for the oversight of the Australian Government's workers' compensation schemes and occupational health and safety regimes be strengthened by progressively developing the Safety, Rehabilitation and Compensation (SRC) Commission as a stand-alone regulator. The SRC Commission to:

- ***be controlled by a board of independent directors appointed for a fixed term on the basis of their expertise and skills;***
- ***have a full-time director appointed as chairperson; and***
- ***be provided with its own staff and funding.***

The Commission recommends that, independent of, and operating in parallel to, the progressive development of a national workers' compensation scheme, the States and Territories join with the Australian Government to establish immediately a new national body for workers' compensation having the following features:

- ***establishment by Australian Government legislation with an independent board of five to nine members appointed by the Minister on the basis of their relevant expertise and skills, the appointment to be approved by the Workplace Relations Ministers' Council (the Council);***
- ***it would develop nationally consistent scheme elements for consideration and approval by the Council, collect data and undertake/coordinate analysis of research, and monitor and report on the performance of workers' compensation schemes. It would take over the current performance monitoring role of the Council;***
- ***its priority work areas would be determined by the Council;***
- ***it would have the ability to appoint advisory bodies, noting the importance of stakeholder concerns and operational matters to maintaining the contemporary relevance of workers' compensation schemes; and***
- ***its funding would be shared by the jurisdictions.***

The Australian, State and Territory governments would retain responsibility for implementation, with a view to improving the performance of their respective schemes and, over time, achieving national consistency.

6 Defining access and coverage

This chapter is concerned with the term of reference which asks the Commission to identify and report on '… a consistent definition of employer, employee, workplace and work-related injury/illness and fatalities relevant to both workers' compensation and occupational health and safety (OHS) that could be adopted consistently across Australia'.

As discussed in chapter 3, the principal objective of OHS regulation is the prevention of injury and illness. All jurisdictions have adopted a common approach by enacting specific OHS legislation which establishes a general duty of care that is imposed on employers, the self employed, persons in control of premises where work is undertaken, occupiers, suppliers and employees. The duty — to remove or reduce work risks arising from workplace hazards — is broad in coverage and is owed to both employees and to others who may be affected by the worksite, work activity or work equipment. Workers have obligations not to put others at risk and to obey the reasonable instructions of their employers in relation to OHS. Despite this commonality of approach, the legislative provisions are not uniform across Australia and there exist differences in the detail of their application.

Workers' compensation is more narrowly focussed on the employer-employee relationship. It is concerned with providing adequate financial compensation and appropriate rehabilitation and return to work for employees in the event of work-related fatality, injury or illness while ensuring that employer contributions cover scheme liabilities. Typically, but not exclusively, employers make payments by way of insurance, or insurance-like, premiums to cover their financial risks. For self-insured employers, the financial risks are borne directly by the employer. Self-employed contractors, professionals, small businesses and farmers are typically not covered by formal workers' compensation schemes. Instead, they are responsible for arranging their own insurance for work-related fatalities, injuries and illnesses.

The coverage of workers' compensation is more limited than for OHS, being designed around three core criteria, namely:

- the claimant must be an employee (as defined by the relevant scheme);
- they must have suffered an injury or illness (or there must be a fatality) which is compensable; and

- there must be the requisite connection between the fatality, injury or illness and the claimant's employment (work-relatedness).

There are significant variations across Australian jurisdictions in the definitions adopted for establishing elements of all three criteria.

Importantly, there has been increasing variation in the nature of work relationships between workers and employers as contracting, casualisation and part-time work have increased. This has had implications, in particular, for the distinction between those workers who are regarded as employees and required to be covered by formal workers' compensation schemes, and workers who are regarded as self-employed contractors and are responsible for their own cover. In addition, the boundary between what is and what is not 'work-related' is not always clear cut, particularly for diseases of long latency or those which have a number of contributing factors.

Adding to this dynamic environment have been various court interpretations of legislative provisions, the financial performance of some workers' compensation schemes, the views and bargaining strengths of various stakeholders in the schemes and legislative responses by the jurisdictions. The resultant disparate approaches of the jurisdictions have contributed to the complexities and costs faced by an increasing number of employers and workers who operate across State and Territory boundaries (chapter 2).

The emphasis in this chapter is on definitions that are relevant for workers' compensation schemes. Definitions relevant to OHS matters were covered in chapter 4.

The next section discusses the definitions of employer and employee. Section 6.2 then deals with workplace and work-related fatality, injury and illness. Each section concludes with principles relevant to determining coverage.

6.1 Employer and employee

Definitions in workers' compensation legislation

Jurisdictions base their definition of the work relationships that should be covered by workers' compensation schemes on the common law definition of employee. The factors that courts consider when determining whether a work relationship is that of an employee or independent contractor are given in box 6.1. However, in their workers' compensation legislation, each jurisdiction supplements the common law definition through use of an unique set of inclusions ('deeming') and exclusions.

Box 6.1 **Factors courts consider when determining whether a worker is an employee or independent contractor**

The Full Bench of the Australian Industrial Relations Commission provided the following summary of the current state of the law as it pertains to determining whether an individual is an employee or independent contractor:

1. Whether a worker is an employee or an independent contractor turns on whether the relationship between the worker and the putative employer is to be characterised as a contract of service or a contract for the provision of services. The ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own. This question is answered by considering the totality of the relationship.
2. The nature of the work performed and the manner in which it is performed must always be considered.
3. The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it.
4. Consideration should then be given to the following 'indicia' bearing in mind that no list of indicia is to be regarded as comprehensive:
   (a) Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place of work, hours of work and the like. Control of this sort is indicative of a relationship of employment.
   (b) Whether the worker performs work for others (or has a genuine and practical entitlement to do so).
   (c) Whether the worker has a separate place of work and or advertises his or her services to the world at large.
   (d) Whether the worker provides and maintains significant tools or equipment.
   (e) Whether the work can be delegated or subcontracted.
   (f) Whether the putative employer has the right to suspend or dismiss the person engaged.
   (g) Whether the putative employer presents the worker to the world at large as an emanation of the business. Typically, this will arise because the worker is required to wear the livery of the putative employer.
   (h) Whether income tax is deducted from remuneration paid to the worker.
   (i) Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.
   (j) Whether the worker is provided with paid holidays or sick leave.

(Continued next page)

Box 6.1 (continued)

(k) Whether the work involves a profession, trade or distinct calling on the part of the person engaged. Such persons tend to be engaged as independent contractors rather than as employees.

(l) Whether the worker creates goodwill or saleable assets in the course of his or her work.

(m) Whether the worker spends a significant portion of his remuneration on business expenses.

This list is not exhaustive. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

Source: Abraham Abdalla v Viewdaze Pty Ltd t/a Malta Travel (2003) AIRC 927971.

Examples of workers deemed to be employees, and therefore included under workers' compensation coverage, include in:

- several jurisdictions — provisions to the effect that when contractors do not sublet the contract, nor employ workers, they are deemed to be employed by the principal. However, they must be engaged for the purposes of the principal's main business;
- New South Wales — outworkers, some contractors (as above), some rural contractors, taxi drivers, sales representatives, jockeys, certain harness racing drivers, ministers of religion and some timber getters;
- Victoria — timber contractors, drivers of vehicles used for carrying passengers for reward, contractors (as above);
- Queensland — sharefarmers who do not use mechanical equipment and get less than one-third of proceeds, salespersons paid by commission if the commission is not connected to the trade of the salesperson, contractors (as above), and labour hire workers; and
- Tasmania — volunteer fire fighters, police, ambulance workers and other prescribed volunteers.

Examples of workers who are specifically excluded from coverage include:

- crewmembers of fishing vessels;
- most sportspersons;
- outworkers in Tasmania; and
- persons employed on a casual basis where the purpose of the employment is other than for the employer's trade or business — in New South Wales, Western Australia, Tasmania and the Australian Capital Territory.

In the past, some jurisdictions have adopted definitions which are used for other purposes in order to gain the benefits of certainty and/or consistency, and to lower compliance and enforcement costs. For example, Queensland and the Northern Territory formerly used the income tax 'pay-as-you-earn' (PAYE) taxpayer definition to define workers required to be covered under their schemes. Since the demise of the PAYE definition for income tax purposes, the Northern Territory has introduced a provision that excludes persons when they have an Australian Business Number. This provision narrows the coverage and is currently being reviewed, with the intention of providing a broader definition that is also clear and unambiguous.

The Victorian Government drew attention to the definition used by their WorkCover Authority which sought 'to distinguish between genuine contracting relationships and those that amount to "fake self-employment", where a person, formally described as an independent contractor, is actually solely or overwhelmingly working for the one business entity' (IRsub. 256, p. 36). While noting that the Australian Taxation Office had taken steps to clarify this situation, it reported that the definition used in Victoria was derived from that used for their payroll tax purposes.

Queensland has recently introduced a 'results test', based on concepts used by the Australian Taxation Office to define personal services income. It excludes from coverage those individuals who satisfy all three of the following conditions:

- the individual is paid to achieve a specified result or outcome; and
- the individual has to provide the tools, plant and equipment, necessary to do the work; and
- the individual is liable for rectifying the defects in their work or for resulting damages.

WorkCover Queensland considered:

> The test identifies people who are not workers, giving all other individuals an entitlement to compensation. This reduces the need for multiple provisions deeming specific individuals to be workers, as well as reduces employer administration and compliance costs. (IRsub. 225, p. 13)

It also reported that a working party of the Heads of Workers' Compensation Authorities was currently exploring options to achieve consistency among jurisdictions based on the Queensland definition. As well, the working party was exploring options to achieve consistency in the definition of the remuneration base for the levying of premiums.

Coverage of workers under existing schemes

The nature of and variations in definitions, and shortcomings in available data sources, means that there is no agreed estimate of the extent to which workers are covered under existing workers' compensation schemes.

In its recent submission to the House of Representatives Standing Committee on Employment and Workplace Relations inquiry into Aspects of Workers' Compensation, the Department of Employment and Workplace Relations stated that '… up to 40 per cent of the workforce may no longer meet the test applied for coverage under the various workers' compensation schemes' (HoR, sub. 48, p. 3).

The Heads of Workers' Compensation Authorities (2002) *Comparison of Workers' Compensation Arrangements Australia and New Zealand* report (the most recent available) indicated that a total of some 8.21 million workers were covered under the major schemes during 2000-01. Given that the Australian Bureau of Statistics (ABS) (2002b) estimated that there were 9.16 million employed persons at June 2001, this would suggest a coverage of some 90 per cent of all workers.

However, this is an overstatement of coverage. Some workers hold more than one job during the year (the ABS (2001a) estimate that 7 per cent of the workforce hold two or more jobs and nearly all second jobs are not of a standard nature) and some, who worked inter-state, would be covered under more than one scheme. Aon stated in its submission that there are a significant number of 'nominal' policies in place to cover work outside the normal jurisdiction of business (sub. 73, p. 4).

Work by Moran (2002) using ABS (2000a) survey data on forms of employment during August 1998, indicated a coverage of 76.6 per cent. Application of the same methodology to more recent survey data (ABS 2002a), indicates coverage of approximately 78 per cent by November 2001. However, most schemes have legislated to include a wider group of workers than would be covered by the common law definition of employee. Conversely, those who are likely to be counted as covered by this methodology, but who may not be, are: owner managers of incorporated enterprises; family workers; people who work for payment in kind; and illegal workers.

The ABS' (2001a) survey of employment arrangements and superannuation, using household survey data collected during April to June 2000, estimated that, of total employed persons of 8.73 million, some 6.34 million employees reported they were covered by workers' compensation. This would indicate a coverage of 73 per cent. The estimate would be slightly higher if dependent contractors were included.

On all the available evidence, the Commission concludes that approximately three-quarters of employed persons are covered by workers' compensation schemes.

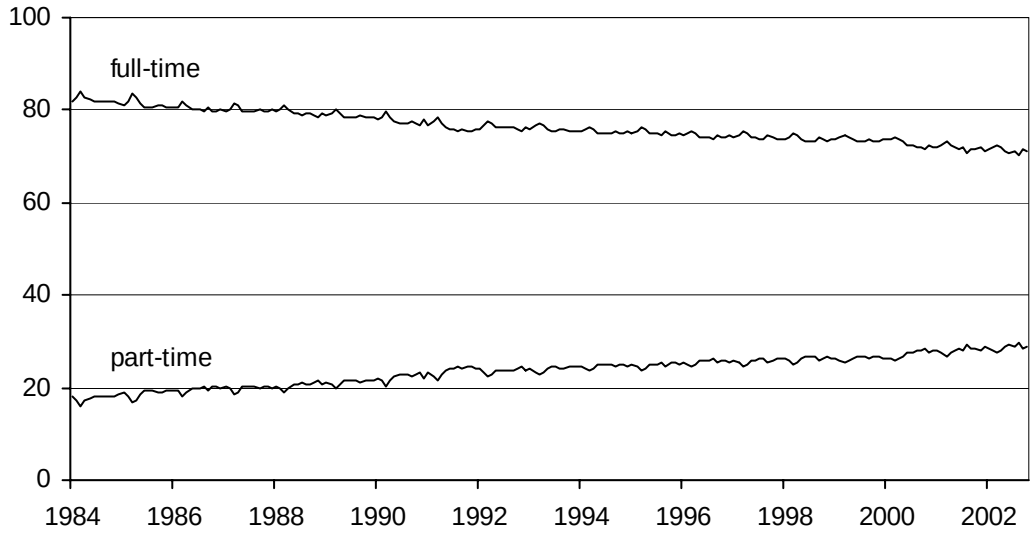
Traditional work arrangements

There has been a shift away from traditional employer-employee, full-time work arrangements over the last two or more decades and this has contributed to the decrease in the number of workers to which workers' compensation provisions apply. Data which

show the detail of the shift are limited, as labour force statistics are collected in relatively broad categories. The group that makes up 'non-traditional' is very disparate. It includes temporary workers, part-time workers, the self-employed, those employed on fixed terms, labour hire workers, outworkers, seasonal workers and unrecorded work.

The decrease in the proportion of full-time workers and the increase in the proportion of part-time and casual workers are shown in figures 6.1 and 6.2. Whilst casual and part-time workers are formally covered by workers' compensation legislation, they are often more likely to be unaware of their entitlements or be afraid of the impact on their job of reporting a claim.

Figure 6.1 **Share of persons employed full-time and part-time, 1984 to 2003**
per cent of total employed persons (monthly data)



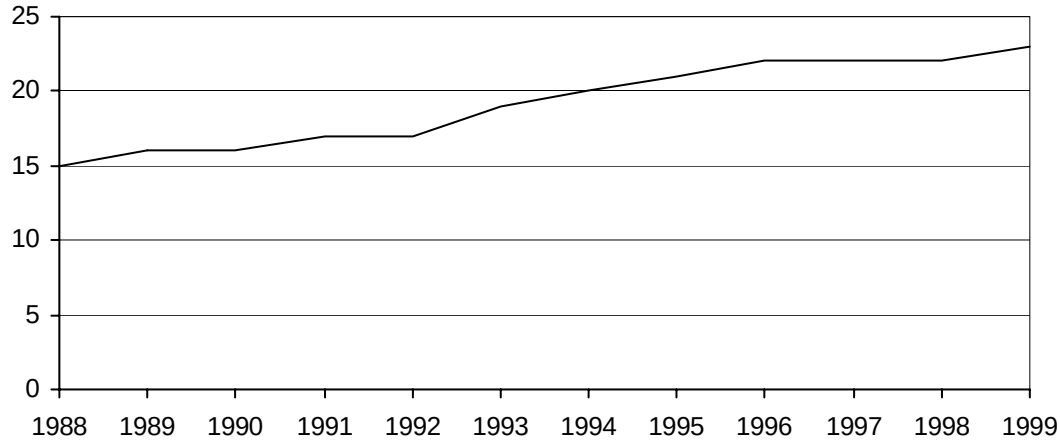
Source: ABS (*Labour Force Australia*, Cat. no. 6291.0.55.001).

Data showing the increase in the proportion of workers not covered by the common law definition of employee is more problematic. The ABS (1997a) found that the proportion of all employed persons whom it defined as self-employed[1] remained relatively unchanged at 15 per cent from February 1978 to February 1996. However, the proportion of owner

[1] A self-employed person can be an own account worker or an employer, and is defined as a person who 'operated his or her own economic enterprise or engages independently in a profession or trade and the business is not incorporated, either with or without employees'. This definition excludes owner managers of incorporated enterprises and is based on the main job of the worker.

managers of incorporated enterprises increased from 1.8 per cent to 5.6 per cent[2] (ABS 1997b). The Productivity Commission's (Waite and Will 2001) analysis using ABS data showed that the proportion of employed persons it defined as self-employed contractors[3] in Australia increased by at least 15 per cent over the two decades to 1998. An increase in self-employed contractors would result in a decrease of formal coverage.

Figure 6.2 **Share of casual employment[a], 1988 to 1999**
per cent of workforce



a Casual employment is defined as employment that does not attract entitlements for either holiday or sickness benefits.

Sources: Burgess and Strachan (1999, p. 124); Burgess and Ruyter (2000, p. 252).

Cost-shifting

The lack of formal coverage of some workers can result in a large proportion of the costs of fatality, injury or illness affecting these workers being shifted onto Australian Government programs such as Medicare and social security. The Department of Family and Community Services noted:

> Although State compensation schemes are responsible for supporting injured workers from the time of injury, where an individual is unable to attribute responsibility for an accident or illness, the social security system effectively becomes a de facto compensation scheme. Definitional exclusion of many persons from the workers compensation system and the changing nature and form of workplace relations are

2 This is under counted as some owner managers of incorporated enterprises may identify themselves in the Labour Force Survey as working for an employer rather then being self-employed.

3 Employed persons who operated their own business without employees and supply labour services to clients on an explicit or implicit commercial contract basis.

> resulting in a significant number of workers falling outside the scope and coverage of the traditional workers compensation systems. The self-employed are, in most cases, excluded from coverage and left to make their own personal accident compensation insurance arrangements. For those that fail to take up a personal insurance policy, or for those that fall through the cracks of the workers compensation system for a number of other reasons, the income support system is often the only recourse. (sub. 167, p. 3)

A high proportion of people who suffer compensable injuries do not make claims, even when they are formally covered by workers' compensation insurance. The claiming rate is lower amongst certain groups and for certain types of injuries. For example, the precariously employed and adolescents appear to be less likely to make claims than other workers (Quinlan and Mayhew 1999).

According to a recent ABS survey (2001b), less than 40 per cent of persons who experienced a work-related injury or illness received workers' compensation (table 6.1). Over half did not apply for compensation, the majority considering that the injury was minor or it was inconvenient to apply (table 6.2). It would be reasonable to conclude that the cost of such injury and illness is generally likely to be small and be borne by the worker and, if necessary, Medicare.

Table 6.1 **Persons who experienced a work-related injury or illness**
in the year ending September 2000

	'000	%
Applied for workers' compensation and did not receive it	28.5	6.0
Did not apply for workers' compensation	259.9	54.4
Applied and received workers' compensation	189.4	39.6
Total	**477.8**	**100.0**

Source: ABS (2001b, pp. 12–13).

However, a significant proportion stated that the reason they did not apply for workers' compensation is because they were not covered or were not aware of workers' compensation benefits (7.7 per cent), did not think they were eligible (4.7 per cent) or thought it would have a negative impact on current or future employment (2.3 per cent). These accidents and illnesses may be more significant as could be the costs borne by injured workers, Medicare and the social welfare system.

Table 6.2 **Reasons for not applying for workers' compensation**

persons who experienced a work-related injury or illness in the year ending September 2000

Main reason for not applying for workers' compensation	'000	%
Not covered or not aware of workers' compensation benefit	36.8	7.7
Did not think eligible	22.4	4.7
Minor injury only/not considered necessary	127.4	26.7
Negative impact on current or future employment	10.9	2.3
Inconvenient/required too much effort/paperwork	17.3	3.6
Employer agreement to pay cost	11.5	2.4
Other/don't know	33.5	7.0
Total	**259.9**	**54.4**

Source: ABS (2001b, p. 13).

Issues

Knowledge of coverage is important. To allow the matching of liability with premiums paid, and to avoid under payment of premiums, employers and insurers need to be able to identify those workers who are required to be covered by workers' compensation schemes. Further, for workers to make informed decisions, they need to know if they are covered. If it is clear that they are not covered, then they have responsibility for their own cover.

In this respect, Quinlan reported research which indicated that 82 per cent of employed persons knew that they were covered by workers' compensation, but that some 47 per cent were not sure which system (state, federal or other specified scheme) covered them (sub. 93, p. 22). The awareness varied significantly between different industries and occupations.

Due to its nature, the common law definition does not provide certainty for some working relationships. As a result, the matter may not be determined until it is tested in court following an incident.

Some jurisdictions have recently reviewed their definitions used for coverage. As mentioned above, Queensland has introduced a new results-test definition. In New South Wales, Le Couteur and Warren (2002) recommended (and the State is currently implementing changes based on it) an approach that harmonises the definitions used for workers' compensation and pay-roll tax purposes and eliminates direct use of the common law approach. Workers who are paid wages (as defined for the purpose — it includes any payment for which an employer is required to withhold income tax under the Pay-As-You-Go withholding system or payments that are subject to superannuation contributions) are covered. All contractors are covered unless they meet one of seven tests. In addition, they

recommended deeming to deal with special cases. They also prefaced a longer-term goal of national alignment with the income tax definition of personal services income.

In South Australia, Stanley et al. (2002) recommended that the definition of workers required to be covered by their WorkCover scheme should have a better alignment with South Australian industrial relations law. The recommendation, which involves a new definition for contract of employment, *presumes* that contracts to supply labour involve employees, *unless* it can be shown that the other party is a client or customer of a business genuinely carried on by the worker. The recommendation lists factors to be considered when determining whether or not a worker is carrying on a business. These are drawn from the criteria that courts have used to determine a contract of service (box 6.1 above).

Confusion and uncertainty

A source of confusion for workers and employers about their legal rights and obligations can be the complexity of current arrangements and inconsistencies across states. This particularly affects parties which operate interstate. The Association for Payroll Specialists stated that:

> When a business operates in more than one jurisdiction, the difficulty in ensuring the accuracy of the information being provided to the insurer increases substantially. Not only are there differences in the definitions of employer, employee, workplace and work-related injury/illness, there are also numerous differences in the definitions of wages for premium calculations, wages for payment of benefits, the excess the employer is liable to pay for each claim made for time lost due to injury/illness, and whether the insurer will pay the employee directly if employment is terminated.
>
> All these differences and many others lead to the likelihood of payments and calculations being incorrect. (sub. 15, p. 1)

The Housing Industry Association cited the case given in box 6.1 and the Western Australian case of *Brian Ryder v Beaulieu of Australia Ltd*, 2003, WAIRC 08203 to illustrate how Tribunals interpreted the various factors and the weightings that could be applied to them (IRsub. 193). It argued that the various parties are left with a significant amount of confusion, particularly when they are also faced with the adaptations of the control test as applied by State Revenue offices for payroll tax purposes, the interpretation for superannuation purposes and the differing perspectives of the eight separate workers' compensation schemes. It supported adoption of Queensland's results test and considered that it was:

> … very helpful because it does give a knowable, commercially certain avenue for people certainly in our industry, to be able to know what their status is rather than having to have a reasonably certain view, but subject to what someone else may say at a later date and another place, and it's that uncertain element that's caused much of the not only confusion for business, particularly small business, but increased administrative costs for workers compensation authorities. (trans., p. 1215)

It stated that, since Queensland has adopted the new test, 'the workload of the Housing Industry Association in terms of members who came to us with problems with WorkCover has fallen away almost completely …' (trans., p. 1215). It noted that:

> The Queensland definition for workers compensation purposes relies on the Personal Services Business (PSB) tests from the Federal Alienation of Personal Services Income legislation. Specifically if a contractor is operating a Personal Services Business then it is not necessary for that contractor to be covered for workers compensation by the principal. (IRsub. 193, p. 6)

Similar satisfaction with the Queensland results test was expressed by BDS Recruit Pty Ltd (IRsub. 213, p. 3). It saw the need for there to be separate definitions of 'employer' and 'employee' for workers' compensation and OHS, given their different scopes.

The Queensland Government also reported success with the test so far (it was implemented in July 2003) (sub. 205, p. 2). The Australian Manufacturing Workers' Union considered that it was too early to assess its effects and that the '…formulation of the common law tests for determining if a person is an employee … has not been considered by the courts or the State Industrial Relations Commission' (IRsub. 231, p. 1).

Contractors

There is a proportion of contractors whose relationship with their client is not one of genuine independence, as the worker is economically dependent on and subservient to a single 'employer', even though this is not characterised as such under common law. This occurs in essentially three ways:

- the worker sets up a private company or partnership;
- work arrangements are set up like the Odco case[4], where the Federal Court decided that the labour hire company was not the employer because it had no control over the worker and, as there was no contract between worker and client, the client was also not the employer (see section below on labour hire agencies); and
- features are incorporated into the contract that the courts would consider to be indicators of a relationship that is not an employer-employee relationship (for example, the workers supply their own tools and, in theory, the contract provides for the work to be delegated to someone else, see box 6.1) (Creighton and Stewart 2000).

These workers are referred to as dependent contractors. In a Productivity Commission analysis of ABS data (Waite and Will 2001), the number of dependent contractors was estimated to be 215 200 (or 2.6 per cent of employed persons) in 1998. Contractors were categorised as dependent contractors if they had leave entitlements or identified themselves

4 *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 33 ALR 235.

as casuals, if they had no control over their working procedures *and* were prevented from subcontracting, or if they had no control over their working procedures *and* were prevented from working for multiple clients. This definition would underestimate the numbers because there exist other contractors who have work arrangements consistent with being an employee, for example, where a contract has been deliberately designed to allow subcontracting in theory, but this is not exercised.

The Master Builders Australia was opposed '… to the notion of extending compulsory workers' compensation insurance to so-called dependent contractors' (IRsub. 217, p. 3). In establishing a definition of worker required to be covered, it considered the control test needed to be supplemented '… with a test that aligns with the test used in income tax law' (IRsub. 217, p. 3). In particular, it sought '… adoption of the same terms as are used in the alienation of personal services provisions of the Income Tax Assessment Act 1997 (Cth) (ITAA97)' (IRsub. 217, p. 7). An alignment with something equivalent to an Australian Taxation Office ruling as to what is definitively the test was also envisaged by the Australian Meat Industry Council (IRsub. 234, p. 5).

Mobile workers

Workers whose work takes them to different jurisdictions are at times not covered by workers' compensation. Recent cross-border initiatives by Queensland, followed by New South Wales, Victoria, Western Australia and the Australian Capital Territory, have gone some way to address the issue of coverage of temporary work inter-state but so far have not provided a complete solution. The Heads of Workers' Compensation Authorities are coordinating the development of a mutual recognition framework for workers' compensation arrangements in respect of coverage for employees operating temporarily in another jurisdiction. Currently, to ensure cover of employees who move across borders, employers need to check with the appropriate government body and it is necessary for many workers who work inter-state to be covered under more than one scheme.

The difficulty of introducing a mutual recognition framework which could cope with all possible cross-border issues that could arise was illustrated by Jim Pearson Transport (IRsub. 224).

Casual workers

In a recent ABS survey (2001b), nearly 22 per cent of casual workers reported not being covered or not knowing if they are covered by workers' compensation. This is partly due to employers not declaring their employment of casual workers and partly to the existence of cash-in-hand work arrangements. Coverage of such workers is an issue of increasing magnitude as the number of casual workers increases (figure 6.2 above).

Quinlan has examined the issue of increased casualisation of the workforce and the implication for workers' compensation. He pointed to a major increase from 18 per cent of the workforce in 1988 to 25 per cent in 1999. He noted that:

> The Australian data just cited doesn't include the well over 200,000 backpacker tourists that visit Australia every year, almost all of whom take on casual and seasonal work to supplement their income even though only a minority actually obtain work permits. (sub. 93, p. 8)

He also cited evidence that casual workers are less likely than other workers to claim workers' compensation, pointing to a study by the ABS of workers in New South Wales:

> In relation to occupational groups, uncertainty was greatest amongst sales and personnel services (10% were unsure of their coverage) followed by labourers and related unskilled workers (8.5%). Uncertainty amongst retail workers would seem more than coincidental with its propensity to employ young inexperienced workers on a casual part-time basis. (sub. 93, p. 22)

Labour hire arrangements

Labour hire agencies can play two different roles. In one, agencies just 'place' workers, who are then left to negotiate their own work arrangements with the client, including, by implication, coverage under workers' compensation insurance. In the other, agencies have an ongoing relationship with the worker whereby they act as a labour hire service — for example, for the provision of workers with particular skills, such as nurses, or 'temps'. In this situation, where there is an absence of a contract directly between the client (or host organisation) and employee, the labour hire company is effectively the employer.

There continues to be a degree of confusion and uncertainty regarding the responsible employer in labour hire arrangements (see submissions from the Victorian Government (sub. 164, p. 11), the Institute of Actuaries Australia (sub. 88, p. 10), the Australian Plaintiff Lawyers Association (sub. 69, p. 11), Telstra (sub. 136, p. 16) and the Australian Industry Group (sub. 104, p. 17)). This is partly due to different provisions applying in the jurisdictions, as well as to confusion arising over the case law that has developed around Odco-type cases (discussed above), with some firms constructing relationships in an attempt to avoid compulsory coverage. Recently, the Full Bench of the South Australian Workers' Compensation Tribunal upheld a decision that a worker engaged in a Odco-type arrangement was an employee of the contracting agency (that is, the labour hire firm). This case is under appeal.

The Recruitment and Consulting Services Association highlighted the inconsistency and confusion across borders about legal responsibility of the labour hire agency and the client:

> Particularly in South Australia, the host organisation probably wouldn't be prosecuted whatsoever. In New South Wales the host organisation may be prosecuted on an equal footing. In Victoria we're still trying to determine that. In each and every state it will

> vary, and of course the burden of proof in New South Wales is different to the burden of proof in Victoria. (trans., p. 954)

Participants expressed a desire for there to be clarity about the status of labour hire workers so as to clarify coverage, minimise confusion and simplify administration of these arrangements. In particular, the Australian Manufacturing Workers' Union were unclear as to how the recommended principles for defining an employee, as set out in the Interim Report, would apply to labour hire workers (IRsub. 188, p. 5).

In specifically addressing this issue, the Stanley report recommended that:

> An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client. (2002, vol. 2, p. 14)

Although this places the responsibility on the employment agency which is not directly in control of the work environment, the Commission sees merit in such a deeming approach. It provides clarity and certainty whilst allowing those who wish to develop alternative arrangements for coverage of the risk to do so and to know that they should do so.

Two labour hire agencies, Skilled Engineering (trans., p. 1036) and BDS Recruit (IRsub. 213, p. 3) informed the Commission that they inspect work sites where they intend to send employees to ensure the sites are safe. If they are not satisfied with the safety of the work environment, then they do not place their people on those sites.

Outworkers

The number of outworkers has been increasing[5], as have been the types of work they perform (Quinlan, sub. 93, p. 5). This has been facilitated, for some, by improvements in telecommunications technology and has brought with it a number of problems for the operation of workers' compensation schemes. These include the limited ability of employers to control workplace risk and be held accountable for it. In addition, there is uncertainty about coverage of these workers as they often supply their own equipment and can appear to be self-employed workers. Also, there are difficulties in determining whether an accident 'arose out of or in the course of employment' — a necessary condition for making a claim under workers' compensation (section 6.2).

The current arrangements for coverage of outworkers vary between jurisdictions. Outworkers are not covered in Tasmania, but are specifically included in New South Wales and Victoria.

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[5] The ABS (2000b) has estimated that 21 per cent of persons at work worked some hours at home and classified 11 per cent as home workers.

A limit of 'contract of service'

For a contract of service to exist there has to be remuneration *and* the remuneration has to be in return for the work done. Hence, defining coverage on this basis does not include a range of unpaid voluntary workers as well as work arrangements in a family, social or domestic context. Those who work for religious and spiritual organisations are usually also excluded. Similarly, farmers, artists and small shop owners are not considered to be employees because they derive part of their income from the profit of supplying goods and services. To provide clarity and certainty in such situations, some jurisdictions have used a range of deeming provisions.

National framework issues

In the 1997 report on *Promoting Excellence National Consistency in Australian Workers' Compensation*, the Heads of Workers' Compensation Authorities considered the question of who should be covered for workers' compensation 'in order to provide consistency in the definition of a "worker" and to provide some predicability at the outset of an employment relationship about responsibility for workers' compensation insurance' (HWCA 1997, p. 10). It recommended an approach to coverage based on principles that:

- the common law concept of employment should be the fundamental determinant of coverage;
- coverage should not be extended to the self-employed;
- schemes should cover contractors who are incorporated, but who operate as a sole proprietor or in partnership, in circumstances where they derive a personal service income from predominantly one organisation; and
- standardised categories of deemed coverage should be granted to certain classes of worker. (1997, p. 10)

The final report of the Royal Commission into the Building and Construction Industry recommended that the Australian Government encourage the States and Territories to continue efforts to harmonise the key definitions of their various workers' compensation systems, particularly the definition of 'worker' (RCBC 2003b, p. 271).

Having assessed issues of coverage under current schemes, and the impacts on various sub-groups of workers, the Commission considers that the following criteria should be used when defining workers to be covered by workers' compensation schemes:

- employer control. It is neither desirable, nor practicable, for all work relationships to be compulsorily covered by formal workers' compensation schemes. The degree of control, as developed under common law, enables work relationships to be divided into those involving a 'contract of service' where employers exercise control over the conduct of work, and should be covered, from those involving a 'contract for service'

where workers carry on a business or trade on their own behalf and are responsible for providing their own cover;

- certainty and clarity. The successful operation of any scheme depends on all parties knowing and understanding their rights and responsibilities. In particular, workers need to know, from the outset, which work relationships provide cover and, similarly, employers need to know the work relationships for which they are required to provide cover;
- administrative simplicity. Workers' compensation schemes are costly to administer and costly for employers to comply with. These costs can be minimised if there are few, simple and definite rules. Practicability is an important consideration when introducing a new or changed feature of a scheme;
- consistency with other legislation and other jurisdictions. There are significant informational benefits and cost savings from the use of consistent, and where possible common, definitions across a number of policy areas. The nature of work relationships is important in other contexts, such as industrial relations, payroll tax and income tax, and alignment of coverage under workers' compensation with these provides scope for significant benefits; and
- durability and flexibility. The schemes operate in a dynamic environment and as such should seek to provide sufficient flexibility to cope with a wide variety of situations so as to provide durable, longer-term definitions.

The Australian Chamber of Commerce and Industry, the Australian Industry Group and Australian Business Limited supported, in general terms, the above criteria for defining workers to be covered by workers' compensation schemes. The Australian Chamber of Commerce and Industry considered that the principles should not be used to extend the definition beyond the common law 'contract of service' (IRsub. 196, p. 16). The Australian Industry Group considered that 'Whenever a scheme requires an employer to be liable for work that they cannot adequately control it has the potential for undermining the integrity of the Scheme' (IRsub. 240, p. 25). Australian Business Limited did not think that 'the definition should be modified to accommodate specific groups of workers and types of work' (IRsub. 249, p. 9). It considered that the parties to such arrangements should bear the responsibility of protecting their own interests, including purchasing appropriate levels of income protection and related insurances.

In contrast, the Queensland Council of Unions, while also agreeing in general terms with the above criteria, was concerned that any definition arising from application of the principles should not be exclusive. In particular, it was concerned that any definition should not exempt any person currently covered and that it 'include casual employees, volunteers, labour-hire employees, outworkers or any employees defined as contractors or sub-contractors designed to avoid OHS and workers' compensation obligations' (IRsub. 206, p. 2).

The Direct Selling Association of Australia was also supportive of the principles put forward for defining workers to be included, but considered that deeming coverage would not work '… for our people because of the undefined workplace [and] the uncontrolled working conditions …' (trans., p. 1177). As a small business, LMR Roofing Pty Ltd considered that there were important advantages to having definitions of employer/contractor made in 'clear and plain English' as opposed to the current 'cryptic, grey, descriptive way that they've described workers and deemed workers' in current legislation' (IRsub. 199, p. 5; trans., p. 1191). It was also concerned that 'If people choose to be a contractor they should not be made to be employees …' as important productivity issues were involved (trans., p. 1188). These views were supported by the Housing Industry Association which opposed the use of deeming when it '… undermines contractual relationships and attempts to impose a non-preferred regime onto contractors who have knowingly entered into a contractual arrangement' (IRsub. 193, p. 7). They were also supported by Master Builders Australia which considered that '… the deeming of so-called dependent contractors as employees will not assist in bringing clarity to the divide between employees and contractors' (IRsub. 217, p. 10).

RECOMMENDATION

The Commission recommends the following as principles to use when defining an employee, to determine coverage under compulsory workers' compensation schemes:

- ***employer control, recognising that the common law 'contract of service' provides a solid basis for defining an employee in most situations;***
- ***certainty and clarity, as coverage under workers' compensation should be clear to both workers and employers at the commencement of the work relationship. For certain groups of workers and types of work relationships, deeming may be necessary;***
- ***administrative simplicity, to reduce the costs of administration and enforcement;***
- ***consistency with other legislation, to capture significant informational benefits and cost savings; and***
- ***durability and flexibility, to deal with a wide variety of work arrangements.***

As outlined above, Queensland has recently adopted a 'results-test' approach to defining workers required to be covered by its workers' compensation scheme. The initial indications are that it has provided the added certainty and clarity for the coverage of workers to the basic common law definition of employee which was provided formerly by its PAYE-based definition. Workcover Queensland considered that the results test was an effective means of achieving the Commission's recommendations. 'It circumvents the traditional "contract of service" test … [and] … responds to the changing dynamics of employment arrangements by broadening the group of individuals entitled to workers' compensation' (IRsub. 225, p. 13). As mentioned above, the Heads of Workers'

Compensation Authorities are looking at it as a basis for developing a consistent definition across schemes. Although it is a specific stand-alone definition for workers' compensation purposes, it is based on concepts used by the Australian Taxation Office for determining alienation of personal services income (box 6.2).

In New South Wales, by way of contrast and following a review by Le Couteur and Warren (2002), a new definition is being adopted which provides for greater commonality with the definition of worker being adopted for pay-roll tax purposes. In addition to added certainty and clarity, it should provide cost-saving benefits to employers and the government from administrative simplicity and consistency with other legislation within the one jurisdiction. Adoption of this approach among all jurisdictions would be limited by differences in pay-roll tax schemes among the jurisdictions. It would require them to adopt a new definition for both purposes.

Box 6.2 **Personal services income tests**

The Review of Business Taxation (the Ralph Report) found that the rapid growth in the number of individual contractors and consultants had implications for the integrity of the tax system because of the favourable tax arrangements that were available for personal services income. Under those arrangements, the income earned (personal services income) by an individual contractor or consultant could be paid to another entity such as a company or partnership. This provided a number of tax advantages, such as income splitting and larger tax deductions than were available under normal PAYE arrangements.

The Government introduced a number of amendments to tighten the system as part of the *New Business Tax System (Alienation of Personal Services Income) Act 2000.* The amendments, which included treating payments to companies and trusts as assessable income, were not to apply where an individual or entity was earning personal services income and set out a *results test* to define this.

The results test requires an individual to be earning at least 75 per cent of personal services income under the following arrangements:

- under a contract or arrangement where the individual works to produce specific results and payment is based on achieving these results;
- where the individual provides the tools and equipment necessary; and
- where the individual is responsible for rectifying any faults in the work.

Where *all* these tests are met, the income is considered to be from personal services.

However, where an individual fails the *results test* and provided more than 80 per cent of their income comes from more than one client, they are able to self-assess against the following tests:

- the unrelated clients test (provides services to two or more unrelated clients);
- the employment test (engages employees or sub contractors to perform at least 20 per cent of the work under contract); and
- the business services test (operates from premises used exclusively for business and physically separate from the private residence).

To be considered as personal services income, only one of the above tests has to be satisfied.

Source: ATO website.

Another approach to seeking benefits from commonality across policy areas as well as certainty and clarity within workers' compensation is provided in South Australia where the Stanley (2002) review recommended greater consistency between the definition of employment used for workers' compensation and industrial relations. As with the NSW approach, differences among jurisdictions, in industrial law in this case, limit its easy adoption by other jurisdictions.

Of the models for national frameworks outlined in chapter 5, model A (self-insurance under Comcare) would rely on the existing Comcare scheme definition of employee to define coverage (box 6.3).

Box 6.3 **Coverage under Comcare**

Companies that self insure under Comcare (that is under section 100(c) of the *Safety, Rehabilitation and Compensation Act 1988*) are referred to as 'licensed corporations'. The Act states that a person who is employed by a licensed corporation is eligible to seek compensation and that person is taken to be employed by a licensed corporation if, and only if:

(a) a person performs work for that corporation under a law or a contract; and

(b) pursuant to that law or pursuant to the law that is the proper law of that contract, as the case may be, the person would, if that corporation were not a licensed corporation, be entitled to compensation in respect of injury, loss or damage suffered by, or in respect of the death of, the person in connection with that work. (s. 5(1A))

This indicates that, for licensed corporations, eligibility is to be determined by reference to the legislation of the jurisdiction in which they operate. However, licensing is subject to the approval of the Safety, Rehabilitation and Compensation Commission and as part of this approvals process it must be satisfied that 'the grant of the licence will not be contrary to the interests of the employees of the licensee whose affairs fall within the scope of the licence' (s. 104(2(c))). This would allow coverage issues to be considered and determined at the licensing stage.

Model B (an alternative national self-insurance scheme) would require new legislation to be implemented. This provides a convenient time for a preferred definition of employee to be developed and adopted that is consistent with the principles recommended above. This would also apply to a possible future alternative national premium-paying insurance scheme (model C). The Commission considers that the income tax definition of personal services income should be used as a basis for defining employee for the purposes of coverage under a national workers' compensation scheme. It would provide certainty and clarity at the commencement of work relationships. And by being aligned with a major piece of national legislation affecting all organisations, the definition would provide additional benefits from administrative simplicity and consistency. Given the importance of the definition to income tax law, it is also likely that it would have its contemporary relevance maintained so as to deal with a wide variety of work arrangements. As with current definitions, the basic definition may need to be supplemented by a limited set of exclusions and deeming provisions so as to deal efficiently with particular work arrangements, such as with charitable institutions, volunteer fire fighters, SES volunteers and labour hire firms.

Under model D, which is based on formalising cooperation among the jurisdictions, the proposed national cooperative body should use common principles, such as those recommended, when developing and advocating a common definition of employee for purposes of coverage. As indicated above, the Commission considers the income tax definition of personal services income should be used as a basis for this. If all jurisdictions adopted a common definition on an item of fundamental importance to the operation of their schemes as the definition of employee for coverage, then it would help them achieve greater consistency among their schemes and reduce the costs associated with differences in their schemes.

6.2 Workplace and work-related fatality, injury and illness

The focus in this section is on work-relatedness. Under workers' compensation schemes, a workplace includes any place at which employees are required to be for the purposes of carrying out employment duties.

As The Australasian Faculty of Occupational Medicine has pointed out:

> It is fundamental to a cause-based compensation scheme, in this case workers' compensation, that work-caused health afflictions may be reliably identified and distinguished from what is not work-caused. There are difficulties in making such identification and distinction with diseases of long standing or long latency although seldom with 'blood on the floor' injuries.
>
> The definition of work-relatedness is fraught for four reasons:
>
> - slow-developing health afflictions (eg spinal degeneration, noise-induced deafness, arterial disease) have causes that cross boundaries within and between compensation schemes;
> - it is difficult to establish or apportion cause in retrospect because much verifiable information is commonly missing[6];
> - risk factors for many diseases may be known but not necessarily how the risk factors interact to produce the disease; and
> - some people regard a workers' compensation scheme as a source of local humanitarian aid and exert pressure through courts and tribunals to gradually push

6 As an illustration, the Australasian Faculty of Occupational Medicine referred to its guide on occupational cancer in which is stated:

… the occurrence of a cancer in a person previously exposed to a cancer-causing agent cannot readily be attributed to that agent, since work-related cancers are usually indistinguishable, histological and in natural history, from similar cancers unrelated to work. A decision on whether an exposure was causal in development of cancer is based on factors such as whether exposure occurred, the extent and timing of exposure, and consideration of the balance of probabilities in the light of current scientific evidence. (2003, p. 31)

> the margins of what is embraced by work-relatedness. This underlines the uneasy joining of need with cause. (sub. 29, p. 4)

Nonetheless, a practical application of work-relatedness is required if workers' compensation schemes are to cover only those fatalities, injuries and illnesses that are truly work-related and to avoid cost-shifting. If the criteria are too stringent, then is would involve cost shifting from employers to injured workers and to the Australian Government's Medicare and social programs. Conversely, if the criteria are too lax, then there would be cost shifting to employers for medical conditions that are minimally work-related.

Current approach

In effect, the definitions of all jurisdictions recognise injury (both internal and external), illness (including mental), industrial deafness and aggravation, acceleration, deterioration, exacerbation or re-occurrence of a condition. There are, however, many differences: some make specific reference to mental illness; some refer to injury by accident; some include a specific definition of disease; and South Australia specifically excludes coronary heart disease. Jurisdictions make varying provisions for particular diseases such as dust disease, stress-related conditions, repetitive strain injury and hearing loss.

The Australian Chamber of Commerce and Industry considered that the definitions of illness and injury used in most jurisdictions were comprehensive and that attempts to define them in excessive detail '… would lead to much dispute and would in the final analysis not achieve the [coverage] objective' (IRsub. 196, p. 17). However, it cautioned against advocating 'comprehensive coverage' because it believed that 'comprehensive coverage sometimes is code for taking coverage to the nth degree … [and that it] … could be used unintentionally even to take coverage of the schemes out to every potentially defined medical condition' (trans., p. 1357).

Similarly, Australian Business Limited considered that qualifiers like 'comprehensive' and 'recognised' (for medical conditions) were not needed as it was unclear as to the interpretation that would be placed on them (IRsub. 249, p. 10).

All jurisdictions use the phrase 'arising out of or in the course of employment' to express work-relatedness in their enabling legislation, apart from Tasmania, which uses a narrower definition of 'arising out of *and* in the course of employment' [emphasis added].

'Arising out of' signifies employment causation or contribution. The courts have given it a wide interpretation. An important case that considered the meaning in detail was *Brooker v Thomas Borthwick & Sons (Australasia) Limited* (1933) AC 669, where several workers died when the building they were working in collapsed as a result of an earthquake. The

deaths were judged to have 'arisen out of' employment because the immediate cause was some factor associated with the employment, namely, the destruction of the employer's premise whilst the workers were inside.

Most claims are made under the 'in the course of employment' provision. This provision specifies a temporal relationship and the worker need only be engaged in an activity that was part of or incidental to employment. The limits of the relationship are not clear cut and some jurisdictions have provided legislative guidance for the interpretation of this provision. For example, the South Australian legislation specifies that employment of a worker includes when they are at the place of employment on a working day but before work begins (in order to prepare or be ready for work) or after work ends (while preparing to leave or in the process of leaving) (*Workers Rehabilitation and Compensation Act 1986*, s. 30(3)). The issue of coverage during journeys to and from work is addressed later.

Issues

Work-related concept problematic for certain injuries and illnesses

As indicated above, determining work-relatedness for certain injuries and illnesses is problematic in two situations: conditions that are of long latency or acquired over a number of years of exposure; and those that have a number of contributing factors.

Long latency and gradual onset injuries and illnesses

Illnesses of long latency or those that are acquired over a number of years include skin cancer, emphysema, noise induced hearing loss and degenerative back conditions. When workers have had a number of different jobs, it can be difficult to assign appropriate responsibility for the condition to a particular employer. This issue is compounded when workers have been employed in a number of jurisdictions (box 6.4). The significance of this issue is growing as there has been an increase in the mobility of workers and in the frequency of changing jobs (Quinlan, sub. 93, p. 18). Added to this is the issue of the ageing of the workforce and the progressive accumulation of injury, and longer recovery time, of older workers.

Box 6.4 **Illnesses of a gradual nature**

Dr Sherryl Catchpole, a medical officer at the Workers Medical Centre in Brisbane, submitted:

> The Dust Diseases, eg Silicosis, Coal Workers Pneumoconiosis, Asbestosis, and Noise Induced Hearing Loss are recognised as being acquired over years of exposure. Decisions may have to be made by the claimant and the certifying doctor, as to which jurisdiction is the appropriate one for lodging a claim if the worker has moved interstate or from Commonwealth to State employment.
>
> With differing rules between jurisdictions there are further complications for decision making. An example of this is with industrial deafness. In Queensland the claim is accepted for lump sum compensation only if the initial reported loss is greater than 5%, and subsequent loss is only eligible after a 3 year period and a further 1% loss. Comcare requires a 10% initial loss and subsequent loss of 5%. A worker with hearing loss will provide a full work history. Often the medical officer suspects that the loss, for instance in a 50 year old boilermaker, started many years ago during the trade apprenticeship, and has only become apparent now because of the added effects of aging. Hearing protection has only been supplied by employers for about the last 10 years, and worn consistently by workers for the last 5 years.
>
> It seems to me that it is often quite by chance as to which employer within a jurisdiction has the loss attributed for causation. When the worker has been employed in the construction industry the list of employers may run to several pages, and many of the employers are now out of business. Surely it would be fairer if there was one set of rules across Australia and a pool of money contributed by all employers within an industry for claims with accumulative exposure causation. (sub. 128, p. 3)

The available data from the National Occupational Health and Safety Commission's database indicates that the occurrence of these types of injuries is significant — somewhere in the order of 12 per cent of claims. In addition, claims of this nature are likely to be more expensive than average.

Some of the workers' compensation legislation contains special provisions for injuries or illnesses of long latency or that are acquired gradually. For example, most jurisdictions make specific provisions for dust disease (New South Wales has a special fund which employers in particular industries contribute to, and a board to manage this fund). Also New South Wales, Queensland, South Australia and the Australian Capital Territory have special procedures for determining compensation entitlements and employer liability for hearing loss. In South Australia, hearing loss is deemed to have arisen out of employment in which the worker was last exposed to noise capable of causing noise-induced hearing loss, subject to proof to the contrary. The provisions, however, are not consistent across jurisdictions and add to the complexity facing workers who move inter-state.

There are essentially three broad approaches that have been used to attribute work-related costs:

- Attribute the costs to the last job where the employee was exposed to conditions that could have caused the illness. This is relatively simple to implement, but results in the last employer bearing more than his or her fair share of the full cost of the claim. It also discourages employers from hiring older employees or anyone with a history of an illness of this nature or an employment history that may have exposed them to risk factors. This is largely what occurs currently.
- Implement a system whereby if an employer can show that a claim could be partly the result of other employment, then reduce the impact of the claim on the employer's experience rating. This results in more of the cost being part of a general (industry) premium rate.
- Apportion costs on the basis of which employment contributed to the injury or illness and how much it contributed. This is largely impractical to implement because administrative costs are high and the accuracy is uncertain. Also employees may move across jurisdictions and employers go out of business before the disease emerges as a problem.

There are no easy solutions to the problems associated with determining the degree of work relatedness and attributing the costs of long latency and gradual onset injuries and diseases. The current approach of expressly identifying some that are clearly associated with certain occupations or industries (such as dust), using appropriate levies and creating special procedures to handle such claims provides a practical solution in some circumstances, but it is not a panacea.

Diseases with a number of contributing factors

Identifying work-relatedness is also problematic for diseases that have a number of contributing factors such as lifestyle, ageing, degenerative or hereditary factors, as well as work. For example, ageing workers are more prone to muscular/skeletal injuries. Also, psychological injuries, such as stress, can be caused by a combination of work and non-work factors. Jurisdictions variously exclude certain stress-related conditions and psychological conditions resulting from demotion, dismissal, transfer and the like. This is to allow employers to conduct reasonable management functions.

However, as The Australasian College of Occupational Medicine has said:

> … where a disease has many possible causes – one of which is occupation – the actual cause is often difficult, if not impossible, to decide in retrospect. (1990, p. 19)

This issue and its implications for cost-shifting on to workers' compensation schemes was considered by a number of participants. According to the Department of Employment and Workplace Relations:

> Coverage now extends beyond compensation for traumatic injury and disability to occupational stress and diseases, such as musculo-skeletal degenerative disorders. Such types of compensable injuries/diseases may be contributed to by factors external to the workplace such as ageing and degenerative conditions. (sub. 166, p. 13)

The Workers' Compensation and Rehabilitation Commission (Western Australia) observed:

> In determining what constitutes appropriate boundaries the Commission should acknowledge that the issue of cost shifting is not limited to that of the State systems to the Commonwealth. For instance, in the WA system injuries and illnesses attributable to multiple causes provide the opportunity to shift cost onto the workers' compensation scheme. A number of injuries and diseases covered by workers' compensation relate to the aggravation or acceleration of pre existing injuries, degeneration, environmental or social causation factors which would otherwise be met via the Commonwealth social security or medical health budgets if they did not occur or present in the work environment. (sub. 111, p. 6)

The various schemes have introduced tests to help insurers assess claims and, in particular, more fairly apportion the costs of claims to employers.

Contribution of employment

In addition to the basic 'arising out of or in the course of employment' criteria, jurisdictions, to a varying degree, also include a test of the degree of contribution to the illness or injury from employment. This is an 'in or out' test in that if the condition meets this test, then it is covered by workers' compensation insurance; if it does not, then it is not covered. Uncertainty as to which particular test applies and what exactly it applies to, particularly for multi-state employers, arises from:

- differences between jurisdictions;
- different arrangements for different conditions within a jurisdiction;
- unclear legislation;
- changes to legislation; and
- uncertainty of interpretation by the courts.

In the case of diseases, to be eligible, for example:

- in the Australian Capital Territory, employment must be 'a substantial contributing factor';

- under Comcare, employment must have 'contributed to a material degree'; and
- in Western Australia, employment must be 'a contributing factor and contribute to a significant degree'.

Some jurisdictions have also added a provision of this nature for injuries. This provision also differs across jurisdictions:

- in New South Wales, employment must be 'a substantial contributing factor'.
- in Victoria, employment must be 'a significant contributing factor' to an injury, although this has recently been tested in the courts[7].
- in Queensland, the same test applied until 1997 when it changed to 'the major contributing factor'. Two years later Queensland reverted to 'a significant contributing factor'.

The difficulty with the current employment contribution tests has been highlighted by the Australasian College of Occupational Medicine which said:

- worker's compensation statutes do not clearly specify a threshold below which the contribution of employment to injury or disease is so trivial that it may be disregarded.

  Without a specified threshold of work-relatedness, a worker's compensation Act is ambiguous. This is because it implies that any contribution – be it 35%, 5%, 1% or as low as 0.01% – would be sufficient for the disease to be fully compensable. To call something 'work-related' when in fact work has contributed just 1% – seems to fly outside the boundary of the commonly-accepted meaning of this term. This departure from common parlance brings about the ambiguity.

  For a range of disease – severe and otherwise – the various proportional contributions from employment fall on a continuum which ranges from near 0 to 100%. In the absence of statutory guidance, doctors are left to define their own thresholds below which they consider the work contribution to be so small that to regard it as existing would be nonsensical. Thus, doctors are forced to make two discrete categories – work-related and not – from what is truly a continuum. (1990, pp. 19–20)

Employers argued that there should be more emphasis on employment causing the injury or illness, instead of covering any medical condition that happens in the workplace. In particular, employers sought a restricted definition whereby employment has primacy of causation. The National Council of Self Insurers stated that the definition of injury should clearly link injury to the work tasks (sub. 168, p. 39). Woolworths argued:

[7] The Victorian Supreme Court found that it was not necessary for work to be 'a significant contributing factor' in the case of physical injury (in this case the worker cut his hand whilst peeling an apple whilst on a paid work break on the employer's premise) – the caveat was only intended to apply to disease. On appeal the High Court agreed with the Supreme Court and the workers medical costs were covered by Victorian WorkCover. *Carlton & United Breweries & Anor v Hegedis* (2000) VSC 380.

> Injuries covered should be limited to those arising "out of or in the course of employment", and where employment is "the major significant factor" contributing to the injury. The current definitions allow claims to be paid for events such as merely walking at a workplace. It is not reasonable that employers be held liable for everyday events, just because they occur at a work-place. (sub. 98, p. 5)

Their use of 'the' major significant factor rather than 'a' major significant factor was deliberate (trans., p. 553). The Australian Chamber of Commerce and Industry agreed and stated in their submission that:

> …the definition of attribution as 'the major contributing factor' would remove much of the confusion and lack of consistency in interpretation by WorkCover authorities and the courts in workers compensation cases. (IRsub. 196, p. 17)

This was supported by the Australian Industry Group (IRsub. 240) and Australian Business Limited (IRsub. 249). The Queensland division of The National Meat Association of Australia argued that:

> The current definition of injury allows the acceptance of claims even when employment is not the major cause. It is possible that an illness may manifest itself while a person is at work, or an injury occurs at work simply because the person was at work at the time, and under these circumstances employment may be assessed as "a significant contributing factor".
>
> … It is submitted that:
>
> The definition of injury be amended to ensure that employment is the major and substantial cause of the injury, and that injuries due to other causes are excluded from the workers' compensation system. (sub. 83, p. 2)

In contrast, the Victorian Government stated its belief that:

> … the 'a significant contributing factor' test does strike the right balance, and that a move to 'the major contributing factor' test would represent an unacceptable impediment for the establishment of compensability by injured workers. (IRsub. 256, p. 36)

A similar argument was made by the Queensland Council of Unions. It considered that the change in Queensland to 'the major contributing factor' had led to the rejection of a lot of legitimate claims and did nothing to improve occupational health and safety (trans., p. 1018). It claimed that 'significant' had been introduced in the first place to lift the barrier higher because the schemes were experiencing increases in non-visible injuries.

Woolworths provided an estimate of the significance of a change from 'the major contributing factor' to 'a significant factor':

> The only state where the company was able to analyse a trend was in Queensland where the proposed definition of "the major significant factor" was introduced into legislation from January 1997 to June 1999. From July 1999 the definition was changed

> to "a significant contributing factor". Woolworths self-insurance statistics show that the rejection of claims lodged under the previous definition in 1998/99 was 5.8%, and that this decreased to 3.3% in 1999/00 with the amended definition. (sub. 156, p. 2)

This estimate provides some indication of impact there would be of changing the test definition to 'the major contributing factor'.

To provide some clarity of the contribution of employment, all jurisdictions have used industrial disease schedules which list certain diseases that are covered by workers' compensation legislation if the worker was engaged in a prescribed form of employment. For example, hepatitis B is considered an industrial disease if the worker was employed in a hospital, other medical centre, dental centre or employment associated with a blood bank.

Whereas a desirable principle is for an employer to meet the proportion of the injury or illness to which employment has contributed, it is recognised that apportioning the costs of a condition to different work and non-work related factors would result in significant administration costs and disputation.

The Commission considers that, in view of it being problematic to determine the contribution of work to some medical conditions, the definition of attribution included in workers' compensation legislation should be based on there being significant evidence of its contribution. The 'a significant contributing factor', which is used in a number of jurisdictions is a minimum acceptable test. Recognition that work should be *the* major contributing factor would give greatest clarity. The development of a uniform test of work-relatedness applying to both disease and injury across all jurisdictions would enable a significant body of case law to develop which would add to certainty of outcomes.

Finally, as emphasised by BDS Recruit Pty Ltd, early notification of workplace incidents to employers is important to prevent subsequent disputation about the work relatedness of any injury (IRsub. 213).

Journeys to and from work

The coverage of journeys to and from work under workers' compensation schemes varies across jurisdictions. In this respect, the common law position is that whilst travelling to and from work, an employee is not within the course of employment. However, a number of jurisdictions have deemed this travel to be within the course of employment and therefore compensable (Comcare, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory). The others — Victoria, Western Australia, South Australia and Tasmania — have not. Where journey claims are not covered by workers' compensation, alternative coverage is provided for all motor vehicle journeys under each jurisdiction's compulsory third party (CTP) insurance schemes. In all schemes, journeys made during the work day that are an integral part of work are covered.

WorkCover Queensland reported that, although the Queensland scheme covers journey claims (and all recess breaks as well), it does not impact directly on employers' premiums as they exclude them from the experience-based rating calculations (IRsub. 225, p. 13). The cost of them is spread over other elements of the premiums.

Employers claim that, as they have no ability to control circumstances associated with journeys, these should not be covered by workers' compensation legislation (see submissions from Australia Business Limited (sub. 106, p. 15), the Australian Chamber of Commerce and Industry (sub. 81, p. 5; IRsub. 196, p. 18), the Minerals Council of Australia (sub. 141, p. 4) and the Australian Industry Group (sub. 104, p. 23)). For example, Woolworths stated that:

> Journey claims (to and from work only) should not be covered under workers' compensation legislation, as employers have no ability to control these events. (sub. 98, p. 5)

On the other hand, unions have argued that journey injuries arise out of or in the course of employment because of the requirement for workers to attend their place of employment. Journeys are simply a physical relocation of the worker to the place of employment to undertake activities to the benefit of the employer and so should be covered. For example, the Queensland Council of Unions said it:

> … strongly believes that journeys to and from work must be included in any workers' compensation scheme and totally opposes any removal of this provision. We do not accept that lack of control by an employer is a reason for omitting this important provision. There are many situations in employment where the employer cannot control the employee eg walking to meetings in another building and labour hire situations. The QCU submits that but for work, the worker would not be in the situation and therefore should be entitled to a no fault workers compensation scheme. (IRsub. 241, p. 6)

The financial significance of the journey claims varies. Some participants have stated that journey claims make up only a minor portion of their costs whereas for others it is a significant factor. In part, this can depend on the nature and occurrence of the totality of the injuries and illnesses experienced by the organisation's employees.

For example, Telstra said that:

> The differences in this provision [relating to journey claims] would have significant impact on Telstra's claims numbers and costs due to the number of commuting to and from work claims which Telstra has and the fact that these claims are prone to being of a serious and long term nature. To show this point the following Telstra claims data is provided:

- There are currently 311 "open" commuting to/from work claims out of the total of 3,562 total open claims, or 8.7%.

- The cost to date of these 311 claims is $25.6m, or 12.5% of the total cost to date of all current open claims.
- The average cost to date of these 311 claims is $82,485.13 per claim, which is 44% higher than the average cost per claim of all open claims.
- Of the overall 22 open dependant claims within Telstra, 10 resulted from commuting to/from work claims.
- In 2001/02 the number of commuting to/from work claims received was 231 out of a total number of 1,739 claims received, or 11.2%. (sub. 136, p. 3, attachment 2)

Westpac Banking Corporation found that journey claims comprised approximately one-third of total claims in New South Wales (sub. 130, p. 2). Woolworths, in providing additional information on its journey claims for New South Wales and Queensland, stated that these:

> … journey claims have represented 4-5% of the total number of claims over the last 2 years. Cost analysis reveals journey claims have been approximately 20% higher on average than other workers compensation claims. Another matter that is worthy of note in relation to journey claims … is the problems that can occur when there is a third party recovery action pending. Third party litigation occurs in approximately 30% of cases, and can be a significant deterrent in a successful return to work. The legal action in these cases is often not resolved for at least two years, and the worker is often not motivated to achieve a full return to work until the action is settled. (sub. 156, pp. 1–2)

As evidenced from the above, the cost of journey claims can be significant and influence the affordability of workers' compensation. Also, while journeys to and from work are an inevitable part of meeting employment commitments, the mode and nature of the journey, and the location of the workers' residence relative to work are not, in most circumstances, matters over which the employer exercises any control. In addition, where it is not included, compulsory coverage for motor vehicle journeys is provided under CTP schemes. Some workplaces have also negotiated special provisions for their inclusion as part of enterprise bargaining.

In view of these factors, the Commission, on balance, does not support the inclusion of journeys to and from work within workers' compensation schemes.

Recess breaks and work social events

Jurisdictions also vary in their coverage of injuries that occur during lunch times or other breaks. Legislation in New South Wales, Victoria and Queensland states that injuries sustained during an ordinary or authorised recess are covered as long as the worker does not voluntarily subject themselves to abnormal risk of injury. Examples of cases from New South Wales include:

- A worker who injured his knee during a game of touch football whilst on his lunch break was awarded compensation. The worker was judged to have not subjected himself to abnormal risk.
- A worker on his lunch break who suffered a hypoglycaemic attack while driving and then collided with a semi-trailer was awarded compensation because he did not voluntarily subject himself to an abnormal risk as this implies that there was some degree of deliberation or intention.

South Australian legislation specifies that authorised breaks *at the place of employment* are covered. Tasmanian legislation states that absences are not included except where they occur at the request or direction of the employer or, if it is work-related, with the expressed or implied authority of the employer.

The other jurisdictions rely on the common law interpretation of their legislation. If an employee is allowed to spend breaks on an employer's premises then he or she is in the course of employment and therefore injuries arising are compensable. If the rest break is taken away from the employer's premise then the courts apply a test of reasonableness.

The courts tend to interpret the legislative provisions liberally. The Australian Chamber of Commerce and Industry gave as an example:

> A decision by the NSW Supreme court where an employee in his lunch break showing off to a friend by riding a motor bike up a steep grade sustained a serious injury and which the court ruled was 'in the course of employment' is an example of an interpretation.
>
> The employer in this case claimed that he was not in control of the activity and could not be expected to take responsibly for the employee's reckless actions. (sub. 81, p. 6)

More generally, for social and recreational activities, if employers have expressly or implied, induced or encouraged their workers to engage in an activity, then an injury arising from that participation is compensable under workers' compensation legislation.

Participants indicated that consistency across jurisdictions in this area was desirable, but there was no consensus as to what the provisions should be. The Australian Chamber of Commerce and Industry strongly supported restricting coverage to recess breaks at the workplace and employer sanctioned events, based on the lack of employer control (IRsub. 196, p. 18). The Queensland Council of Unions considered that full coverage must be afforded to recess, meal breaks and work-related events (IRsub. 206, p. 2). And the Victorian Government argued for its current position (IRsub. 256).

The Commission accepts that the employer's ability to exert control over workplace recess breaks and social activities is a relevant consideration. Such an approach would have the advantages of ease of understanding and administrative simplicity, thereby minimising delays in claims management and the scope for disputation.

National framework issues

For defining the work-relatedness of fatalities, injury and illness under workers' compensation schemes a number of criteria are relevant. These include:

- employer control. Statutory obligations are placed on employers under workers' compensation (and OHS) legislation to exercise control over safety at workplaces and be held liable to pay compensation for work-related fatalities, injuries and illnesses. On this basis, work-relatedness would be confined to situations where employers could exercise a degree of control over circumstances. Journeys to and from work and accidents occurring off-site during recess breaks or non-sanctioned activities would be excluded and work-sanctioned social and sporting events would be included, irrespective of location.
- work contribution. Workers' compensation is a cause-related compensation scheme and not a welfare scheme to compensate workers for injury, illness and death irrespective of cause. For certain illness and death, determining the contribution of work to the condition can be problematic and practical tests have to be developed if such schemes are to operate as intended.
- certainty and clarity. For a number of conditions, the determination of work-relatedness requires the exercise of judgment. Regulators should ensure that the intention of legislation is clear. Acceptance of the results is more likely where the bases on which the judgments are made are known and understood. At times, however, this may require the inclusion, or exclusion, of certain conditions and specification of onus and standard of proof. Also, certainty and clarity are aided if there is consistency in definitions across borders and for different conditions as can assist in building up a body of case law to support them, as well as directly reduce confusion, complexity and uncertainty.
- administrative simplicity. The determination of work relatedness of cause can be complex and costly for some conditions. These costs should be borne in mind when specifying tests of the work contribution. It provides a basis for specifying minimum thresholds for certain conditions, such as industrial deafness.
- availability of alternative forms of cover. This is relevant in optional areas of coverage, such as journey claims and recess breaks. It is not relevant to the basic rationale underlying compulsory coverage for employees under employer-financed schemes. This criterion provides an added rationale for excluding journey claims as CTP would cover the majority of journeys to and from work.

RECOMMENDATION

The Commission recommends the following as principles to use when defining work-related fatality, injury and illness under compulsory workers' compensation schemes:

- ***definition of injury and illness to be comprehensive in terms of coverage of medical injuries and illnesses and include aggravation, acceleration, deterioration, exacerbation or recurrence of a medical condition;***
- ***definition of work-relatedness to be in terms of 'arising out of or in the course of employment', as used by nearly all jurisdictions;***
- ***definition of attribution, 'a significant contributing factor', which is used in a number of jurisdictions, to be a minimum benchmark, while 'the major contributing factor' would add greater clarity;***
- ***coverage for journeys to and from work not to be provided, on the basis of lack of employer control, availability of alternative cover in most instances and the ability to be dealt with under enterprise bargaining; and***
- ***coverage for recess breaks and work-related events to be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events.***

Under model A (self-insurance under the Comcare scheme) of the options for national frameworks outlined in chapter 5, the coverage of illness, definitions of work-related and attribution would be those currently applying under the *Safety, Rehabilitation and Compensation Act 1988*. The Act covers a wide range of injury and disease, including mental illness and aggravation of existing medical conditions. It uses the 'arising out of or in the course of employment' test to define work relatedness and 'material degree' to define the attribution of work to disease. Journey claims are covered, as are injuries that occur during ordinary recess breaks.

Model B (an alternative national self-insurance scheme) requires new legislation to be implemented. This provides an opportune time for new definitions to be developed that are consistent with the above recommendations. An alternative national premium-paying insurance scheme (model C) would provide a similar opportunity.

Under model D (a national cooperative body), jurisdictions could work towards a consistent approach, particularly in the areas of attribution, journey claims and recess breaks. They could also consider consistent ways of handling the difficulties of diseases of long latency and those with a number of contributing factors, such as skin cancer, hearing loss, the dust diseases, back conditions and stress. This could be done independently of, and concurrently with, the implementation of broader based self-insurance under model A and the development of subsequent more widely-based models.

7 Injury Management

This chapter considers that part of the terms of reference which asks the Commission to identify and report on issues relating to appropriate approaches to injury management.

Although the intent of occupational health and safety (OHS) arrangements is to prevent work-related fatality, injury and illness, not all harm is avoided. Where prevention fails, the task of minimising the associated human and economic costs falls to injury management. The *Workplace Injury Management and Workers' Compensation Act 1998 (NSW)* defines injury management as:

> … the process that comprises activities and procedures that are undertaken or established for the purpose of achieving a timely, safe and durable return to work for workers following workplace injuries. (Section 42 (1))

The emphasis on providing 'a timely, safe and durable return to work' is a feature of all schemes. According to the National Occupational Health and Safety Commission (NOHSC):

> Early intervention and a workplace focus for rehabilitation are recognised as effective in reducing the economic and human costs associated with work-related injury and disease … research and practical experience have demonstrated employers benefit from developing systems for early identification, treatment and management of work-related injury or disease, thereby reducing the prospects of an injury or disease becoming a long-term workers' compensation claim. This approach will typically involve some form of early reporting of injury and a coordinated response from management involving all relevant parties. (1995a, p. 2)

To achieve this, mechanisms have been established to encourage injured employees to participate in rehabilitation as soon as medically feasible and, whenever possible, at the pre-injury workplace. Despite this, there are scheme attributes which can frustrate the goal of early and durable return to work — in particular, the incentives provided to employees through the benefits structure and those provided to employers to facilitate rehabilitation. As explained by Associate Professor Nicholas Buys:

> The establishment of workers compensation schemes usually focuses on *levels* of benefits and *entitlements* to benefits with little regard for the impact of these provisions on prevention and rehabilitation. Consequently the systemic features of workers compensation schemes militate against successful rehabilitation. The presence of common law, lack of focus on employer responsibilities to assist injured workers to return to work, and poorly funded rehabilitation services have contributed to this problem. (sub. 92, p. 1) [Emphasis in original]

Claims management and dispute resolution procedures also have important roles to play in effective injury management. There is evidence that when confrontation is introduced into the claims process, recovery may be delayed (RACP 2001; Kenny 1995b; and The Australian Psychological Society Ltd, sub. 165, p. 3).

7.1 Why injury management is important

Aside from the obvious benefits to the injured worker from recovering as soon as possible, associated personal costs can also be reduced. Financial benefits can also accrue to the employer through lower workers' compensation premiums, avoidance of retraining costs and reductions in other expenses. Indirect benefits may arise through improved productivity and workplace morale. To the extent that there is cost-shifting, early recovery can reduce the burden on the general community.

There have been various attempts to quantify the direct benefits of injury management to the employer:

- Ashby analysed rehabilitation services provided by the Queensland Department of Education in one region of Queensland in 1995-96. He estimated that an annual outlay of $82 050 generated annual savings of $3.8 million (1999, p. 44) — a benefit-to-cost ratio of 47 to 1. The savings arose from lower workers' compensation premiums and reduced sick leave, but excluded potential indirect benefits of rehabilitation such as improved morale or productivity. The costs comprised the salaries of rehabilitation co-ordinators; incidental costs were excluded (1999, p. 36);
- a review of Commonwealth Rehabilitation Services (CRS) programs (Anutech 1993) estimated a benefit-to-cost ratio of 9 to 1;
- the Victorian Accident Rehabilitation Council (1990) estimated that the benefit-to-cost ratios for a number of workers ranged from less than 1 to 1 to over 33 to 1; and
- Ganora and Wright (1987) provided case-study data for a firm of 300 employees which had developed its own injury management and rehabilitation program with a benefit-to-cost ratio of 13 to 1.

However, in a study of a Commonwealth government business enterprise, Hocking et al. (1993) found that rehabilitation, while acceptable to employees, was not undertaken in a cost-effective manner and resulted in a net financial loss.

Although overseas compensation and rehabilitation systems can differ greatly from those of Australia, evidence from the United States of America suggest that there are significant savings for every dollar spent on rehabilitation (Roberts, Wood and Thomas 1985). A review of US studies suggested that the benefit-to-cost ratio can vary considerably, with estimates of between 1 to 1 and 36 to 1 (Pati 1985).

A number of studies have attempted to estimate the overall benefits of effective injury management. Taking into consideration the benefits to the individual of a full recovery, the gains to the community and the indirect benefits to the firm, the total benefits of successfully returning an injured worker to work may be four to eight times the direct savings in workers' compensation payments (Ganora and Wright 1987; IC 1995).

7.2 Factors which facilitate recovery

The Royal Australasian College of Physicians (RACP) reviewed the factors which contribute to recovery following an injury or illness. While some of these factors are unique to the individual — such as socioeconomic circumstances or psychological attributes — others relate to the method of compensation. Among the factors identified by the RACP as influencing recovery were:

- early intervention;
- workplace-based rehabilitation;
- the benefits structure; and
- effective claims management (2001, p. 4).

Early intervention

The RACP noted that one of the reasons for poorer health outcomes following injury was:

> The management of initial treatment (for example, in non-specific musculo-skeletal injuries, not identifying psychosocial risk factors ['yellow flags'], not encouraging resumption of normal behaviours as much as possible, not encouraging return to work or normal activities, etc.). (2001, p. 4)

The Rehabilitation Task Group, comprising representatives of workers' compensation schemes, employers, employees and rehabilitation providers, also acknowledged the importance of early intervention:

> Early and effective workplace-based rehabilitation is instrumental in maintaining or returning injured employees to work, thereby minimising costs associated with work-related injury. Benefits for employers include a reduction in compensation costs, retention of experienced and skilled employees and increased employee morale. Employee benefits include a decrease in loss of earnings and financial costs, in addition to a reduction in the psychological effects of work-related injury. (NOHSC 1995a, p. 5)

The importance of early identification of the medical issues involved, and the development of an appropriate treatment strategy, were identified by many participants. According to Buys:

> Early intervention is a key component of a workers compensation scheme. Early intervention includes a range of components: (a) maintaining communication with workers who are absent from the workplace, (b) appropriate medical treatment, (c) immediate contact with the treating doctor to obtain return to work restrictions, and provide information about job demands and the availability of transitional work, and (d) implementation of a clearly defined return to work program that may include modifications.
>
> Provision of rehabilitation services as soon as possible after injury is strongly correlated with early return to work. For example, a study in Victoria (Strautins & Hall, 1989) examined return to work data of 443 injured workers who were referred to an on-site disability management program in a company that had manufacturing plants in the areas of paper, steel, cardboard and plastic products. There were two important findings. First, early referral to rehabilitation was linked to likelihood of return to work. For example, of those referred within 8 – 28 days of injury, 77% returned to work. Where workers were referred after a month, only 66% returned to work. Second, the earlier the referral to rehabilitation the shorter the time taken to return to work. Of those workers who were referred to rehabilitation within seven days of injury, 73% had returned to work within 28 days. However of those workers who were referred for rehabilitation after 29 days, only 42% had returned to work within 28 days. (sub. 92, p. 3).

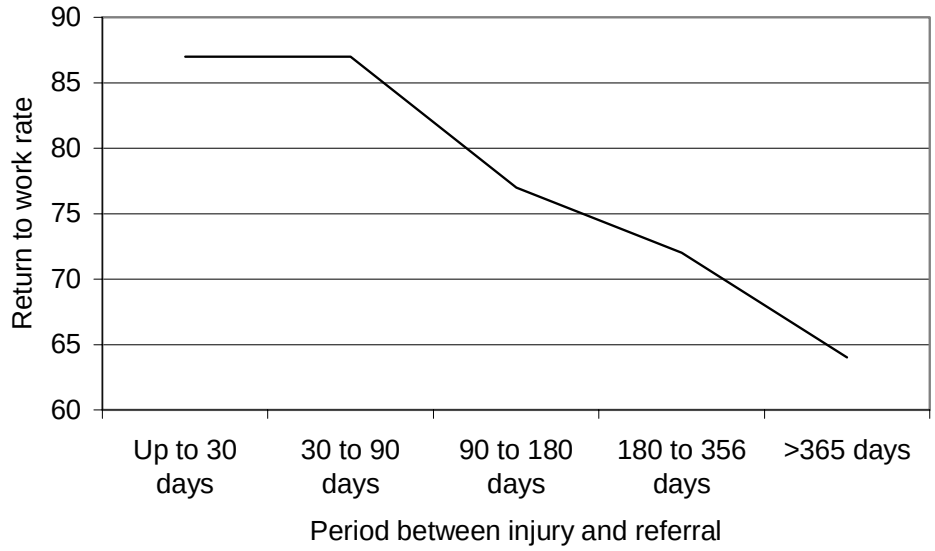
Employer groups also recognised the need for early intervention:

> Good injury management is the most effective driver of high workplace morale, cost mitigation, shared responsibility and positive outcomes. Injury management should commence immediately the injury occurs. Jurisdictions and employer management strategies of lost time injuries in particular must not provide the disincentive for the early reporting of claims and immediate injury management by the employer.
>
> The most critical period of any claim is the first 24 to 48 hours. It is during this time that the injured worker requires the most support in a number of areas including personal, moral, medical, financial with a clear understanding of the return to work expectation and assistance. Poor support systems for workplace injury can result in an adversarial relationship developing between the injured worker and the employer and the chances of a successful return to work diminish quickly. (Chamber of Commerce and Industry, Western Australia sub. 55, p. 16)

Figure 7.1 indicates the relationship between referral and return to work for a sample of 500 workers from the Australian Capital Territory.

Figure 7.1 **Early Intervention and return to work**

per cent of 500 workers referred to a rehabilitation provider in the ACT



Source: Association of Rehabilitation Providers in the Private Sector, ACT (sub. 139, p. 14).

The Australian Rehabilitation Providers Association also provide evidence of the benefits of early intervention. Table 7.1 indicates that there was a 90 per cent return to work rate when the delay between injury and referral to a rehabilitation provider was less than 20 days. When the delay to referral was increased to between 49 and 105 days, the return to work rate fell to 62 per cent. In part, the correlation between early intervention and successful return to work reflects the fact that medical conditions typically have to be stabilised before rehabilitation can commence. For more serious injuries, which could be expected to involve a lower likelihood of successful return to work, the time delays involved in stabilisation can be substantial. In some cases, the delay between injury and referral to a rehabilitation

Table 7.1 Rehabilitation costs and delays to referral

Delay between injury and first referral	*Return to work rate*	*Average cost with a return to work*	*Average cost with no return to work*
	% of cases	$	$
20 days or less	90	1 354	2 539
21 to 48 days	71	1 801	3 287
49 to 105 days	62	1 664	3 110

a Sample of 1393 workers injured since January 1999 in Victoria, South Australia and the Australian Capital Territory who were referred to rehabilitation providers.

Source: ARPA (2004).

provider has been as long as 2000 days (ARPA 2004). Rehabilitation costs are lowest when rehabilitation commences immediately.

Some participants identified the need for early indicators of the risk factors that could lead to an injury becoming a long term disability. 'Red flags' relate to physical risk factors; 'yellow flags' are indicators of psychological and social risk factors — for example, in relation to the management of chronic pain. Failure to adequately manage chronic pain can lead to long-term disability and delay return to work (CCH 2003a, p. 712). This is particularly problematic in soft tissue injuries which represent almost two-thirds of workers' compensation injury claims (NOSHC 2003a). Merse, Fitzgerald and Nichols (sub. 5, p. 3) noted that most people with soft tissue injuries to the back, neck or shoulders recover quickly. However, around 15 per cent will still be unable to return to work after six months and many of these will be permanently disabled. Those with long term injuries utilise around 80 per cent of the resources associated with managing this type of injury. Early identification and treatment of psychological risk factors therefore has the potential to produce considerable savings in rehabilitation resources.

The financial advantages of early intervention were also noted by the Department of Family and Community Services:

> … the importance of returning injured people to work within six months of injury was affirmed by NSW data indicating that two-thirds of workers' compensation payments were for claims over six months duration. Earlier referral to vocational rehabilitation (within six months of injury) was found to save employers and insurers $6 million each year (around 21% of scheme vocational rehabilitation costs) and increased people's earnings by $9 million. (sub. 167, p. 6)

Workplace-based rehabilitation

Maintaining contact with the workplace has been identified as a major contributor to successful recovery. Return to work allows injured workers to maintain self-esteem, benefit from the social network provided by the workplace, ensure that skills do not atrophy and enable income to be earned during rehabilitation.

The RACP noted the importance of maintaining contact with the workplace:

> Unemployment is, in itself, a risk factor for poor health. There are multiple and interrelating effects of being away from work, including loss of sense of identity, loss of social networks, loss of economic control and independence, loss of social status, loss of financial security (such as loss of family home), and so on. Long-term unemployment is notoriously hard to break. (Where unemployment is caused by injury, this is exacerbated by employer's reluctance to employ anyone with pre-existing injuries because of risk to workers' compensation premiums and the perceived risk of re-injury.) (2001, p. 4)

The RACP concluded:

> People who have had to leave work or abandon their normal activities due to injury usually find their social networks reduced and their social support reduced proportionately. Social support from family and friends has a protective health effect and assist people to recover from illness. People who do not have access to social support die earlier, suffer more illness and are marginalised from society, making them emotionally and physically vulnerable. (2001, p. 15)

If practicable, return to work should occur at the pre-injury workplace. This ensures that injured or ill workers have access to existing workplace and related social networks and that rehabilitation occurs in a familiar and relevant environment:

> Wherever possible, rehabilitation should be workplace-based as this provides the most realistic environment to assess work fitness. It also assists the employee and employer to maintain appropriate links which might be otherwise compromised by the injury/compensation process. (NOHSC 1995a, p. 5)

In an analysis of workers' compensation recipients in the United States, Galizzi, Boden and Liu (1996) found that return to work was quicker, and subsequent unemployment rates were lower, among employers who returned to their pre-injury employer rather than an alternative employer. Among the employees of smaller firms, who were unable to provide return to work opportunities, rehabilitation was slower.

The financial benefits to employers of instigating workplace-based rehabilitation can be substantial. Hawkins (2000, p. 6) provides evidence that Queensland employers using workplace-based rehabilitation in 1995-96 reduced average premium costs by 17 per cent and average claim duration by five days.

The advantages of rehabilitation at the pre-injury workplace are also reflected in the experience of the CRS:

> The CRS Australia experience is that the average gap between date of injury and date of referral are:

- for return to work with the same (ie. the injury) employer — 4.5 months
- for return to work with a new employer — 8.4 months

> Despite the long delays before referrals are made, CRS Australia has been able to effect return to work rates of 84% (same employer) and 56% (new employer) in this scheme. (Department of Family and Community Services, sub. 167, p. 8)

Benefits structure

The incentives provided by workers' compensation benefits are discussed in chapter 9. There is strong evidence that, beyond a certain level[1], an increase in benefits results in an increase in both the number of claims and claim duration. Moreover, lump sum compensation can lead to poor recovery outcomes (chapter 8).

It has long been recognised that the payment of compensation can delay recovery (Dereby and Tullis 1983; Hanson-Myer 1984). McNaughton et al. (2000) found that whether or not a claimant was receiving earnings-related compensation was the strongest determinant of whether a case would be closed within 12 months. For claimants receiving earnings-related compensation, 41 per cent cases were not closed after 12 months compared to 16 per cent in the non-earnings related group. Case closure statistics should be interpreted with caution as they may not indicate durable return to work (Butler, Johnson and Baldwin 1995). Nonetheless, the evidence suggests that incentives provided through the benefits structure can adversely influence rehabilitation outcomes. Hirsch (1997) found that, for a given injury, workers were likely to remain away from work longer when compensation for lost earnings was increased.

The benefits structure may also influence the type of injuries claimed for, with consequent implications for recovery statistics. This raises the possibility of moral hazard, such as exaggerating the severity of the injury or claiming for an injury which occurred outside the workplace. For example, it can be difficult to establish the severity of soft tissue injuries — which include sprains, strains and lower back injuries — or to attribute them to one cause (Insurance Australia Group, sub. 89, p. 39). Butler, Durbin and Helvacian examined the marked increase in soft tissue injuries in US workers' compensation claims and concluded that the ' … moral hazard response explains most of the 30% increase in the proportion of soft tissue injuries during the 1980s' (1996, p. 1).

The potential for moral hazard was recognised by the Chamber of Commerce and Industry, Western Australia:

> Another important issue lies in the exaggeration of symptoms. With high benefit levels, individuals find that they are pressured to justify their absence, and then begin to exaggerate the extent of their injuries or illness. This process can have deep psychological implications, in that individuals often come to believe their own exaggerations, thus perpetuating the duration of absence, and undermining the potential for effective recovery. This process has been termed 'functional overlay', and its destructive effects are well documented. (sub. 55, p. 11)

[1] The Institute of Actuaries of Australia (sub. 88, p. 10) provides evidence that increases in income replacement above 75 per cent can lead to more than proportional increases in claim costs (chapter 9).

Effective claims management

The way in which an injured worker is treated, particularly during the early stages of the claim, may condition their expectation of, and commitment to, the rehabilitation process (Foreman and Murphy 1996).

RACP identified the following factors as having the potential to delay recovery:

- The initial response to claimants by insurers (for example, acting as though claimants are automatically assumed to be fraudulent, thus pushing them into a defensive 'I'll show them, I'm really sick' attitude) …
- The handling of case management by insurers (for example, not developing appropriate return to work programs nor monitoring these, not providing claimants with good information about the effects of long-term sick leave, etc.).
- The handling of case management by treating doctors, including specialists (for example, not reviewing treatment by service providers and continuing treatment which is not helping, providing unnecessary treatment, not giving early referral to pain management programs, not addressing psychological problems such as depression).
- The number and type of medical examinations required … the effect of these appears to be twofold: to entrench illness behaviours and to prejudice the claimant further against the insurance company. (2001, p. 20)

Kenny (1995b) provides evidence that if an injured employee considers the claims management process to be unsympathetic or judgemental it can become adversarial and lead to delays in rehabilitation. The adversarial nature of common law compensation can also delay return to work (chapter 8).

7.3 Scheme approaches to injury management

Although best practice principles for injury management have been broadly accepted in all jurisdictions, differences exist in the way in which these principles have been incorporated into scheme arrangements (Victorian Government, sub. 164, p. 15). In particular, the schemes differ in regard to the specific responsibilities assigned to key stakeholders.

Employers

Most schemes emphasise workplace-based programs and employer involvement in the process (Comcare, New South Wales, Victoria, Queensland and the Australian Capital Territory). By contrast, South Australia places greater emphasis on services provided by external rehabilitation specialists and a case-management approach facilitated by claims managers. Western Australia and the Northern Territory are less prescriptive. They simply require that employers take reasonable steps to provide rehabilitation and suitable

employment. Obligations placed on employers are set out in table 7.2 and include the following:

- report the injury to the insurance company as soon as possible;
- provide suitable duties whenever practicable. Suitable duties are determined on the basis of medical advice and must involve 'productive' employment — 'demeaning' or 'token' duties cannot be offered. This requirement is imposed by all schemes;
- develop a rehabilitation program which outlines the process of returning the injured employee to the workplace. A rehabilitation program is written in consultation with the treating doctor and the worker. In complex cases, it may also involve a rehabilitation provider. This is a requirement of all schemes except Western Australia, the Northern Territory and Seacare. In New South Wales, Victoria and Queensland this requirement is only imposed on large employers[2]. In New South Wales and the Australian Capital Territory, it is known as an injury management plan and is drawn up by the insurance company;
- develop a return to work (RTW) plan which outlines the suitable duties offered to the employee. A RTW plan is designed to make clear the physical limitations on the worker and the steps to be taken in the graduated return to normal duties;
- employ a rehabilitation/RTW coordinator who, amongst other duties, collaborates with the injured worker and the treating doctor to establish appropriate rehabilitation and return to work strategies. In New South Wales, they collaborate with the claims manager in writing an injury management plan. This requirement applies to large employers in New South Wales, Queensland and Tasmania[3]; and
- keep the injured worker's position open for a specified period of time (which can vary between schemes). This is a requirement of all schemes except for Seacare, the Northern Territory and the Australian Capital Territory. In Tasmania and Western Australia, the obligation is to maintain the position 'if reasonably practicable'.

[2] In New South Wales, this is an employer with a workers' compensation premium of $500 000 or more; in Victoria this is an employer with a payroll of $1 million or more; in Queensland, workplaces with more than 30 employees are required to have a rehabilitation plan while in Tasmania, this requirement applies to workplaces with more than 20 employees.

[3] In Tasmania, workplaces with more than 50 employees are required to have a rehabilitation coordinator.

Table 7.2 **Employer obligations in rehabilitation/return to work**

	Notify insurer of claim	*Provide suitable duties*	*Appoint rehab/RTW coordinator*	*Develop rehabilitation policy*[d]	*Develop RTW plan*	*Keep position open*
	days					months
Comcare	1[a]	Yes	No	Yes	Yes	Indefinitely
Seacare	12	Yes	No	No	No	ns
NSW	2	Yes	Yes[b]	Yes[b]	No	6
Victoria	10	Yes	No	Yes[b]	Yes[e]	12
Queensland	10	Yes	Yes[b]	Yes[b]	No	6
WA	3	Yes	No	No	No	12
SA	5	Yes	No[c]	Yes	Yes	Indefinitely[f]
Tasmania	5[g]	Yes	Yes[b]	Yes[b]	No	12
ACT	2	Yes	No	Yes	Yes	ns
NT	3	Yes	No	No	No	ns

[a] For a serious personal injury, incapacity or dangerous occurrence. Within 2 hours for a fatality. [b] For large employers. [c] In South Australia, self-insurers are required to have a rehab/RTW coordinator. [d] In New South Wales and the Australian Capital Territory, employers are required to comply with injury management policy developed by the insurance company (claims manager). [e] For workers with no work capacity for 20 or more days. [f] For firms with 10 or more employees. Firms with less than 10 employees are required to keep position open for 12 months. [g] Working days.

Sources: HWCA (2002); scheme sources.

The strong correlation between early intervention and successful return to work has prompted two schemes — New South Wales and Western Australia — to allow provisional workers' compensation payments to be made without any admission of liability on the part of the employer. According to the Association of Rehabilitation Providers in the Private Sector, ACT:

> Short timeframes on accepting liability and access to benefits while liability is being determined, assists early intervention. There have been cases where claimants have gone back to work before liability was determined because liability was not held up by the insurance process. (sub. 139, pp. 13–14)

Work placement

In some circumstances, returning the employee to the pre-injury workplace is not possible. Small and medium-sized enterprises are often unable to offer suitable duties or lack the necessary resources to undertake workplace-based rehabilitation. Those difficulties were identified by Workplace Injury Management Services:

> Lack of opportunities for return to work with the pre-injury employer is especially the case for small to medium employers. Based on our experience, we estimate that as many as 80% of injured workers of small to medium employers, who are still off work at three months post injury, will not return to ongoing work with their pre-injury employer.
>
> To varying extents workers' compensation schemes include provision for vocational retraining and placement services for injured workers who cannot return to work with their pre-injury employer. As well, several jurisdictions provide varying levels of incentives and support to employers who employ previously-injured workers, such as wage and training subsidies, premium exemptions and protection from future costs associated with the injury (eg, NSW's JobCover program, Victorian WISE program and South Australia's RISE Program).
>
> However, in our experience vocational retraining and placement services are generally under-utilised. Where they are accessed, it is often as a last resort after sometimes lengthy delays and unsuccessful attempts to achieve return to work with pre-injury employers, which may result in considerable frustration and loss of confidence for the injured worker. (sub. 37, p. 5)

Other arrangements could facilitate the placement of employees of small to medium enterprises following a work-related injury or illness:

> There may also be opportunities for workers' compensation schemes to access or learn from the services and expertise of specialist disability placement services such as those funded through the Commonwealth Government's Job Network program. (WIMS sub. 37, pp. 5–6)

The specific problems arising from labour hire arrangements were noted by a number of participants. For example, BDS Recruit Pty Ltd observed:

> In the labour hire industry the employer, the agency, in most cases cannot provide suitable duties as they may only have an office with limited duties. The host company, controller of the workplace has no obligations under current legislation to participate in any way in the injury management system. This results in:

- The injured worker having limited access to suitable duties.
- The introduction of a 3rd party to try and find suitable duties for the worker, adding to the cost of the claim.
- The job the worker was in being filled by another casual worker as the host company has no obligation to keep it open for the injured worker.
- The injured worker staying on compensation because there is no work to return to. (IRsub. 213, p. 6)

The Commission's preference is for labour hire companies to be deemed the employer for workers' compensation purposes (chapter 6). This would include responsibility for injury management. The Commission notes the difficulties faced by labour hire companies in providing suitable duties but considers that these difficulties are also likely to be faced by

the host company. The host company's decision to enter into a labour hire arrangement reflects the temporary nature of the intended employment relationship. Furthermore, the costs of workers' compensation claims would normally be reflected in labour hire agreements entered into by the host company and the labour hire company.

In addition to the obligations placed on employers to facilitate rehabilitation, some schemes provide incentives for employers to hire workers injured at another workplace. These incentives may take the form of training subsidies, exemption from paying workers' compensation premiums for a worker injured at another workplace or indemnification against costs arising from an aggravation of a pre-existing injury.

For example, in New South Wales, the JobCover Placement program provides:

- a training allowance of up to $300 for the first 12 weeks;
- workers' compensation premium exemption for the injured worker in the first year; and
- payment for second injury costs if the worker has a work-related aggravation of a pre-existing injury in the first year of employment.

Incentives for new employers of injured workers are also offered by Victoria, South Australia, Queensland and the Northern Territory. These 'second-injury' arrangements need to be closely monitored to ensure that re-employment subsidies are only received by employers hiring previously injured workers. For example, in South Australia, scheme data would suggest that 72 per cent of workers' compensation claimants had a prior injury. However, according to the HWSCA survey of injured workers, the figure was only 41 per cent (2003, pp. 21–2).

In December 2003, the Australian government initiated a pilot program to improve access for recipients of the Disability Support Pension to the employment services offered by the Job Network. These services could also be accessed to provide employment opportunities for workers' compensation claimants. Workers' compensation schemes and industry associations could also directly contribute to reducing job search costs and facilitating the placement of injured workers.

Programs aimed at the placement of injured workers operate in other countries. The Workers' Compensation of British Columbia offers a free service to employers who submit job vacancies online. The employers are then contacted with the details of injured workers who may meet the employer's requirements. Employers are also eligible for financial benefits when hiring injured workers. South Australia has introduced a similar job-matching service through its RISE program.

In North America, many smaller firms[4] have entered into employee leasing arrangements with Professional Employer Organisations (PEOs). The PEO manages workers' compensation claims, payroll, payroll tax and OHS for the client company. In an arrangement similar to labour hire for temporary employees, the PEO hires the employees of the client company and leases them back. As a larger employer, the PEO can exploit economies of scale in handling personnel relate matters, including workers' compensation and workplace risk assessment. It may also be better placed to offer workplace-based rehabilitation opportunities. As a large purchaser of insurance, the PEO may be able to negotiate premium discounts on workers' compensation insurance that would not be available to individual smaller employers. Employee leasing agreements have been entered into by a small number of Australian employers.

Employees

Employees are generally required to make all reasonable attempts to participate in rehabilitation. Failure to do so can result in a reduction, suspension or cessation of benefits. Specific obligations include the following:

- notify the employer about the injury as soon as possible (all schemes);
- cooperate in medical examinations and provide medical reports on request by the insurer (Comcare, Victoria, Western Australia, Tasmania and the Northern Territory); and
- cooperate in the establishment of a rehabilitation/RTW plan and comply with its provisions (New South Wales, Victoria, Queensland, South Australia, the Northern Territory and the Australian Capital Territory).

Doctors

Medical practitioners have a primary role in providing initial treatment and the prognosis for rehabilitation and return to work. Typically they play a central role, together with the employer and employee, in developing injury management and return-to-work strategies (NOSHC 1995a, p. 10). Among the other tasks of the treating doctor are: initial diagnosis and treatment; ongoing treatment; referral to specialist treatment; and, where necessary, cooperation with the employee, employer and rehabilitation provider to facilitate return to work.

[4] Collectively, firms with employee leasing arrangements employ around 3 million employees. The average firm covered by an employee leasing arrangement has 16 employees (NAPEO 2004).

The central role of doctors in pronouncing workers fit to return to work, and the condition under which that return should occur, has been acknowledged by workers' compensation schemes. For example, in the Northern Territory:

> Doctors are the 'gate keepers' of the workers' compensation scheme, with no other medical or paramedical group being afforded equivalent powers. This places doctors in a privileged position when it comes to workers' compensation matters, as under the Northern Territory's legislation only they have the authority to issue medical certificates for lost time by injured or ill workers. With such powers comes a number of responsibilities to ensure that the injured or ill worker receives appropriate, timely and effective treatment during their period of injury or illness (Northern Territory Worksafe 2004).

In all schemes, injured workers have the right to receive treatment from their own doctor. In New South Wales and the Australian Capital Territory, an injured worker is required to nominate a treating doctor who is prepared to cooperate in the establishment of a rehabilitation plan. However, if a dispute arises over the worker's medical condition, independent medical advice may be sought by the insurer. In Victoria, Queensland, Western Australia and Tasmania disputes can be referred to a medical panel for arbitration (chapter 13). In New South Wales, medical disputes are referred to the Workers' Compensation Commission. Under the Australian Government schemes, expert medical witnesses, who are independent of both parties, can be used by the Administrative Appeals Tribunal to resolve disputes.

Allied health professionals

Allied health professionals include physiotherapists, occupational therapists, chiropractors and psychologists. Participants noted the importance of services provided by allied health professionals in ensuring effective rehabilitation outcomes. For example, the Chiropractors' Association of Australia (CAA) submitted that the recommendations contained in the Interim Report reinforce the view of:

> … the GP as the gatekeeper and makes no mention of other allied health professionals who have an important role in the management of many claimants and especially of those workers who require a rehabilitation coordinator … The CAA is of the view that chiropractors by virtue of their undergraduate training are suitably qualified to provide an equal or superior gate-keeping role to GPs for neuro-musculoskeletal injuries. There have been instances in the past where medical practitioners have indulged in discriminatory practices against chiropractors (and other health professionals). We consider this may prejudice the rehabilitation of the worker and compromise the ability of the medical practitioner to act as the sole gate-keeper for workplace injuries. (IRsub. 230, p. 2)

The Commission acknowledges that, in many cases, once the initial medical diagnosis is made and immediate treatment is given, allied health professionals are primarily

responsible for rehabilitation. However, as noted by NOSHC the ' … medical practitioner is central to the rehabilitation of injured employees and must be consulted prior to the implementation or maintenance of return to work programs' (1995a, p. 10). In a national survey of almost 3,000 injured workers, doctors were identified by about a quarter of those surveyed as most helpful in assisting return to work. Physiotherapists were regarded as most helpful in facilitating return to work by 13 per cent of injured workers. Other allied health professionals were identified as most helpful by 18 per cent of workers (HWSCA 2003, p. 36).

Allied health professionals, such as occupational therapists, can also be involved in preventing work-related injuries (OT Australia, Victoria sub. 13, p. 3) in particular those involving musculo-skeletal injuries. Counselling services may also be utilised to prevent work-related stress claims.

Some participants submitted that inflexibility in claims management practices may have resulted in the under-utilisation of services provided allied health professionals. OT Australia, Victoria said the reasons for this inflexibility included:

- Service delays in claims administration,
- The need for paper-based approvals by claims officers for every hour of service,
- Varying degrees of intervention towards rehabilitation, depending on the expertise and workload of individual claims officers,
- Systemic barriers to a focus on early intervention and prevention, and
- Post-injury purchase of services and no provision for prevention services. (sub. 131, p. 1)

Claims management

Insurers are responsible for claims management. In publicly underwritten schemes, the claims management may be outsourced to private insurers. The insurance company may either be responsible for writing an injury management or rehabilitation plan (New South Wales) or approving its implementation. Several participants noted the importance of claims management in successful rehabilitation:

> There is a direct relationship between the design of the injury management programme and the benefits regime in respect to duration. It is possible for an insurer to effectively 'park' a claimant in a scheme and only comply with statutory obligations in respect of rehabilitation or return-to-work. The long-term prospects of the injured worker returning to work may be minimal if this occurs.
>
> The skills required to rehabilitate an injured worker are different to those required to manage a claim and a case could be made for a total separation of the two functions within the workers' compensation scheme. (Department of Employment and Workplace Relations, sub. 166, p. 26)

In South Australia, claims agents are responsible for coordinating return to work. In New South Wales and the Australian Capital Territory, the insurance company develops a rehabilitation plan in consultation with the worker, employer and treating medical practitioner.

Rehabilitation providers

Rehabilitation providers: offer advice on return to work strategies; arrange alternative employment if injured workers cannot return to their previous job; arrange for the assessment of psychological factors that might be impairing return to work; arrange counselling, if necessary; and arrange independent medical opinions for the purpose of claims management. Rehabilitation providers may also be involved in dispute resolution.

As noted by NOHSC, '[i]t should not be necessary to refer all injured employees to a rehabilitation provider. In many cases, liaison with the treating medical practitioner and workplace supervisor may be all that is required to develop an appropriate rehabilitation program for an injured employee' (1995a, p. 13). In a national survey of injured workers, the rehabilitation provider was identified as most helpful in facilitating return to work by 9 per cent of injured workers (HWSCA 2003, p. 36).

Although rehabilitation providers employ allied health professionals, the role of the provider is not to supply treatment but to manage the rehabilitation process. In all schemes, with the exception of Tasmania and Queensland, rehabilitation providers require accreditation (Australian Rehabilitation Providers Association, sub. 160, tables 1 and 2). Queensland and Tasmania are currently considering the introduction of accreditation.

7.4 Outcomes of injury management

A key indicator of injury management success is the rate of durable return to work. Nationally, around 83 per cent of workers return to work within six months, but for 10 per cent of workers it is not durable (box 7.1). The national durable return to work rate of 73 per cent is below its peak level of 77 per cent in 1999-00 and slightly below the level when comparative rates were first compiled in 1997-98.

Box 7.1 **Results from the Australasian Return to Work Monitor**

The Australasian Return to Work Monitor is a survey undertaken on behalf of HWSCA. It compares rehabilitation and return-to-work (RTW) outcomes across workers' compensation schemes in Australia and New Zealand. All Australian jurisdictions, with the exception of Western Australia and the Northern Territory, participate in the survey. Each worker surveyed:

- had submitted a claim seven to nine months before; and
- had more than 10 days compensation paid (including any employer excess).

Key results of the survey for Australian jurisdictions in 2002-03 were:

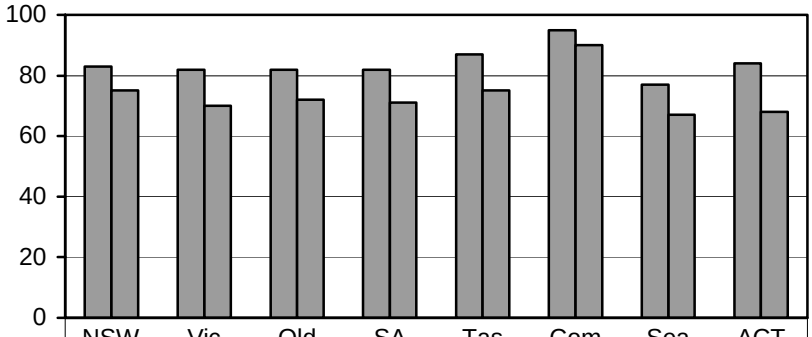
- 83 per cent of injured workers returned within six months of making a claim;
- 73 per cent of injured workers achieved a durable return to work (that is, had returned to work and were still working at the time of the survey);
- the most common reason for returning to work was 'recovery from injury' (41 per cent) followed by 'economic need' (17 per cent) and 'wanting to RTW' (16 per cent). Pressure from the employer, insurer or workers' compensation scheme was rarely identified;
- three-quarters of workers who returned to work felt ready to do so;
- three-quarters of workers who returned to work reported they had been given suitable duties;
- doctors were reported most frequently (23 per cent) as being most helpful to return to work; and
- on average 57 days of compensation was paid and the average claim cost was $10 102.

Source: HWSCA (2003).

Comparative return to work outcomes are provided in figures 7.2 and 7.3. Across jurisdictions, several trends could be observed:

- All schemes recorded similar outcomes with respect to return to work at the pre-injury workplace. Across the Australian schemes surveyed, 83 per cent of workers who returned to work did so with their pre-injury employer. The differences between the jurisdictions were relatively minor, with the exception of Comcare and Seacare, which both recorded a rate of return to the pre-injury employer of about 95 per cent.

Figure 7.2 **Comparative return to work outcomes[a], 2002-03**
per cent of injured workers

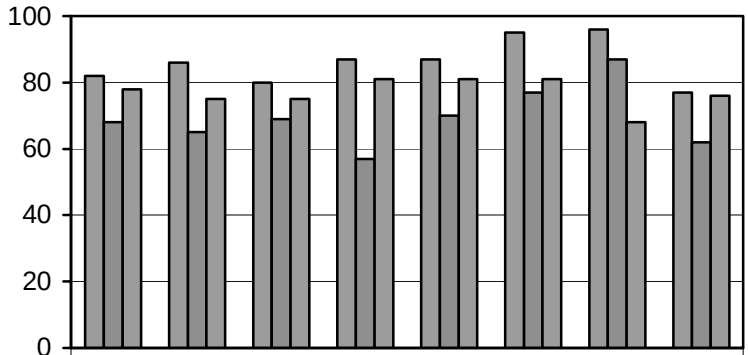


	NSW	Vic	Qld	SA	Tas	Com	Sea	ACT
RTW	83	82	82	82	87	95	77	84
Durable RTW	75	70	72	71	75	90	67	68

a The return to work rate measures the proportion of injured workers who have returned to work within six months of making a claim. The average return to work rate for Australia (excluding the Northern Territory and Western Australia) was 83 per cent in 2002-03. The average durable return to work rate was 73 per cent in 2002-03.

Source: HWSCA (2003, pp. 1–2).

Figure 7.3 **Employment conditions on return to work 2002-03**
per cent of injured workers who returned to work



	NSW	Vic	Qld	SA	Tas	Com	Sea	ACT
Return to same employer	82	86	80	87	87	95	96	77
Return to same employer/same duties	68	65	69	57	70	77	87	62
Given suitable duties	78	75	75	81	81	81	68	76

Source: HWSCA (2003, pp. 12–14, 31).

- 68 per cent of injured workers returned to the same employer and carried out the same duties as they did before their injury. Injured workers most frequently returned to the

same employer and the same duties in Seacare (87 per cent) and Comcare (77 per cent). The lowest rate of return to the same employer and the same duties was in South Australia (57 per cent).

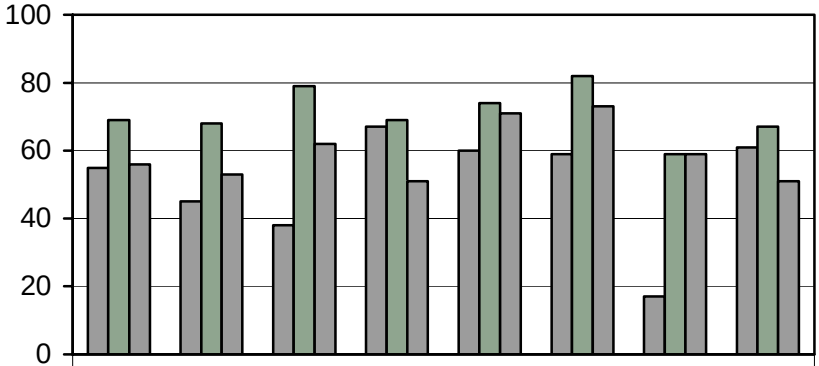
- 36 per cent of injured workers participated in rehabilitation. The highest rates of participation in rehabilitation were in the Australian Capital Territory (83 per cent), Tasmania (65 per cent) and South Australia (65 per cent), while the lowest were in Queensland (17 per cent) and Seacare (9 per cent). New South Wales and Victoria had participation rates close to the national average (HWSCA 2003, p. 49).

Return to work plans

A comparison of return to work provisions is provided in figure 7.4.

- 49 per cent of injured workers reported that they had a RTW plan developed for them. The proportion was highest in South Australia (67 per cent) and lowest in Seacare (17 per cent).
- Of those who received a RTW plan, 72 per cent considered them helpful to return to work. This proportion was highest in Comcare (82 per cent) and Queensland (79 per cent) and lowest in Seacare (59 per cent).

Figure 7.4 **Comparison of return to work provisions, 2002-03**
per cent of injured workers



	NSW	Vic	Qld	SA	Tas	Com	Sea	ACT
Had RTW plan	55	45	38	67	60	59	17	61
RTW plan was helpful	69	68	79	69	74	82	59	67
Given help with RTW plan	56	53	62	51	71	73	59	51

Source: HWSCA (2003, pp. 24, 26, 27).

Comparing outcomes

It is difficult to compare return-to-work outcomes between schemes. Differences in benefit structures, dispute resolution mechanisms and the labour force covered by schemes make it difficult to isolate the impact of return to work and rehabilitation provisions. Nonetheless, a few broad inferences can be drawn:

- The design and implementation of RTW plans, and the provision of suitable duties, appear to have an important role to play in facilitating return to work. Comcare, which had the highest durable return to work rate, had the highest proportion of workers who found that RTW plan helpful; a high proportion of workers who felt they had been given help to implement their RTW plan; and (along with South Australia and Tasmania), the highest proportion of workers who believed they had been given suitable duties when returning to work.
- The experience of Seacare illustrates the crucial role that employment conditions can have on injury management outcomes. Reflecting the difficulties of finding alternative duties in the maritime industry, Seacare claimants were more likely to report that they returned to the 'same employer, same duties' (figure 7.3). Graduated return to work is problematic in the maritime industry[5]. Reflecting this, Seacare had the lowest proportion of workers with a RTW plan (figure 7.4), but the highest proportion of workers who felt ready to return to work (81 per cent). Comcare, which largely covers public service employers, was able to offer the highest proportion of return to the same employer. These observations suggest that a 'one size fits all' approach may not be appropriate in injury management and that consideration should also be made of the nature of employment covered by the scheme.

The Australian Rehabilitation Providers Association (ARPA) has identified the claims management features which it believes are most conducive to workplace based rehabilitation. ARPA divided schemes into four types:

- State underwritten and administered (Queensland): 'While these schemes generally agree with the need for early intervention they are usually the slowest at claim determination and therefore *the slowest at referral to rehabilitation services.*' (sub. 175, p. 1) [italics in original]
- State underwritten and agent administered (South Australia, New South Wales and Victoria): 'These schemes are reasonably quick at claim determination which can allow

[5] According to HWSCA an 'injured seafarer ready to return to work must have access to a supernumerary position on a ship for a graduated return to seafarer duties or must be passed medically fit by an Australian Maritime Safety Authority approved medical practitioner in accordance with fitness for duty regulations if able to return to full pre-injury seafarer duties. There are few supernumerary positions on ships. As ships are often away from port for 4–6 weeks, the options for graduated return to work under such conditions is limited' (2002, p. 65).

for early rehabilitation intervention. In reality Agents will often 'triage' claims in house which adds a delay to intervention times. Some use in house rehabilitation for this function which could be considered a form of early intervention, others use less qualified and experienced people for this role resulting in slow or inappropriate rehabilitation service delivery.' (sub. 175, p. 2)

- Insurer underwritten and administered (Tasmania, Western Australia, Northern Territory and the Australian Capital Territory): 'These schemes are also reasonably quick at claim determination which can allow for early rehabilitation intervention. They are also often ambivalent to the value of rehabilitation to the scheme so are more likely to delay referral. *It is only when time standards are built into these schemes that early intervention is achieved.* (sub. 175, p. 3) [italics in original]
- Self insured (Comcare): 'Self Insurers often have in house rehabilitation providers that know about the injury before the claim is determined … *Self Insurers achieve the best levels of early intervention.* This level of early intervention is difficult to achieve in any other way and may not be translatable to other schemes … *Self insured rehabilitation is almost exclusively workplace based.* This scheme form understands the value of retaining a focus on the workplace if return to work is the primary outcome expectation of the scheme. It is often easier for self insured employers to understand the importance of training supervisors and managers to support injured workers in their recovery and return to work.' (sub. 175, p. 4) [italics in original]

7.5 National framework issues

The Heads of Workers' Compensation Authorities proposed seven principles of best practice injury management:

- In a workers' compensation system, early return to work is the expected outcome of occupational rehabilitation intervention. Occupational rehabilitation should be workplace-based with services aimed at the maintenance or restoration of a worker to appropriate employment.
- The employer should be responsible for assisting in the occupational rehabilitation and return to work of their injured workers, as well as keeping the job available for a reasonable period.
- Occupational rehabilitation services are not required for all injured workers, but, where necessary to achieve a return to work, services are most effective when delivered as soon as possible after injury, and subject to regular assessment for relevance, effectiveness and results.
- Workers' compensation systems should provide an environment where an early return to work is seen by the injured worker as the most appropriate outcome. This involves an obligation on behalf of the injured worker to participate positively in the occupational rehabilitation programme and return-to-work plan.

- Insurers and managed fund agents should ensure that there is a clear focus on occupational rehabilitation and return to work as part of the workers' compensation claims management process.
- Occupational rehabilitation is most effective when the employer, worker, medical and rehabilitation providers (where involved) jointly develop, implement and show a commitment to return-to-work programmes.
- The workers' compensation system regulator should have responsibility for developing and fostering a culture which strongly supports and reinforces the expectation of return to work as the normal outcome for any work related injury or disease. The regulator's role should be to develop, communicate, promote and enforce the legislative framework required to achieve return to work and the provision of occupational rehabilitation. (HWCA 1997, p. 15)

These principles are consistent with those proposed by other organisations (for example, NOHSC (1995a, p. 3)[6] and IC (1994, p. 127)). They have been broadly accepted in all jurisdictions, although the details of how these principles are implemented can vary. Some schemes favour a regulatory approach to facilitate workplace-based rehabilitation, such as New South Wales, Queensland and Tasmania who require large firms to hire a rehabilitation coordinator. Other schemes are less prescriptive. According to the Victorian Government:

> Common acceptance of these principles does not mean that the States have adopted uniform approaches to promoting these behaviours. For example, Victoria has initiated an educational campaign whilst South Australia has introduced compulsory RTW plans. These different approaches demonstrate that encouraging these behaviours is not easily mandated through a regulatory regime. The Australian Rehabilitation Providers Association highlights these challenges stating that increasing control and regulation does not automatically lead to better outcomes, as does the Australian Industry Group (AiG) who comment that instruments such as written RTW plans are more commonly understood as a compliance issue "rather than a legitimate part of the rehabilitation process". This is evidenced by the Tasmanian experience in 2001-02 where durable RTW outcomes of 79 per cent exceeded the Australian average even though no accreditation procedures, fee setting or other controls were in place. Accordingly, there are significant challenges in identifying and extracting best practice in achieving rehabilitation and durable RTW outcomes. This conclusion is reinforced by the findings of the Comparative Performance Monitoring report that few guidelines or principles can be established that greatly influence the degree of success associated with specific worker rehabilitation programs and the implementation of durable RTW plans. (sub. 164, p. 15)

6 These principles were developed by the Rehabilitation Task Group which included representatives of the Victorian WorkCover Authority; Workers' Compensation Board of Tasmania; WorkCover Corporation of South Australia; Work Health Authority of the Northern Territory; Workers' Compensation Board of Queensland; WorkCover Western Australia; Australian Chamber of Commerce and Industry; Australian Council of Trade Unions; Comcare; Commonwealth Rehabilitation Service; and Victorian Chamber of Commerce and Industry.

An important advantage of a federal system of workers' compensation is that it provides opportunities for jurisdictions to learn from each other. This may be particularly important in injury management where medical treatment protocols and rehabilitation practice can change over time. Differences in local conditions and the nature of employment in each jurisdiction may also necessitate different approaches in relation to return to work. In this respect, the Commission endorses the comments of the Tasmanian Government:

> The Government believes that in broad terms the differences between jurisdictions with respect to early intervention and return to work arrangements are not particularly significant. This is an aspect of workers compensation systems that is largely driven by notions of best practice and there are benefits in being able to compare results and innovations. This is a strong example of where a multiplicity of systems is providing a demonstrated benefit.
>
> There may be some differences in reporting and legislative requirements which could create some difficulties for employers operating in more than one jurisdiction if claims management is centralised. However, the Government's view is that claims are best managed at the local level and that therefore these differences are largely irrelevant. (sub. 135, p. 9)

Comparability of injury management outcomes is currently hampered by the lack of consistency in benefit structures and dispute resolution mechanisms. In particular, the presence of common law in some jurisdictions may affect early return to work (chapter 8). However, schemes have recently taken steps to facilitate the exchange of information; in particular, the Return to Work Monitor (HWSCA 2002, 2003). Moreover, schemes have shown a willingness to co-operate on injury management issues. The development of best practice guidelines for injury management (NOHSC 1995a) and guidelines for the accreditation of rehabilitation providers (NOHSC 1995b) are two important examples.

Some participants pointed to the compliance costs imposed on multi-state firms by different rehabilitation and return to work provisions (Insurance Australia Group, sub. 146, p. 3). However, these costs are unlikely to be significant. Where schemes have imposed restrictions, for example compulsory RTW plans, they have also made available comprehensive material (such as template RTW and rehabilitation plans) to make compliance easier. This material is often directed specifically to small- to medium-sized employers.

RECOMMENDATION

The Commission recommends the following as principles to facilitate durable return to work:

- ***early intervention, including the early notification of claims and the provisional assignment of liability;***

- ***workplace-based rehabilitation where possible, at the pre-injury workplace, noting the various schemes aimed at overcoming the particular difficulties faced by small to medium enterprises in this respect; and***
- ***return to work programs developed and implemented by a committed partnership of the employer, employee and treating doctor, drawing on the services of a rehabilitation coordinator and allied health professionals as required.***

Those eligible firms who choose to self-insure under Comcare (model A) would be subject to its injury management provisions. ARPA were of the opinion that Comcare was essentially a self-insurance scheme and had features most conducive to achieving to early intervention and workplace based rehabilitation (sub. 175, p. 4). This view is supported by the fact that Comcare has the highest return to work rate of any scheme (HWSCA 2003, p. 1). Under an alternative national self-insurance scheme (model B) the injury management provisions of Comcare could also apply.

An alternative national insurance scheme (model C) would provide an opportunity to consider whether the injury management provisions of Comcare were appropriate for premium-paying employers, particularly smaller employers. For example, the provision that a firm must keep the injured worker's position open indefinitely may be considered an onerous impositions on small firms. This could be modified, as in South Australia, to apply only to larger firms.

The national body charged with developing internally consistent scheme elements (model D) would continue the cooperation demonstrated by schemes in sharing information and developing consistent guidelines in injury management. One area in which greater national consistency could be achieved is in the accreditation of medical and rehabilitation professionals. Groups representing rehabilitation providers (for example, ARPA sub. 160, tables 1 and 2) noted the costs imposed by different accreditation standards applied to rehabilitation providers across schemes. The Commission sees no reason for different accreditation standards to apply and notes that best practice principles have already been agreed to by the schemes (NOHSC 1995b). An agreement of mutual recognition of accreditation standards could reduce the cost of multiple accreditation and facilitate adoption of a common standard over time.

8 Common law access

The Commission has been asked to consider the 'implications of retaining, limiting or removing access to common law damages for work-related injuries/illness and fatalities'.

The common law is the set of traditional English legal principles which have been adopted by Australian courts. The common law of tort[1] may provide injured workers with an alternative avenue to compensation, distinct from statutory workers' compensation. Although rarely used, action for workplace harm may also be brought against an employer for breach of contract.

Under statutory workers' compensation schemes, employees do not have to establish fault in order to receive compensation — it is only necessary to show that the workplace fatality, injury or illness arose 'out of or in the course of employment'[2]. However, to succeed in a common law action for the tort of employer negligence, it is necessary to show that the employer breached a duty of care owed to the employee and, as a result, damage was suffered. Similarly, in an action for breach of contract, an injured worker must establish that it was the employer's breach of an express or implied term of the employment contract which caused the injury.

The inclusion of common law can have a significant impact on the statutory benefit structure. Schemes with little or no common law access — such as Comcare and South Australia — tend to have statutory benefits which cater for the ongoing needs of permanently impaired workers (are 'long-tail' schemes). Schemes with relatively unrestricted common law access — such as Queensland and Tasmania[3] — tend to have a statutory benefits structure directed towards workers with shorter-term illnesses or injuries. These schemes look to the common law to meet the needs of the more seriously injured.

1 Tort is a private or civil wrong, independent of contract, arising from wilful or negligent misconduct in breach of a duty of care owed to an injured person.

2 The exception is Tasmania which uses 'and' instead of 'or'.

3 The Australian Capital Territory has unrestricted common law access and a long-tail benefits structure (chapter 9).

8.1 Common law in workers' compensation

Common law actions

Common law actions may be brought by employees directly against employers for the employer's own actions, against employers for the actions of third parties, or directly against third parties. The majority of common law actions in workers' compensation are under the tort of employer negligence. Employees may also bring action for breach of contract.

Employer liability in tort

Negligence can be established by proving that an employer breached a general duty of care or a statutory duty.

Breach of general duty of care

Employers are regarded as having a general duty to provide their employees with a 'safe system of work'. This includes, inter alia, a duty to:

- employ reasonably competent staff;
- take reasonable care to ensure a safe place of work; and
- provide, inspect and maintain safe plant and equipment (CCH 2003a, p. 122).

Where an employer fails to satisfy the duty of care (is negligent) and an employee suffers loss as a result, damages may be recovered by the employee, provided common law actions are not disallowed by legislation. Employers may be held directly liable for their own acts or omissions, or vicariously liable for the acts or omissions of employees or third parties (for example, contractors).

Breach of statutory duty

An action for breach of a statutory duty may be available where such a right is provided under the OHS regulation. This is distinct from a criminal action under OHS regulation against an employer. Since OHS regulations are clearly established under legislation, breach of statutory duty will often be easier to prove than negligence.

Employer liability in contract

Although seldom used, employment contracts can provide the basis for a common law action against an employer. Under contract law, an employer will be held liable for the consequences of a breach of that contract. This may be a breach of an explicit term of the employment contract, such as an OHS provision of an award, or a term implied into the contract by the courts. Unlike actions in tort, damages for breach of contract will not be reduced to take account of an employee's contributory negligence. However, it may be difficult to establish that the loss suffered by the employee was caused by the breach of contract.

Third party liability

All schemes allow injured workers to claim damages against non-employers. Examples include when a third party supplies defective products to be used in a workplace or provides negligent advice. However, usually, an injured worker will seek to hold the employer liable for the actions of third parties. The employer (or the employer's insurer) may then seek indemnification from the third party.

If damages are awarded, the employer is entitled to be repaid any workers' compensation previously paid or the amount of damages, whichever is the less. The employee also ceases to be entitled to any further workers' compensation.

Provision is also made for an employer to institute proceedings on behalf of an employee against a third party. In this case, the employee retains their right to workers' compensation once the common law award is exhausted.

Common law damages

Damages can be awarded for economic and non-economic loss. Economic loss is a measure of reduced earning capacity and expenses incurred as a result of the injury. This includes not only past earnings loss which is directly attributable to the harm, but also future earnings loss. Non-economic loss relates to pain and suffering, reduced enjoyment of life, reduced expectation of life, impairment and disfigurement. Common law damages are normally paid as a lump sum.

8.2 Common law access in Australian jurisdictions

Common law is not available in all Australian jurisdictions. Since the mid-1980s, all Australian governments, with the exception of the Australian Capital Territory, have

restricted the availability of common law for workers' compensation claimants. Some states have abolished common law access altogether.

The availability of common law damages can be restricted by excluding certain heads of damages, making eligibility subject to meeting a minimum injury threshold or placing a cap (upper limit) on the amount of damages which can be paid. Schemes may also impose a limit on the time in which a common law claim can be initiated.

Access to common law was removed in the Northern Territory from 1 January 1987 and South Australia from 3 December 1992. In the Comcare and Seacare schemes, damages have been abolished for economic loss (although actions may be taken by dependants in the case of death). In New South Wales, Victoria and Western Australia, access to common law is restricted to workers with a serious injury (the definition of this differs between jurisdictions) and damages are capped[4]. In Queensland and Tasmania, there are no caps on damages but access is subject to a minimum injury threshold.

Where access is restricted to more seriously injured workers, most schemes use thresholds based on impairment percentages. In Western Australia, access to common law is based on a disability threshold. Thresholds based on narrative tests or monetary thresholds tend to erode over time, allowing claimants with less serious injuries or illnesses to access common law:

> Since their introduction in the 1970s both monetary and verbal thresholds have been greatly eroded by claims "padding" to surmount thresholds, by expansive judicial interpretations of verbal thresholds, and by the impact of inflation on monetary thresholds — most of which are not indexed to increases in the nominal costs of injury compensation. (Dewees, Duff and Trebilcock 1996, p. 57)

All schemes which provide compensation through a statutory scheme and allow damages at common law include provisions to prevent compensation by both. Most jurisdictions allow the claimant to retain the right to no-fault damages up to the point at which their case for negligence is proved. Any compensation received under the no-fault scheme is then repaid and the claimant is prevented from accessing further statutory benefits. If the claim is not successful, the worker will continue to receive compensation under the statutory scheme. Two jurisdictions — the Australian Government and Queensland[5] — require an irrevocable election over which form of compensation to pursue. An election to pursue common law damages precludes further receipt of statutory benefits. Table 8.1 provides a comparison of common law access across the jurisdictions.

[4] New South Wales abolished common law actions in 1987 but reintroduced them, in modified form, in 1989. Victoria abolished common law access in 1997 and reintroduced it in 1999.

[5] In Queensland, this restriction applies only to workers with an impairment of less than 20 per cent of statutory maximum compensation. Workers with a more severe impairment can pursue both concurrently.

Table 8.1 **Access to Common Law in Australian jurisdictions**

	Compensable losses	*Minimum injury threshold*	*Election of avenues*
Australian Government	Non-economic loss only (max $110 000 in Comcare; $138 571 in Seacare). No restrictions on dependants or in third party actions.	10% impairment	Irrevocable decision to sue, relinquishes right to statutory lump sum benefits. No restrictions on dependants.
New South Wales	Economic and non-economic loss.	Economic loss: death or 'serious impairment'[a]	Irrevocable decision to sue, relinquishes right to statutory lump sum benefits. For injuries sustained from 27/11/01, may pursue both concurrently until damages awarded.
	Non-economic loss not available for injuries sustained from 27/11/01.	Non-economic loss: $45 350 [b] (for injuries sustained before 27/11/01)	
Victoria	Economic and non-economic loss. (Max for economic loss $933 000; max for pain and suffering $406 000). No medical costs. Not available for injuries between 12/11/97 and 19/10/99	30% impairment. Monetary thresholds[c].	May pursue both concurrently until damages awarded.
Queensland	Economic and non-economic loss	None	Only if permanent impairment less than 20% of statutory maximum compensation.
Western Australia	Economic and non-economic loss. For disability less than 30%, limit of $284 615[d]	16% disability according to Table of Compensation Payable	Only for disability less than 30%.
South Australia	Abolished.	na	na
Tasmania	Economic and non-economic loss. No limits	30% impairment	May pursue both concurrently until damages awarded.
Australian Capital Territory	Economic and non-economic loss. No limits	None	May pursue both concurrently until damages awarded.
Northern Territory	Abolished	na	na

a Defined to be where compensation under Table of Disabilities is greater than 25 per cent of maximum amount or entitlement under non-economic loss is greater than $45 350. For injuries occurring after 27 November 2001, access is restricted to workers with at least 15 per cent whole person impairment. **b** Damages for non-economic loss reduced if the loss is assessed at less than $60 450. These thresholds are indexed. **c** For pecuniary loss $36 590. For pain and suffering $36 730 (for injuries occurring before 12 November 1997) and $35 340 (for injuries after 19 October 1999). **d** Indexed.

Sources: HWSCA (2002); Victorian Government, sub. 164, p. 12; scheme sources.

Although only a small proportion of claimants proceed to common law, payments to them can represent a significant proportion of scheme liabilities. For example, in 2000, around 1 per cent of claimants initiated common law action in New South Wales. Common law payments in that year represented over 20 per cent of scheme liabilities (PwC 2001, p. 8).

Common law access in other countries

In most countries, the role of common law as an avenue of providing compensation has largely been replaced by statutory workers' compensation schemes, while its role as a deterrent has largely been assumed by OHS regulations. For example, common law actions are disallowed in New Zealand, which compensates workplace injury, along with all other personal injury, through a comprehensive, no-fault scheme.

Common law actions for workplace injury are also generally disallowed in the United States and Canada — the only two countries (other than Australia) to have federal systems of workers' compensation. 'Exclusive remedy' is provided by statutory schemes. Exceptions are allowed in some circumstances[6]. US courts view workers' compensation as part of the employment bargain under which employees relinquish common law rights in return for a guarantee of compensation by employers. It is only when employers breach this contract, for example, by failing to carry workers' compensation insurance or by intentionally causing harm, that the exclusion from common law action is removed.

The United Kingdom allows unrestricted common law access for work-related fatality, injury and illness. For this reason, all employers are required to carry privately underwritten Employers' Liability insurance. There is no separate statutory workers' compensation fund (Williams 1991, p. 132). Workers who are unable to establish negligence on the part of their employers, or who choose not to pursue a common law claim, may be entitled to payments through the social security system[7].

A review of the UK civil justice system, conducted in the mid-1990s, concluded that the common law was:

> … too expensive in that the costs often exceeded the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful wealthy litigant and the under resourced litigant. It is too uncertain: the

6 Georgia allows common law actions for breach of statutory duty. Texas is the only US state which does not make participation in workers' compensation compulsory. In Texas, firms who choose not to participate in the workers' compensation scheme are not protected from common law actions.

7 The Industrial Injuries Disablement Benefit provides payment in the event of an injury or specified illness which is work-related. Access to this benefit is dependant on suffering a minimum impairment of 14 per cent, which equates to the loss of an index finger or a big toe. The benefit is a specified weekly amount (not a proportion of pre-injury earnings) and depends on the severity of the injury. For example, a person with an impairment of 100 per cent receives a payment of £116.80 per week. In 2003, this represented 24 per cent of average weekly earnings in the United Kingdom. A claimant with an impairment of 20 per cent may receive a payment of £23.36 per week. This benefit is not paid for the first 90 days following a claim and may include an unemployability supplement and Exceptionally Severe Disability Allowance. An Industrial Death Benefit is not payable to surviving dependents for work-related fatalities occurring after 11 April 1988 (Department of Work and Pensions, 2003, pp.15–16).

> difficulty of forecasting what litigation will cost and how long it will last induces fear of the unknown; … it is incomprehensible to many litigants … and too adversarial. (Department for Constitutional Affairs, 1996, p. 1)

In response to this report, the UK government introduced a number of reforms including a framework designed to encourage pre-trial settlement; fast-tracking of smaller claims; reforms to legal costs and the encouragement of Alternative Dispute Resolution (Department for Constitutional Affairs 2001, p. 4).

8.3 Evaluating common law in workers' compensation

Access to common law differs across jurisdictions. Over the past two decades, nearly all schemes have restricted access to common law on a number of grounds, including that it: is fundamentally contrary to the concept of 'no-fault'; undermines scheme affordability; and, is inimical to early intervention, rehabilitation and return to work. According to the Northern Territory Government:

> Common law is not available as the NT Government believes this is inappropriate for a 'no fault' scheme since it increases costs, results in significant delays, provides a disincentive to rehabilitation and return to work, and creates an adversarial environment which is detrimental to the workers long-term return-to-work prospects. (quoted in IC 1994, p. 120)

Participants have expressed strong views, either supporting or opposing common law access.

The arguments against a role for the common law in workers' compensation include:

- common law runs counter to the basic principle of a no-fault scheme;
- common law can be slow, denying the victim access to timely compensation;
- common law has high transactions costs, reducing the amount of compensation available for injured or ill workers and/or their dependants;
- common law is inimical to rehabilitation and return to work because it promotes confrontation between the employer and employee;
- common law may delay rehabilitation and hamper effective injury management because damages are determined by the severity of the injury sustained;
- compensation is not guaranteed under common law, which can leave some injured or ill workers without adequate income support; and
- common law damages are provided as lump sums, which can be dissipated by the victim or otherwise prove inadequate to meet longer term need.

According to the Australasian Faculty of Occupational Medicine:

> … access to common law assists a person with a serious injury to gain a financial basis for changing their lifestyle or mode of employment. However, its administrative costs are proportionally high and its slowness can delay recovery and act against minimisation of disability and handicap. This opposes what is needed. A compensation scheme should encourage recovery and minimise long-term disability. (sub. 29, p. 5)

The Minerals Council of Australia (MCA) also argued that common law can be counter-productive to rehabilitation:

> The focus of any workers' compensation system should be on return to gainful employment rather than litigation as a means to resolving claims. The MCA considers that litigation through common law can act as a disincentive to return to work and directly conflict with a focus on injury management. Common law action may be appropriate in some circumstances where employees have permanent severe impairment but even then, the adversarial court system is not always in the best interests of injured workers (third parties may be the beneficiary of any such action). (sub. 141, p. 5)

Optus expressed similar views:

> Optus believes that access to common law damages:
>
> (a) increases the potential for disputes between employers and employees;
>
> (b) can reduce the incentive for some workers to participate positively in return to work programs; and
>
> (c) significantly increases costs of workers' compensation arising from legal costs and increased cost of administration. (sub. 57, p. 5)

While noting that access to common law damages can exist alongside statutory benefits, the Institute of Actuaries of Australia commented:

> … [common law] is based on the concept of fault, which does not sit comfortably with the needs-based approach of statutory benefits. In order to accommodate this needs-based ethos, it stretches the concept of fault so that it no longer has any meaning and in a way that is not compatible with the reforms underway elsewhere in common law. (sub. 88, p. 13)

Other submissions (for example, COSBOA, sub. 7; Australian Physiotherapy Association, sub. 20; Territory Insurance Office, sub. 27; Plastics and Chemicals Industries Association, sub. 114) argued for the removal of common law or its restriction to the most seriously injured workers.

Arguments for the retention of common law include:

- it is a fundamental right;
- it is intended to provide 'just' compensation for those harmed because of the negligence of others;

- it provides an efficient process to monitor the adequacy and propriety of a no-fault scheme;
- it provides an incentive for employers to prevent work-related fatality, injury and illness;
- it prevents employers from shifting costs on to others;
- there are some cases for which statutory benefits are too inflexible to cover particular cases (for example, disfigurement);
- without common law, some workers/dependants would suffer from under-compensation; and
- removal of access to common law for work-related fatalities, injuries or illnesses would discriminate against those harmed in (as opposed to outside) the workplace as a result of the negligence of others.

Some inquiry participants, particularly those representing legal professionals, strongly supported the retention of common law. For example, the Queensland Law Society argued that access to common law is a basic right which can assist in the recovery process:

> Structures can be developed to contain costs without the arbitrary abrogation of citizens' rights as must necessarily follow from the introduction of any inhibition upon the right to bring common law claims. In addition, there is ample evidence that access to common law remedies facilitates rehabilitation rather than inhibiting rehabilitation in any way.
>
> It is the contention of this submission that the Queensland scheme, including common law remedies, is the pre-eminent workers' compensation scheme in Australia. It is affordable, fully funded and maintains the traditional rights of injured workers to seek individual compensation assessments that recognise the specific circumstances that the individual claimant brings to each case. (sub. 97, p. 4)

The NSW Bar Association presented the case for common law on the basis of assigning responsibility for workplace safety:

> … the duty of care is the fundamental but basic underpinning of workplace safety. Common law liability, before and after accidents, is a necessary overarching principle which will, in conjunction with a no-fault scheme, achieve proper balanced outcomes … The Bar Association endorses the concept of personal responsibility in risk allocation. … Philosophically the basis of common law theory is the allocation of personal responsibility. Modern exposition of the theory takes account of compulsory insurance but declines to depart from the fundamental underpinning. (sub. 64, pp. 20–1)

The Queensland Council of Unions (QCU):

> … has consistently opposed the diminishing ability of workers to access common law.

> The QCU stresses that compensation claims occur as a result of poor OHS by employers with the majority of workplace injuries and illnesses being predictable and therefore preventable. This is particularly true of manual handling injuries (the largest compensated class of injuries) and illness from hazardous substances (the largest occupational killer).
>
> Workers, like other members of society, must be granted the right to sue where negligence has caused them injury or illness. Common law access has functioned historically as a powerful deterrent for negligent employers and has provided workers with the ability to claim compensation which is directly relational to the degree of impact of the injury on their lives. (sub. 91, p. 3)

Taking into consideration the above arguments for and against common law, there are three broad criteria against which common law in workers' compensation can be evaluated:

- the incentives it provides to prevent workplace injury or illness. (In particular, whether these incentives are appropriately allocated between employers and employees);
- how well it provides compensation to victims of workplace injury or illness (including the costs of providing that compensation) and whether it gives appropriate incentives for rehabilitation; and
- how well it satisfies reasonable standards of 'justice'.

Legal rules and the provision of incentives for safer workplaces

The two tort rules for assigning liability for workplace harm are strict liability (as applied in statutory workers' compensation schemes) and negligence.

Strict liability

Under strict liability[8] there is no standard of care which will allow the employer to escape liability. Irrespective of who is to blame, the employer is legally responsible for all fatalities, injuries or illnesses 'arising out of or in the course of employment'[9].

[8] The terms strict liability and no-fault liability (as used in current workers' compensation arrangements or compulsory third party motor vehicle insurance) are interchangeable. Both rules provide the same incentive effects. However, there are some minor differences. For example, under traditional strict product liability rules it was possible for the defendant to escape liability by making use of 'affirmative defences'. These defences include that the plaintiff had willingly assumed the risk (after being fully informed by the defendant of the possible consequences) or that the plaintiff used the product in a way that it was clearly not intended to be used. No-fault liability is also typically imposed by legislation as part of a compulsory insurance scheme.

[9] The exception is Tasmania as noted at footnote 2.

When the employer is required to fully compensate an injured employee, the cost of the injury is internalised by the firm. As a general rule, people who are forced to bear costs have an incentive to reduce them. An important argument in favour of strict liability is that, by confronting a firm with the full cost of workplace injury or illness, cost effective OHS procedures will be incorporated into firm management practices.

In addition, since the cost of workplace harm is a part of the firm's operating costs, production decisions will reflect accident costs. Where market conditions allow, these costs are passed on to consumers. This reflects the important distinction between legal incidence and economic impact.

Although a standard of strict liability could be seen as assigning all responsibility for OHS to employers, there are strong natural incentives for employees to avoid injury and to avoid harming others. Moreover, OHS regulations also require employees to exercise care. Compensation under statutory workers' compensation schemes is also typically less than complete (chapter 9) which further increases incentives for safe workplace behaviour.

The observation that employees may contribute to workplace injury or illness has lead to some participants advocating the concept of 'contributory negligence' in workers' compensation schemes (for example, ACCI, sub. 81, p. 9). 'Contributory negligence' would involve reducing the benefit paid to an injured worker in proportion to their culpability in causing the injury or illness. However, such an approach would negate many of the advantages of strict liability. Disputation over employee fault would result in further delay and increased legal costs. Legal costs already represent a significant proportion of workers' compensation costs. Additionally, no-fault schemes have generally evolved as workers have given up their right to sue in return for guaranteed (but possibly lower) levels of compensation. Any attempt to return the apportioning of fault in statutory workers' compensation schemes would, in all likelihood, lead to pressure for increased benefits.

All workers' compensation schemes have provisions to prevent an employee from receiving compensation if the incident occurred as a result of the 'serious and wilful misconduct' of the employee[10]. Working under the influence of alcohol or drugs qualifies as such behaviour.

Insurance and OHS incentives

Workers' compensation insurance does not necessarily distort the incentives provided to employers by liability rules. Insurers will attempt to provide the correct incentives to ensure that the behaviour of the employer is consistent with risk minimisation. This can be achieved by linking insurance premiums to the employer's behaviour (experience rating)

[10] This provision does not apply in the case of death or serious injury.

or by some form of co-insurance (such as an excess under which the employer pays a predetermined share of the injured workers' costs — chapter 10). In this way, the insurance premium reflects the expected cost of injury or illness arising from the workplace and the employer continues to face adequate incentives to provide a safe working environment.

Incentives can be diluted if there is a considerable time delay in any increase in risk being reflected in premiums. Cross-subsidisation can also dampen incentives. In most schemes, insurance premiums are capped, even for the riskiest firms, implying that firms which invest in safety initiatives are effectively subsidising the behaviour of less safe firms (chapter 10). This may mitigate, to a significant degree, any incentives for desirable behaviour in managing workplace risk.

Compulsory insurance may actually increase the deterrence offered by liability rules by mitigating the problem of the 'judgment-proof' defendant. A defendant without the capacity to pay damages is said to be 'judgment-proof' and any threat of award of damages against such a defendant is meaningless as a means of encouraging optimal behaviour. It has been argued that a judgment-proof defendant may fail to take adequate care to prevent catastrophic events but will initiate measures to prevent less damaging occurrences (Shavell 1987).

Negligence

The availability of an action for negligence can create positive incentives for both employers and employees to take care. Employees may have their damages reduced by the proportion of their own negligence in causing injury or illness. Employers will be liable for damages arising out of their own negligence.

To succeed in an action of employer negligence, an employee must prove that the employer failed to meet a standard of care. Courts determine what a reasonable standard of care is by considering the evidence of both employers and employees. This is based on a comparison between the cost of reducing workplace harm and the expected benefits:

> … broadly, negligence requires someone who has a duty of care to take reasonable care to protect against foreseeable harm. What is reasonable is decided on balancing the likelihood and severity of an injury that may occur on the one hand, and the cost and inconvenience of obviating that risk on the other hand. (Law Council of Australia 2002, pp. 25–6)

The case for common law as a deterrent may be strongest in situations where accidents can be prevented by the actions of both employers and employees. Since employers can escape liability (and therefore the need to provide compensation) by meeting the standard of care, employees will be induced to take additional care, over and above that taken by the employer, in workplace situations whenever it is their best interests to do so.

Although a negligence rule can induce an optimal level of care (for example, reasonable safety management practices) there is no reason to expect that it will induce an efficient level of firm activity. This is because once the standard of care is satisfied, the employer is no longer responsible for harm arising out of the workplace and the costs of work-related fatalities, injuries or illnesses will not be passed on to the firm.

Empirical studies conducted in the United States do not support the conclusion that common law provides greater incentives to reduce workplace risk than does a no-fault scheme:

> … the empirical evidence does not yield a determinate conclusion as to the effects of tort liability on accident rates. One explanation for the variation in the empirical results is that the least cost avoider may vary according to technological conditions and also from industry to industry. The evidence does not establish that tort liability will reduce workplace injuries: it indicates that it might reduce those injuries in some industries in the absence of a regulatory regime, although in those circumstances workers' compensation appears to have a greater deterrent effect. (Dewees, Duff and Trebilcock 1996, p. 355)

The absence of a discernible deterrent effect may indicate that the pre-existing contractual relationship between employers and employees (which could be expected to reflect workplace risk), together with experience rated premiums and OHS enforcement, provide adequate incentives. In the words of Insurance Australia Group:

> In the context of workers' compensation, it is certainly arguable that the fault principle no longer operates to achieve its original aims:
>
> - The no fault concept is already well entrenched as a means of accessing benefits. Strict liability has been imposed on employers because of the close and special nature of the relationship between employers and employees. If satisfactory levels of no fault benefits are provided there should be no need for "add-on" or "election of" common law damages to mitigate the loss.
> - Other mechanisms provide the "punishment and deterrence" factor for employers including OHS laws and, depending on the scheme, experience-based premiums. (sub. 89, p. 24)

The Institute of Actuaries of Australia noted that the common law

> … punishes the employer for negligence. Where genuine fault exists, action under occupational health and safety legislation is a more effective penalty and is not softened by insurance. In many cases, however, there is little or no fault on the employer's part. (sub. 88, p. 13)

There are several reasons why the threat of common law action may provide employers and employees with inadequate incentives.

First, the strength of any deterrence is muted by the indirect and delayed link between a common law action and its reflection in future workers' compensation premiums and other

costs to employers. Common law actions are comparatively rare for individual small employers and are usually given only partial weight in determining future premiums, because of the difficulties in differentiating between good and bad risks on the basis of rare events. In addition, a common law claim may not be finalised for a number of years, effectively divorcing any ensuing incentive from the original event. According to the Australasian Faculty of Occupational Medicine:

> Use of common law as an incentive to prevention is too slow and indirect, and its case-by-case processes do not make for orderly setting of priorities in prevention. (sub. 29, p. 6)

Second, if liability cannot be assigned, or there is a high probability that it will not be assigned, a potential defendant's incentives to take care are obviously greatly reduced. A plaintiff's ability to prove liability in the case of industrial disease may be limited by the fact that a long period of time may elapse before the suit can be brought, reducing the chance of a successful action because evidence may be stale or the employer may no longer be in business. This is potentially a greater problem for industrial illnesses, such as mesothelioma, which can have a latency period of up to 40 years. Establishing liability for disease may also be problematic because it can be difficult to prove that the harm originated in the workplace rather than from some other source.

Third, a rule of negligence may fail to provide correct incentives for accident prevention if the standard of care is set inappropriately. For example, there are circumstances in which the employer may not have been able to prevent the injury and an assignment of fault is inappropriate. According to The Australasian Faculty of Occupational Medicine:

> Common law is potentially available for injury where the source of energy comes from *within* the body, i.e. over-exertion injury. However, all the manual handling practices implemented in the last two decades have had but a modest effect on the severity of over-exertion injuries of the back, neck and shoulder. One is then forced to conclude that these injuries cannot be reliably prevented with existing knowledge, and that employers are right to question how they can be reasonably held to be negligent when they occur. So, while the potential for a heavy claim in common law may act as an incentive for an employer to comply with OHS law in regard to prevention of fractures, cuts, burns and electrocutions, it cannot reasonably do so in regard to muscle strains. (sub. 29, p. 5) [Emphasis in original]

Some have expressed concern that, in order to ensure that plaintiffs are adequately compensated, fault has been found in circumstances where it traditionally would not have been. This has resulted in a shifting of the burden of liability towards employers. According to this view, the standard of care applied to employers and employees is not significantly different to that operating under statutory no-fault schemes. The Chief Justice of New South Wales observed:

> Over a few decades — roughly from the sixties to the nineties — the circumstances in which negligence would be found to have occurred and the scope of damages

> recoverable if such a finding were made, appeared to expand considerably … There seems very little doubt that the attitude of judges has been determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages and costs awarded to an injured plaintiff. Judges may have proven more reluctant to make findings of negligence, if they knew the consequence was likely to bankrupt the defendant and deprive him or her of the family home … The proposition that any degree of fault — whether minor or gross — justifies compensation for the whole of a plaintiff's loss — whether catastrophic or minor — may also not have applied in quite the same way, in the absence of the ubiquity of insurance. (Spigelman 2002, p. 2)

Similar observations have been made in the NSW Court of Appeal:

- I think that it is impossible to read recent decisions of the High Court of Australia without realising that employers are now required to comply with safety standards which, only 20 years ago, would have been seen as imposing an onerous, even an absurd burden on employers … Throughout the common law of negligence, but particularly in the employer/employee field, the standard of care required of a defendant has moved closer to the border of strict liability. (McHugh JA 1985 quoted in Spigelman 2002, p. 3)[11]
- [the law] effectively places [the defendant] in position of an insurer … There may be a view, even a preponderant view, that this is a desirable development of the law because otherwise seriously injured plaintiffs may be forced to rely on social services supplied by the government. But there are, as it seems to me, serious implications flowing from the far reach of the present doctrine. (Clarke JA 1993, quoted in Spigelman 2002, p. 5)
- The current tendency to consider only individual circumstances which produce injury and the means by which those circumstances could have been changed and the injury avoided is redefining the foundation of the law of negligence by impermissibly expanding the content of the duty of care from a duty to take reasonable care to a duty to avoid any risk by all affordable means. Such an approach pays insufficient regard to the degree of the risk of injury from the particular circumstance which caused injury and to the time, effort and cost of avoiding the risk of injury and the financial capacity of a defendant to undertake such a task. (Fitzgerald JA 2000 quoted in Spigelman 2002, p. 5)

This view is supported by the fact that findings of contributory negligence against employees are comparatively few. In a sample of 261 common law claims in New South Wales, PwC found that 'only 13 (5%) had some degree of contributory negligence recorded in the common law file. 3 of these claims were assessed as being 50% contributable, whilst the other 10 were assessed as being less than 20% contributable' (2001, Appendix B, p.13).

[11] Justice McHugh's comments were subsequently rejected by the High Court.

There is some evidence that this 'long term trend has been reversed' (Spigelman 2002, p. 3). From 1987 to 1999, the High Court heard 40 personal injury cases. In 32 cases the decision was in favour of the plaintiff. In contrast, from 2000 to 2002, the High Court heard 24 personal injury cases of which only 5 were in favour of the plaintiff (Davies 2003, p. 2).

Finally, common law damages are an uncertain form of compensation. Uncertainty surrounding likely outcomes from a common law action may imply that inadequate incentives are provided to employers and employees. Statutory benefits ensure certainty of compensation, and so reinforce incentives in a predictable way. On this point, the Institute of Actuaries of Australia noted: 'The amounts awarded [under common law] are substantially less predictable and can give rise to substantial cost escalation, long after the corresponding injuries have occurred' (sub. 88, p. 13).

In conducting its review of the law of negligence, the Ipp Panel observed:

> The Ministerial communiqué, the Terms of Reference, and the breadth and range of the responses the Panel received in submissions and consultations, indicate that there is a widely held view in the Australian community that there are problems with the law stemming from perceptions that:
>
> (a) The law of negligence as it is applied in the courts is unclear and unpredictable.
>
> (b) In recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.
>
> (c) Damages in personal injuries cases are frequently too high.
>
> … Irrespective of whether these perceptions are correct, they are serious matters for the country because they may detract from the regard in which people hold the law, and, therefore from the very rule of law itself. (2002, p. 25)

In sum, a rule of strict liability may provide better incentives for harm reduction than a rule of negligence because:

- it ensures that liability is established quickly;
- it ensures costs of workplace harm are internalised by the employer;
- it ensures that the employer will be found liable; and
- it provides certainty as to the amount that the employer will be found liable.

Compensation for workplace harm

The aim of common law damages is to restore the worker, as far as money can, to the position they were in before the accident. In an unrestricted system, it meets the full loss of earning capacity and explicitly compensates non-economic loss. Under common law, when the injury stabilises, an award of damages is made on a personalised assessment of the

individual's circumstances. This, it is argued, allows more accurate, individualised compensation than that provided by the statutory scheme through the use of impairment schedules and tables of disabilities. Common law damages may therefore avoid any inequities which flow from standardisation, particularly in the case of the seriously injured. In the words of one lawyer:

> While any civilised society provides assistance for those injured, the Common Law provides an active system of compensation to those who have been wrongly injured by the negligence of others. Compensation goes beyond mere assistance, placing the injured person as far as possible in the position they would be in if they had not been injured at all. (K M Splatt & Associates, IRsub. 210, p. 1)

This advantage of common law is likely to be greatest in the case of non-economic loss. Non-economic losses, by their nature, are impossible to fully insure against — prior to an accident occurring, the psychological and physical impacts of an injury cannot be accurately quantified. Furthermore, compensation for heads of damage like pain and suffering may vary considerably between individuals.

However, the evidence suggests that common law damages do not vary greatly between individuals. Neave and Howell studied common law damages awards received by injured road accident victims in South Australia. They examined whether the amounts allowed for non-economic loss reflected individual plaintiff's circumstances.

> It would be expected that individual assessment of the non-economic loss would result in awards varying with age, sex and degree of disfigurement. … In fact, the Table suggests the adoption of a tariff with almost all injured people receiving very similar amounts. … Comparison of the amounts received by these … plaintiffs suggests that individual assessment of loss may have little effect on the size of non-economic loss payments. (1992, p. 83)

Economic losses may be more efficiently compensated through insurance arrangements — such as those provided by statutory benefit schedules — since they can be linked to the victim's pre-injury earnings or to some other specified amount. Compensation of economic losses through periodic payments may also overcome some of the problems associated with lump sum compensation. The Tasmanian Government:

> … noted the disadvantages of lump sum settlements as follows:
>
> - they promote a tattslotto culture and weaken the return-to-work focus of the system;
> - they may result in cost to the Commonwealth Government where settlements are used for purposes other than those for which they are intended; and
> - they may be inadequate to meet the future needs of recipients;
>
> In addition to the above identified disadvantages, the Government also believes that there is a real potential for mismanagement of large sums of money, particularly if clear legal and financial advice is not obtained and followed. (sub. 135, p. 8)

Adequacy of lump sums

The assessment of lump sums is subject to several areas of uncertainty, including:

- claimants expected earnings if the accident had not occurred;
- changes in claimants' capacity for work in the future;
- future rates of inflation;
- future interest rates; and
- future tax rates.

Neave and Howell examined the extent to which road accident victims were under or over compensated. They found that:

- 16 per cent of those surveyed were living in families which were below the poverty line (compared with 12 per cent in the general population);
- 19 per cent were reliant on social security for reasons related to the accident;
- 22 per cent were rated by interviewers as financially insecure because of the accident; and
- 53 per cent said their compensation was insufficient to cover their accident related costs (1992, p. 85).

At the time of settlement, 60 per cent of recipients were satisfied with the amount of compensation they received. By the time of the interview (eight to nine years after settlement), only 24 per cent were satisfied (1992, p. 51).

The pre-accident incomes of these victims were significantly higher than for a population of comparable age and sex. The post-accident income distribution in the interview group was no higher than the expected income distribution for a population of comparable age and sex. This decline in the income position of compensated road accident victims, relative to uninjured people in the general population, suggests that they may not have received damages sufficient to cover their economic loss.

Overall, the study raised considerable doubts as to the suitability of lump sums, and concluded that:

> In the long run, under-compensation and over-compensation caused by inflationary pressures and wrong predictions can only be prevented by a statutory scheme providing indexed periodic payments for economic loss. (Neave and Howell 1992, p. 87)

The Institute of Actuaries of Australia noted that the common law:

> … provides benefits mainly in a lump sum form, which does not match the ongoing needs of many claimants. When a lump sum is provided to compensate for loss of income and ongoing costs, it is almost certain to be the wrong amount. Even if the

> conversion is correct on average across all claimants, almost all will either exhaust the lump sum and suffer hardship, or turn out to have more than was needed. (sub. 88, p. 13)

The Tasmanian Government also noted the potential for lump sum compensation to prove inadequate for the lifetime needs of injured or ill workers and their dependants:

> At this stage, the Government has only anecdotal evidence of situations whereby injured workers find themselves reliant upon the social security system upon exhausting lump sum settlements. There have been cases in which workers have suffered considerable financial hardship and distress where settlements have been exhausted prior to the expiration of social security preclusion periods. This is clearly a matter of grave concern. (sub. 135, p. 8)

Dissipation of lump sums

Another criticism of common law damages is the scope for dissipation of the lump-sum, potentially leading to cost shifting on to the Australian Government's social security system.

Neave and Howell asked interviewees about how they used their lump sum in the year after their claim was resolved.

> It was not possible for us to determine the number of people who had mismanaged their lump sum. Nor was there any statistically significant relationship between use of the lump sum in any particular way and current poverty or insecurity. However there were undoubtedly some people … who had dissipated their compensation, either through mismanagement or bad luck.
>
> Many people found it daunting to have to manage their money to cover future losses and costs. Some accident victims told us they had been pressured by family or friends to lend them money which had not been repaid. Several people had invested in a business which failed. A few young people commented that they were "too immature" to handle their lump sum and regretted having spent it unwisely. When people who felt their compensation was inadequate to cover their financial loss were asked to comment on the reasons for this inadequacy, [22 per cent] referred to mistakes made in investing their lump sum. (1992, p. 58)

Based on a survey of its members, the Australian Plaintiff Lawyers' Association provided evidence that, in a number of cases, lump sums were used to improve the financial circumstances of the injured party:

> Although no obvious patterns could be drawn from [the] survey data, the greater majority of workers used lump sums to reduce liabilities including mortgages and other loans. Between 5% and 30% applied damages to funding self-employment opportunities and between 10% and 50% acquired assets. One thing was certain from the data: suggestions that all common law claimants irresponsibly dissipate lump sums and turn to social security is an obvious myth. (IRsub. 252, p. 6)

It is sometimes argued that the problems which injured people experience in investing their compensation could be overcome by providing them with financial advice. However, this was not strongly supported by the Neave and Howell study, which found that 28 per cent of those who followed professional advice in the management of their compensation were financially secure, compared with 20 per cent of those who did not use professional or legal guidance.

Current taxation arrangements may favour dissipation because common law lump sums are generally treated as a tax-free capital gain, but income earned from the investment of the lump sum is taxable. In December 2002, the Australian Government granted a tax exemption to structured settlements. A structured settlement is a common law agreement reached between a plaintiff and a defendant which involves the defendant purchasing an annuity on behalf of the plaintiff. The annuity has to satisfy certain criteria to qualify (for example, it has to be purchased from an insurance company which is authorised to sell life insurance products). Both the lump sum used to purchase the annuity and the income stream are tax free[12].

The Australian Plaintiff Lawyers' Association (IRsub. 252, p. 5) submitted that the use of structured settlements may alleviate many of the concerns over the dissipation of lump sums. Currently, the tax exemption for structured settlements does not apply to workers' compensation. The Tasmanian Government noted that the decision not to exempt structured settlements awarded in workers' compensation claims 'still appears to be a major impediment to introducing structured settlements' (sub. 135, p. 8). Extending the tax exemption to workers' compensation claims may remove some of the limitations of common law lump sum settlements (including the potential for cost shifting to the Australian Government's social security system as a result of the dissipation of common law settlements — chapter 9).

However, the Institute of Actuaries of Australia cautioned that structured settlements would not solve all the problems associated with lump sums. In particular, the potential for a mismatch between economic needs and compensation remains:

> While structured settlements are now encouraged outside the context of workers' compensation, they are not compulsory and do not fully solve the mismatching problem. They cannot properly allow for unexpected deterioration of a compensable condition, or increases in ongoing costs, in the way that statutory benefits can. (sub. 88, p. 13)

[12] The tax exemption also applies to structured orders which have the same features as structured settlements but are imposed by a court.

Incompatibility with rehabilitation and return to work

A number of participants identified a potential link between the availability of common law actions and poor rehabilitation outcomes. For example, Buys submitted that:

> There is considerable evidence to show that access to common law is incompatible with a scheme that focuses on rehabilitation. The adversarial nature of common law redress does not facilitate recovery and return to work; in effect the presence of common law is a major disincentive to participate in vocational rehabilitation. For example, a study of 200 workers with back injuries over a three year period … found that workers who pursued litigation against employers reported significantly higher levels of disability, pain and psychological distress than workers who were not pursuing litigation. A second finding was that a return to satisfying, meaningful employment during the compensation process minimised disability, pain and psychological distress. These results send a strong message that the adversarial process of common law is psychologically and physically detrimental to injured workers and costs the system millions of dollars in payouts and lawyers' fees. Other studies also highlight this problem. (sub. 92, p. 2)

Similar views were expressed by Woolworths:

> The ability of injured workers to access any form of significant lump sum benefit can be detrimental to their recovery. In Woolworths' experience, this can mean that some employees focus on remaining "injured" so that the extent of lump sum is increased. This situation can be aggravated by the involvement of the legal profession. (sub. 98, p. 7)

And by the Association of Rehabilitation Providers in the Private Sector – ACT Chapter:

> Generally, common law can make it difficult to motivate clients to return to work, acting as a disincentive. For example, a 'pot of gold' syndrome can develop with some injured workers. They will try to maximise a common law payout by staying off work because they believe an early return to work might impact on their settlement. The injured worker then has a different agenda to the other parties involved in the rehabilitation process. … Difficulties in common law can occur where solicitors give medical advice. For example, they might suggest to their client that they are not ready to commence rehabilitation, or that they should not attend an assessment or recommend particular surgeons or investigations. Delays also occur with solicitors being tardy in facilitating consent for providers to talk to their client's treating practitioners, thus reducing the impact of early intervention. (sub. 139, pp. 10–11)

The potential for common law access to be detrimental to rehabilitation and return to work has been identified in previous inquiries. For example, the Commission of Inquiry into Workers' Compensation Common Law Matters in NSW (the Sheahan Inquiry) concluded:

> It is unarguable that the objective of obtaining from the NSW compensation scheme the maximum possible award of common law damages conflicts with the statutory objectives of the scheme ... Swift and effective treatment, rehabilitation, and early return to work at maximum earning capacity, do not sit comfortably with a tax-free

> lump sum based upon an extended period of provable past economic loss, and estimated likely future losses and costs, and better account of the intangible consequences of injury, such as pain and suffering, loss of "amenity of life" and so on.
>
> The increasing focus on gaining a maximum lump sum, especially one offering the prospect of recovering large common law damages for economic loss, is seen to encourage "illness behaviour" rather than "wellness behaviour", and transforms the expected focus on support, recovery and an early return to safe productive work into an adversarial relationship which is costly, in terms of money, time and scheme objectives, and eats into the funds available for the assistance of all injured workers. (2001 p.18)

This view has also been supported by studies of injury victims in the United States. Those involved in common law actions related to their injury tended to have a less successful rehabilitation and a lower probability of returning to work (Dichraff 1993; Hadler 1996; Klekamp, McCarty and Spengler 1998; Deyo 2000; Blackwell et al. 2003). Although, a recent study of workers' compensation claimants in California found no significant correlation between legal representation and poorer rehabilitation outcomes (Braun et al., 1999).

Some participants disputed the link between common law access and poor rehabilitation outcomes. The Queensland Law Society argued that a lump sum payment, in contrast to ongoing income support, can provide positive incentives for rehabilitation:

> Working life pensions can be demonstrated to operate as a disincentive to rehabilitation. That disincentive is not present where once and for all common law awards are made or where redemption of weekly pension rights is available. (sub. 97, p. 5)

Redemptions of weekly payments are available in all schemes, although conditions of access vary considerably (chapter 9).

Of most concern to the Commission are the delays involved in reaching a settlement, which can be detrimental to the interests of the worker, and the adversarial nature of the common law, which can entrench the worker in behaviour that is incompatible with successful rehabilitation.

Delays in reaching settlement

Delay is inevitable in a common law system. An injury must stabilise before a final assessment of damages can be made. There are also procedural and tactical delays during the hearing of a common law claim. This has a detrimental effect on the financial position of the claimant, may affect incentives for rehabilitation and return to work, and adds to the complexity of the compensation process.

A recent survey of common law workers' compensation claims in New South Wales found that the average time for finalisation of a common law claim in 2000 was 4.7 years, down from a peak of 5.6 years in 1996 (PwC 2001, p. 49). This experience is consistent with that of other jurisdictions. In Queensland, the average time between injury and lodgement of a common law workers' compensation claim was 2.9 years in 2003-03; while the average time between lodgement and finalisation was 1.7 years (Q-Comp 2003, p. 12). By comparison, claims finalised through the statutory scheme are of a much shorter duration. According to the Queensland government:

> Current scheme wide statistics (WorkCover and self-insurers) indicate that the majority of claims are finalised within the first 26 weeks … Only 3% of claims have more than a year off work and very few claims (58 claims in 2000-01 and 120 claims in 2001-02) exceed 2 years' duration … trend analysis indicates that 3% to 4% of WorkCover Queensland claims progress to common law. (sub. 154, p. 20)

Delays in reaching a settlement can be detrimental to the welfare of the injured worker and place them under financial pressure. According to the NSW Legal Services Commissioner:

> Perhaps the biggest area of concern expressed to my Office by people suffering personal injuries and caught up in the legal system is the amount of time that the process takes. It is simply inhuman to expect a person to attain any sense of self worth or positive attitude when years can pass after an injury before any compensation becomes payable, notwithstanding the miniscule amount the statutory schemes offer by way of interim payment … We hear horror stories of the destruction caused to relationships, the physical and mental health of the injured and to the community generally by the huge delays involved in compensating people for their injuries.
>
> … The most often heard comment by complainants to my Office in this area is, "if I only knew what I was going to go through, I would never have lodged a claim." It is for this reason that it is of no surprise to me whatsoever that the medical profession's research now shows that the process involved in motor vehicle and work related injury cases makes people sick. I am only surprised that it has taken them so long to do the research which confirms what most others know. (Mark 2001, p. 5)

An injured worker, who had lodged a common law claim in Queensland, identified the adverse consequences of delay as:

> Continually relying on family to help cover expenses eg: retraining, tuition, and children's education too, today still waiting on the finalisation of a common law claim. The average time is 5 years for a case like mine … I'm lucky to have a supportive family and an understanding bank. Once my income protection insurance started, all sickness benefits were paid back. I have to pay full price on all medication and are not eligible for support from government agencies i.e.: re training for job placement … Why is there such a delay in common law cases leaving the injured worker in limbo? (Millen, sub. 61, p. 2)

Medical rehabilitation may be delayed by workers attempting to act in a way to maximise their claim under common law. Similar incentives exist for workers to avoid occupational

rehabilitation, as this may reduce their potential common law damages. According to one doctor:

> Litigants might remain sick (consciously or unconsciously) because of the rewards they are given or are likely to obtain by remaining ill. Certainly, in my own practice, I have more than once been confronted by patients who state they have been instructed by their lawyers not to have medical treatment because if they get better, they will likely reduce their compensation or influence settlement. Other full time GPs have also stated they have experienced similar situations. (Kelly 2000, p. 2)

The Insurance Council of Australia also noted:

> As a result of the possibility of a (large) lump sum payment, common law can act as a fundamental disincentive to effective injury management and early return to work, which is, of course, the fundamental aim of workers' compensation. Further, where access to common law exists, it has been suggested that workers may even be encouraged to act in a manner that would maximise any lump sum payment … There is an equity case for common law access to those suffering catastrophic or severe injuries, or whose injuries are as a result of employer negligence. However, there is a fundamental tension between maximising damages and return to work that cannot be ignored. (sub. 74, p. 25)

However, there are features of the common law which are intended to facilitate rehabilitation. In particular, there is a common law duty for plaintiffs to mitigate their loss (take reasonable steps to minimise the extent of injury) prior to an award of damages. According to K M Splatt & Associates:

> … clear principles of common law exist stating that plaintiffs have a duty to mitigate their loss. It is the duty of every lawyer acting for a plaintiff in a personal injuries claim to explain that the injured worker has a duty to mitigate loss and to ensure the client is actively involved in rehabilitation. Any solicitor or barrister who creates obstacles to rehabilitation, in order to increase damages, is subject to disciplinary action for professional misconduct, which could lead to suspension or striking off. (IRsub.197, p. 4)

Jurisdictions which allow common law access may also have in place mechanisms designed to encourage rehabilitation prior to the commencement of a common law action:

> The Queensland system includes rehabilitation programs, organised by WorkCover, in the statutory process that the lawyer is not involved in. In fact, only when the injury has stabilised is an assessment made by the Medical Tribunal, which becomes the basis of an offer by WorkCover to finalise the claim, can the injured worker elect to move on into the Common Law processes. This ensures that any rehabilitation required by the injured worker is provided by WorkCover prior to the Common Law claim proceeding. (K M Splatt & Associates, IRsub. 197, p. 4)

The adversarial nature of common law

Although early access to rehabilitation services is an important determinant of successful return to work (chapter 7), there is strong evidence that the way in which compensation is determined can also influence the likelihood of successful rehabilitation. In identifying the factors which contributed to poorer health outcomes following an injury or the onset of an illness, the Australasian Faculty of Occupational Medicine noted:

> The factors that have been identified through interviews or discussions with stakeholders but have not been formally tested are:
>
> - The adversarial system of managing compensation cases, which encourages parties to take up fixed opposing positions and creates a climate where getting a result in the court case becomes the goal of both parties, rather than fully rehabilitating the injured person.
> - Encouragement from some plaintiffs' lawyers to remain inactive in order to achieve the highest possible settlement.
> - The length of time between injury and settlement. In one study, 29 months was the average time to settlement. While some legislation requires that the injury be 'stabilised' before settlement, stakeholders suggest that cases are often 'dragged out' unnecessarily, particularly by insurers' lawyers. Ordinary delays in the court system are also a problem. (2001, p. 4)

Similarly, Hadler provides evidence that the compensation process itself may induce poorer health outcomes:

> The process demands that the injured litigant demonstrate the magnitude of the illness to whomever sits in judgment of the validity of the demonstration … The litigant is likely to lose the prerequisite skills for well-being, the abilities to discern among the morbidities, and to cope. The litigant is likely to embody the perspective and language of the diagnostic algorithm. Inexorably, the litigant is drawn into the vulnerable state, too often never to return. In that event, a legal victory is pyrrhic. (1996, p. 2399)

In essence, according to Hadler 'If you have to prove you are ill, you can't get well'.

The adversarial nature of the common law process can undermine the employment relationship, reducing the prospects of successful workplace based rehabilitation. According to the Australian Chamber of Commerce and Industry:

> Common law is based on an adversarial system, which inhibits the rehabilitation process and the normal expectation of a return to work by encouraging both parties to become entrenched in their adversarial roles in order to achieve maximum gain. (sub. 81, p. 18)

The Commission acknowledges that plaintiffs have a common law duty to mitigate losses by undertaking rehabilitation, where practicable, prior to an award of damages. It also recognises that this duty has been supplemented by legislation in some jurisdictions.

However, the Commission remains concerned that the adversarial nature of the process, together with financial incentives provided to claimants and delays in reaching settlement, reduce the prospects for successful rehabilitation and return to work.

Finality

The award of a common law lump sum provides finality for both the injured worker and the workers' compensation insurer. The worker receives a final payment with which they can do as they like, free of the continued scrutiny of their eligibility for compensation and the oversight of their use of funds. Such finality allows the worker to make a psychological break with the injury and may assist in the recovery process. According to the Law Council of Australia:

> But one thing that ought to be borne in mind is, if you ask the accident victim what they want, they will tell you - as they have told me on countless occasions, as they've told the other lawyers on countless occasions - what they want is some finality. If they have a major accident, they do not want to be in a situation where they are depending upon handouts for the rest of their life. They don't want to be in a situation where they're being required to turn up for medical examinations throughout the balance of their life. They don't want to be wondering from one day to another whether the benefits will continue or whether they'll be cut off.
>
> They would like to take a lump sum, provided it is a lump sum calculated on some realistic basis to represent the lifetime losses that they will suffer. That is a strong preference of accident victims. There are a lot of myths put forward about the rehabilitation benefits of one scheme or another, but our long-held view has been that it is a myth to believe that putting people on the drip-feed for the whole of their lives is an effective form of rehabilitation. (trans., p. 1096)

Similarly, the Queensland Law Society quotes medical evidence that:

> Periodic payments do not make the disabled self-reliant, instead they make them dependant and the disabled lose all motivation to improve their status. Such payments do not allow closure but continue and reinforce the accident process. (sub. 97, p. 5)

The availability of lump sum compensation also provides benefits to insurers (including self-insurers). The insurer can close the file on a particular case, saving administrative costs. The insurer has also made concrete an expense which otherwise would have run on indefinitely into the future. However, finality can also be provided through a commutation of statutory payments (chapter 9).

Allocation of common law damages

Some view common law damages as unfairly distributed. Victims with relatively minor injuries can be over-compensated if insurance companies settle rather than subject

themselves to the costs of litigation[13] while, at the other extreme, injury victims with catastrophic injuries receive lump sum payments which can prove to be insufficient to meet their longer-term needs[14]. According to the Ipp Report:

> … we have taken the view that the resources devoted to compensation for negligently-caused personal injury and death should be allocated in such a way as to provide support and assistance where it is most needed. There is reason to think that, under personal injury law, the less seriously injured tend to be treated relatively more generously than the more seriously injured. In our view, if any group is treated relatively better than any other, it should be the more seriously injured. (2002, p. 181)

A justice of the Supreme Court of Queensland also observed that many court decisions appeared to overcompensate the less seriously injured: 'Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime' (Thomas JA, quoted in Spigelman 2002, p. 4).

Evidence of this allocation pattern is provided by the PwC report into common law workers' compensation claims in New South Wales. The report found that the most seriously injured claimants were not better compensated than they would be by the statutory scheme, while workers with low to moderate impairments tended to be over-compensated:

- The most obvious characteristic of claimants which has changed is that they are less severely injured than in earlier years and are receiving larger settlements for comparable levels of severity (2001, p. 44);
- The dramatic increase in common law settlements in more recent years has been because of a significant increase in the number of common law claims with low levels of severity (0% to 25%) (2001, p. 40);
- If we assume individual severely injured claimants remained on benefit until retirement age, the common law lump-sum provides a reasonable "buy-out" of the future income stream. However, the literature supports a view that the provision of a large lump sum is often not used in the manner intended and assumed, leading to the compensation being dissipated (2001, p. 79);
- For injured claimants at a moderate to low level of severity, typically common law payouts appear to "under compensate" relative to the theoretical long term statutory benefits. However, experience has shown that claimants at this level of severity do not

[13] In a survey of common law claims in New South Wales, PwC (2001, p. B13) found that the average legal cost to insurance companies of workers' compensation claims finalised in court was $15 772, compared to average insurer legal fees of $9868 for negotiated settlements.

[14] An influential US study found, that when the level of economic loss was small, victims of motor vehicle accidents recovered on average 4 ½ times their economic loss under tort law. When the injury was serious the average recovery was only 1/3 of the economic loss (United States Department of Transportation 1971 Motor *Vehicle Crash Losses and their Compensation in the United States*. Quoted in Cooter and Ulen 1988, p. 467).

> continue on benefits for long periods. Thus in reality they are overcompensated and hence the provision of common law results in a net cost to the Scheme. (2001, p. 79)

Since common law awards are based on the assignment of fault, individuals with the same injury can also receive different compensation. According the Sheahan Inquiry:

> The avowed purpose of awarding damages at common law is to put the injured plaintiff back into the position which would have been obtained in the absence of the injury – or at least to do so as well as, or to the extent that, a payment of **money** can. It is not the objective to leave the worker better off, but, at the moment, some plaintiffs, with identical injuries, but different fact situations, recover differential damages, or no damages at all. (2001, p. 14) [emphasis in original]

Legal expenses

Common law requires the assignment of liability and possible litigation. As such, the cost of resolving an injury claim through common law can be considerably higher than resolving it through a no-fault scheme. This has the potential to undermine scheme affordability and, to the extent that the plaintiff is responsible for any legal expenses, may limit the amount of compensation available to the injured worker. In reviewing the law of negligence, the Ipp Report noted that the costs of delivering compensation — primarily, legal costs and insurers' administrative costs — could be as high as 40 per cent of the total cost of compensating injury victims (2002, p. 28).

Since nearly all schemes have removed access to common law or limited it to the most seriously injured workers[15], the number of injured workers who seek compensation through the courts is low. However, the individual payments and the associated legal costs tend to be high. For example, as at June 1999, common law payments (legal fees and damages) represented 22 per cent of the Victorian scheme's liability, but these claims had been initiated by only 4 per cent of workers' compensation claimants. (Department of Treasury and Finance (Victoria) 2000, pp. 26, 55). The impact of common law payments on scheme affordability can be considerable. Concerns about the impact of these payments were the main reason for the restriction of common law access in nearly all Australian jurisdictions. According to a 1998 study by Coopers and Lybrand,

> Access to lump sums has been the single most significant reason for past deterioration in claims costs in Australian schemes … it is the benefit and legislative structure of the Schemes, together with the overall social environment, [which] are the most critical factors affecting claims costs. (quoted in PwC 2001, p. 34)

15 The exception is the Australian Capital Territory which allows unrestricted access. There is no threshold for access in Queensland but less seriously injured workers are required to relinquish statutory benefits in order to pursue a common law claim (table 8.1).

The actuary for WorkCover New South Wales estimated that 'a common law claim is between 10% and 20% more costly than the benefits they replace' (quoted in PwC 2001 pp. 7–8). Recent changes in New South Wales have limited the role of courts in determining compensation. Access to common law is restricted to workers with an impairment of at least 15 per cent and damages are only available for economic loss. All claims for work-related damages lodged after 27 November 2001 must be referred to the NSW Workers' Compensation Commission for mediation prior to proceeding to court. The final offers of settlement will be taken into account by the court in determining what costs are recoverable by the parties. Legal costs are also regulated and cost schedules are designed to encourage early resolution of claims (Sheahan 2004, p. 13). According to the NSW Government:

> Changes have been made to increase the levels of statutory permanent impairment benefits and better focus the availability of common law benefits to serious cases. Independent actuarial analysis has shown considerable savings to the scheme from these amendments principally through reductions in legal costs. In the future, expenditure will increasingly focus on weekly benefits and the need to improve return to work rates. (WRMC 2003, p. 116)

Comparing legal costs across schemes is difficult because data reported by schemes often includes costs associated with statutory disputes. In 2000-01, legal fees paid by schemes[16], including those associated with dispute resolution, ranged from more than 15 per cent of total claims costs in New South Wales and the Australian Capital Territory (which have common law access) to 4 per cent of total claims costs in South Australia (which does not allow access to common law) (WRMC 2002a, p. 83).

Schemes have different methods of attributing legal expenses, which can further complicate comparability:

> In most jurisdictions, legal costs paid by the schemes are limited by public court scales. These govern how much the winning party receives towards legal costs from the losing party — usually the workers' compensation scheme. In other states, such as SA, these amounts are capped legislatively. In NSW these limitations do not apply. The higher costs in NSW are explained in part by the practice of paying all the workers' legal costs, including additional private amounts charged to the worker over and above the court scale. Victoria's costs are lower because scheme administrators manage legal work actively on every claim, thus reducing both winners' and losers' costs. (WRMC 2002a, p. 82)

16 According to WRMC: 'Payments by schemes under the broad heading "legal costs" are reliably representative of payments made to lawyers. Lawyers, however, distribute their costs between disbursements, including court costs, medico-legal reports, investigation costs, expert witnesses' expenses and professional fees. Legal costs can reflect both common-law-associated legal costs — generally higher than statutory costs — as well as statutory dispute-associated legal costs' (2002a, p. 88).

Some schemes have regulated legal costs as a means of preserving scheme affordability. For example, in 1996 Queensland imposed restrictions which prevent a worker, with an injury or illness that entitles them to less than 20 per cent of the statutory maximum lump sum compensation, from recovering costs prior to the commencement of a common law action. For workers with a more severe injury or illness, the amount of costs they can recover is specified by regulation[17]. Since the imposition of these changes, legal costs have declined dramatically. While average common law settlements in Queensland rose from $86 180 in 1998-99 to $97 916 in 2002-03, average plaintiff costs fell from $12 154 to $1792. Over the same period, defendant legal costs changed little. In 1998-99, the average defendant's cost was $14 268. In 2002-03, the average defendant in a Queensland common law workers' compensation claim paid costs of $14 395. (Q-Comp 2003, p. 12)

Legal costs tend to be disproportionately high for smaller claims which may otherwise be more efficiently handled by an administrative compensation system:

> … it is well known that in general, the smaller the personal injury claim, the higher the proportion of the total cost of meeting the claim attributable to legal expenses. For instance, the Trowbridge Report to the Insurance Issues Working Group of Heads of Treasuries, *Public Liability Insurance: Practical Proposals for Reform* (30 May 2002) … estimates that for public liability claims of between $20,000 and $100,000, legal expenses account for about 35 per cent of the total cost of claims; whereas for claims over $500,000 they account for about 20 per cent of the total cost. We also know that overall, the administrative costs of the personal injury compensation system are very much higher than those of other compensation systems, in particular the social security system. These facts support the conclusion that reducing the number, and the cost of resolving, smaller claims could make a significant contribution to reducing the overall cost of the system without disadvantaging those most in need of support and assistance. (Ipp 2002, p. 182).

Although of the opinion that consideration of legal costs was outside their Terms of Reference, the Ipp Review Panel recommended the nationwide adoption of Queensland legislative provisions[18] which prevent a plaintiff from recovering costs when the damages awarded are less than $30 000. Where an award of damages is between $30 000 and $50 000, the plaintiff can only recover up to $2500 from the defendant in legal costs. (2002, p. 185). These provisions do not apply to work-related fatality, injury or illness.

Common law legal action can also impact on the size of medical costs. For example, extensive diagnostic tests may be required to establish the extent of the injury or illness in order to determine the level of damages. The medical service provider is placed in the

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17 The pre-proceedings process includes a compulsory settlements conference and, if agreement is not reached at this stage, a written exchange of offers between WorkCover and the worker. At least four days before the settlement conference, the lawyer for the worker must also provide a written statement of costs incurred and an estimate of the costs expected to be incurred through the conference process and, if that fails, at trial.

18 *Personal Injuries Proceedings Act 2002 (Qld).*

position of not only treating the injury or illness, but also providing medical evidence on the extent of the harm for legal purposes.

Where available, the common law is also an avenue of dispute resolution. Disputes can either involve disagreement with the insurer's decision (statutory dispute) or a common law action. Typically, the cost of resolving a common law claim is much higher than the cost of resolving a statutory dispute. In 2001-02, the average legal cost of a statutory dispute in the Queensland scheme was $425, compared to an average legal cost associated with common law claims of $13 978 (WRMC 2003, p. 118).

Some participants, such as K M Splatt & Associates (IRsub. 197) and the Queensland Law Society (IRsub. 207), noted that Queensland has the lowest disputation rate of any scheme (figure 13.1). In part, this may reflect the fact that Queensland has a well-established scheme whose rules are well understood by all stakeholders (chapter 13). These participants also note that Comcare, which has very restricted common law access, has a relatively high disputation rate. However, comparing disputation rates across schemes is problematic because it can depend on other features of scheme design, in particular statutory benefits structures. According to the Workplace Relations Ministerial Council:

> Queensland, which has a low disputation rate, has a long-standing benefit regime, experienced in-house claims officers and well-understood dispute handling processes. However Comcare, despite having these same features too, has high disputation rates. This is, in part, due to the long tail nature of the Comcare scheme where a high number of ongoing benefits disputes can arise from the large population of ongoing claims, compared to the smaller number of new claims. (WRMC 2003, p. 56)

Queensland has introduced pre-trial proceedings, including mandatory settlement conferences. These pre-trial arrangements can be a means of lowering the costs of dispute resolution and minimising the degree of conflict between the parties.

Other common law jurisdictions, such as New South Wales and Victoria, have disputation rates in excess of 20 per cent of new claims. Tasmania has a disputation rate in excess of 30 per cent of new claims (figure 13.1). However, as noted in chapter 13, care must also be taken in comparing disputation rates across jurisdictions because of different definitions of a dispute. For example, disputation rates may be inflated in New South Wales and Tasmania because of the practice of 'deeming' disputes in claims which have not been settled within a specified time.

Justice

It has been argued that access to common law when injured by another person's negligence is a basic legal right. This provides an opportunity for public scrutiny of workplace accidents and injury in open court. However, an employee need not sue their employer to provide public scrutiny. This could be undertaken by OHS authorities, which have powers

to bring actions against employers for breaches of OHS standards. Furthermore, most common law actions are settled without a court ruling. PwC (2001, Appendix B, p. 13) found that two-thirds of common law cases surveyed were settled prior to proceeding to a court hearing.

Participants, such as the Law Council of Australia (trans., p. 1098), noted the importance to claimants of receiving some recognition from their employer of the harm received. Mayou (1996) provides evidence that the motivation for seeking an award of damages ' … is often focused on the lack of concern or apology by those believed to be responsible rather than on gaining maximum financial reward.'

However, other participants expressed the view that attempts to receive vindication through the legal system might ultimately be unsuccessful:

> I think right across the country, from a rehabilitation perspective it is agreed that common law has far more disbenefit than benefit. Even sometimes it could be said that somebody gets their retribution and moves on, and that might be a way of shifting somebody that's really entrenched from a rehab perspective, but that rarely happens. Our experience in general is that people never feel as if they have received retribution. (Australian Rehabilitation Providers Association, trans., p. 1320)

The courts are also represented as the ultimate guardian of the claimant against unjust or capricious administrative action. The worker may have their claim heard by judges who are distanced from the workers' compensation scheme. However, this objective could also be achieved by allowing the claimant access to an efficient and fair dispute resolution system which recognises the principles of natural and administrative justice (chapter 13).

Some participants have argued that reducing access to common law damages would involve an abrogation of workers' rights (Queensland Law Society, sub. 97, p. 4; QCU, sub. 91, p. 3; K M Splatt & Associates, IRsub. 197, p. 9). However, in advocating reforms to the law of negligence, the Ipp Panel noted:

> Some people have contended that any statutory reform of the law … will deprive injured persons of their 'rights'. As long as any such reform is not retrospective, that proposition is incorrect. Parliament can change the law at any time, and parliamentary amendment of the law — including the common law — is, of course, a very common occurrence in Australia. It is part of our democratic system. (2002, p. 29)

Moreover, many of the current conditions for access to common law settlements were established by legislation (Spigelman 2002, p. 6).

8.4 National framework issues

On balance, the Commission regards the common law as an inappropriate mechanism for providing workers' compensation in most circumstances.

Some view the common law as a more affordable means of resolving serious claims. WorkCover Queensland argued that:

> Despite purported savings for large, national employers, WorkCover Queensland believes that the scheme described by the Commission [in the Interim Report] will be unaffordable without massive premium increases. Based on New South Wales experience detailed in the Grellman Report, over time statutory claims costs will increase. Without the availability of common law to reduce tail claims, these increased costs will become unaffordable without massive increases in premium for those employers who have opted to be part of the Comcare scheme. (IRsub. 225, p. ii)

The Commission acknowledges that the Queensland scheme, which is fully funded, has low premiums. However, long-tail claims can be managed cost-effectively in a scheme with little or no common law access. Comcare has a long-tail statutory benefits structure and does not require the worker to establish fault in order to receive compensation for serious injury or illness. This scheme, which is also fully funded, had the lowest standardised premium[19] in 2001-02 (WRMC 2003, p. 40). Moreover, Comcare has the highest return to work rate of any Australian scheme (chapter 7).

Should common law be retained, the Commission considers that access should be restricted to the most seriously injured workers, in particular the catastrophically injured, for whom the poorer rehabilitation outcomes associated with common law actions are less relevant. The sense of justice received by assigning fault is also likely to be greatest in these circumstances. However, the Commission would not support an arrangement which adequately compensated seriously injured workers only in the event of fault being established.

The Commission also recommends that common law damages only be available for non-economic loss, while economic loss is compensated by statutory benefits. The advantages of common law in providing personalised damages are likely to be greatest in compensating heads of damages such as pain and suffering and disfigurement (notwithstanding the evidence that awards of damages tend to be relatively standardised). Economic loss, by its nature, is amenable to compensation through insurance arrangements such as those provided by statutory benefit schedules. Such an approach would also ensure that, irrespective of the ability to establish fault, the economic needs of the more seriously injured could be met.

WorkCover New South Wales commented on this recommendation:

> The NSW Government supports the retention of common law access for the most seriously injured workers but for economic loss only. NSW does not support access to common law for non-economic matters. This is because of the inherent difficulties in courts assessing levels of impairment and that the open-ended nature of such claims put

[19] Standardised premiums take into account differences in industry composition, the number of self-insurers and employer excesses between jurisdictions.

funding pressures on compensation schemes. *(Sheahan Inquiry Report, 2001)*. (IRsub. 255, p. 5) [italics in original]

However, caps can be placed on these damages as recommended by the Ipp Report (2002, p.194) and currently imposed by Comcare, Victoria and Western Australia. Damages for non-economic loss also represent a smaller percentage of awards to the most seriously injured. Restricting access to the most seriously injured could therefore minimise the impact on scheme viability. Public liability claims data from 1999-2000 in New South Wales and the Australian Capital Territory, indicate that damages for non-economic loss accounted for 45 per cent of the cost of claim for claims less than $100 000 but only 13 per cent of the cost of claims over $500 000. Future economic loss (including medical care) represented more than half the cost of the largest claims (Trowbridge 2002, p. 85).

Limiting damages to non-economic loss would also overcome some of the major problems associated with inadequacy and/or dissipation of lump sums. If damages were restricted to economic loss only, it is possible that future medical and living expenses may rise shifting the costs of the injury or illness back on to the worker. This also has profound implications for cost-shifting on to the Australian Government's social security and health budgets. Allowing common law damages to provide some recompense to injured or ill workers for a reduced capacity to enjoy the amenities of everyday life may also accord with community notions of justice.

RECOMMENDATIONS

The Commission recommends that common law should not be included in a national framework for workers' compensation on the grounds that it:

- ***does not offer stronger incentives for accident reduction than a statutory, no-fault scheme;***
- ***can provide lump sum compensation which may prove inadequate to the longer term needs of seriously injured workers;***
- ***may over-compensate less seriously injured workers who, in the normal course of events, could be expected to rehabilitate and return to work;***
- ***delays rehabilitation and return to work (if there are psychological benefits to be derived from receiving a lump sum, these could be obtained through statutory benefits); and***
- ***is a more expensive compensation mechanism than statutory workers' compensation.***

If common law is to be included in a national framework, then access should be restricted to:

- ***the most seriously injured workers (subject to meeting an impairment threshold); and***

- ***non-economic loss only.***

Where common law access is retained, jurisdictions might give consideration to:

- ***imposing restrictions on plaintiff legal fees (including incentives for early settlement);***
- ***mandatory settlement conferences (which include an exchange of offers); and***
- ***legislative provision to encourage early rehabilitation by plaintiffs.***

The national cooperative body (model D) would involve a process by which schemes could achieve greater consistency in common law access. However, reaching consensus on common law access could continue to prove elusive. When HWCA (1997) set out its 'best practice' benefits structure, it was required to offer two options — one with, and one without, common law access — although its preference was to remove common law.

The Comcare-based model (model A) has a very limited role for common law. Common law damages are only available for non-economic loss and are capped at $110 000 (non-indexed). Comcare has generous weekly benefits (only South Australia is more generous), though statutory lump sum payments tend to be less than in other schemes (WRMC, 2003 p. 62).

Establishing an alternative national self-insurance scheme (model B) would require enabling legislation, as would an alternative national insurance scheme (model C). As part of that process the Australian Government should determine the role permitted for common law settlements. The Commission's recommendation is that common law access not be allowed. If common law access is to be allowed, the Commission recommends it be restricted to non-economic loss for the most seriously injured.

9 Statutory benefit structures

In this inquiry, the Commission has been asked to identify and report on 'a consistent benefits structure that provides adequate levels of compensation, including income replacement and medical and related costs, for injured workers and their families'.

Statutory benefits are provided to compensate injured or sick workers for lost income, medical and rehabilitation expenses, and, if the injury or illness is serious enough, for a diminished capacity to enjoy the activities of everyday life. Benefit structures vary considerably across schemes. Differences exist in the level and duration of benefits, as well as in limits on the amount of compensation paid.

In the Commission's view, there is no single 'best practice' benefit structure that is appropriate in all circumstances. Of most relevance is that the benefit structures are aligned with the broader objectives of: prevention of workplace injury and illness; adequate financial compensation; and early intervention, rehabilitation and return to work. The appropriateness of a benefits structure depends, in part, on the interaction between workers' compensation, other accident compensation schemes and the social security and taxation systems. In setting out their principles of good benefit design, the Heads of Workers' Compensation Authorities (HWCA) commented:

> … the most important priority is to prevent workplace injury and illness occurring. However, where such an event occurs, the minimisation of the human and financial costs of the event are the next important priority, particularly through recovery and prompt return to work. Where losses are, in fact, suffered, they need to be met in the most appropriate manner through best practice benefit design.
>
> Good benefit design ensures an appropriate allocation of the costs from these losses between employers, employees and taxpayers more generally. The various systems to meet the needs of injured workers and people with disabilities in our society have developed in a haphazard fashion. This means that people can have several possible sources of assistance in some circumstances. These can vary considerably in size or have different eligibility criteria. (1997, p. 44)

Determination of appropriate benefits structure will also involve consideration of other scheme priorities — in particular, scheme affordability. According to the Tasmanian Government:

> It is critical that the form and level of benefits is aligned with the objectives of the system. Thus benefits which encourage dependency or maintenance of symptoms are incompatible with the objectives of the Tasmanian system. The form of the benefit

structure embodies a balance between the interests of employers (affordability) and the interests of workers (benefit adequacy). Selecting a benefit structure also involves a balance between the interests of severely disabled workers and those sustaining minor injuries and illnesses. (sub. 135, p. 7)

9.1 Features of statutory benefit structures

Statutory schemes provide: income replacement in the form of periodic payments; reimbursement for medical and rehabilitation expenses; and lump sum payments to compensate for non-economic loss and in the event of death.

Income replacement

All schemes link income replacement to the pre-injury earnings of the worker. Normally, this includes regular overtime[1]. In the Australian Government schemes, Queensland, Tasmania and the Northern Territory regular higher duties, penalty payments and allowances are also included. Long service benefits and 'one-off' bonuses are not included by any scheme. Award wages may be used in New South Wales, Queensland and Western Australia.

All schemes impose some limit on weekly benefits. In jurisdictions other than New South Wales, this takes the form of a 'step-down' in benefits, the timing and extent of which vary considerably. In addition, each scheme imposes a different limit on the overall amount of benefits which can be paid (see table 9.1).

Some jurisdictions have relatively long periods before the step-down occurs. Under the Australian Government schemes, there is full income replacement for the first 45 weeks, with a step-down to 75 per cent of pre-injury normal weekly earnings that may be paid until normal retirement age (65 years of age). South Australia reduces benefits only once, after 52 weeks, to 80 per cent of pre-injury earnings, and may continue to pay benefits until retirement age. Both jurisdictions have relatively high upper limits on benefits (twice average weekly earnings in the case of South Australia). Benefits in the Northern Territory's scheme follow a similar pattern, stepping-down at 26 weeks.

New South Wales increases the earnings replacement ratio after 26 weeks (from 80 per cent to 90 per cent) but significantly reduces the maximum amount of compensation available (by over 75 per cent).

[1] The exception is New South Wales.

In order to strengthen return to work incentives, two jurisdictions — Victoria and South Australia — reduce benefits by a notional amount that is an estimate of the amount the worker could earn if he or she returned to the labour force.

In New South Wales and Victoria, payments can be stopped after two years. In Queensland, unless the worker meets a minimum injury threshold, benefits are reduced after two years to the level of the Australian Government pension for a single individual (currently $220 per week). After five years, all payments under the Queensland scheme stop. Tasmania ceases all payments after 10 years.

Table 9.1 **Weekly benefits 2003-04**

	Initial income replacement	Step-down to	at	Limits
Australian Government	Full	75%	45 weeks	Weekly benefits limited to 150% of AWE for full-time adults (current limit of $1409.40).
NSW	80% [a]	90% [b]	26 weeks	Weekly benefits limited to $1348.60 [c]. After 26 weeks $317.20. Payments can be stopped after 2 years.[d]
Victoria	95%	75% [f]	26 weeks	Weekly benefits limited to $1050 [c]. Payments cease after 2 years unless permanently incapacitated.
Queensland	85% [e]	65% [g]	26 weeks	Total amount payable in weekly benefits limited to $157 955. Benefits cease after 5 years.
WA	Full [a]	85%	4 weeks	Weekly benefits limited to $1021.60 [c].
SA	Full	80% [f]	52 weeks	Weekly benefits limited to twice State AWE (current limit of $1662). After 52 weeks, 80% of this.
Tasmania	Full	85% 70%	13 weeks 52 weeks	Payments stop after 10 years.
NT	Full	75%	26 weeks	After 26 weeks, weekly benefits limited to 150% of jurisdiction AWE (current limit of $1358.70).
ACT	Full	$316.03 [c]	26 weeks	None.

[a] Or award wage. [b] A 'step-up' but coupled with a reduction in the maximum amount of compensation payable. [c] Indexed. [d] If the worker is no longer seeking employment, is unemployed mainly as a result of labour market conditions or has unreasonably rejected an offer of employment. [e] Or, if greater, award wage or 70% of Queensland Ordinary time earnings. [f] If the worker has some work capacity this may be reduced to take account of notional earnings. [g] After 104 weeks, workers with an impairment of less than 15% whole body receive the Australian Government single pension rate.

Sources: HWSCA (2002); scheme sources.

Medical benefits

All schemes reimburse reasonable medical and rehabilitation expenses. Some schemes impose a limit on medical benefits, although there is normally discretion to exceed this in certain circumstances. In Victoria, benefits cease 52 weeks after weekly payments cease. New South Wales and Western Australia impose a limit of $50 000 and $37 843, respectively. Queensland caps reimbursement for private hospitalisation at $10 000 for a single incident.

Lump sum payments

Lump sum payments may be made in the event of death or as compensation for non-economic loss. In all jurisdictions, it is also possible for a claimant to receive a lump sum as a commutation of periodic payments — although the conditions governing access vary.

Death benefits

In 2003-04, statutory benefits paid in the event of death ranged from $135 531 in Western Australia to $285 750 in New South Wales. Across all schemes, the average death benefit was about $204 000.

In addition to the lump sum payment, death benefits can include a pension paid to dependants. This can be related to pre-injury earnings (Victoria, South Australia, Tasmania), average state earnings (Queensland) or an indexed amount (currently ranging from $50.75 per week for each dependant child in the Australian Capital Territory to $86.60 per week in New South Wales).

Non-economic loss

Non-economic loss is a measure of the impact of the injury on the worker's lifestyle: pain and suffering; permanent impairment; disfigurement; and reduced expectation of life. Some schemes (the Australian Government, New South Wales and Victoria) compensate pain and suffering separately from other non-economic loss. Others provide one lump sum payment for all non-economic loss.

In 2003-04, maximum payments for non-economic loss ranged from $135 531 in Western Australia to $347 890 in Victoria. The average across all schemes was around $211 000.

Lump sum compensation will normally only be paid for impairments that are permanent. In determining whether impairment is permanent, the following factors can be taken into account:

- the duration of the impairment;
- the likelihood that the employee's condition will improve; and
- whether the employee has taken all reasonable steps to rehabilitate.

Compensation payable for non-economic loss is based on the degree of impairment and is determined according a formula contained in the legislation governing each scheme (or where used, specified in the Table of Maims or Disabilities).

In all schemes except for Queensland, Western Australia and the Australian Capital Territory, access to lump sum compensation for non-economic loss is dependent on meeting a minimum impairment threshold. Guides such as those published by the American Medical Association are used to establish the degree of impairment[2].

The Institute of Actuaries of Australia noted the importance of thresholds as a means of determining access to these payments, but also identified their impact on behaviour:

> Thresholds are commonly used to eliminate trivial claims or to restrict access to particular benefits, such as Common Law damages or lump sums for permanent impairment. This can result in significant administrative savings, and helps to direct limited funds to those who have the greatest need.
>
> Thresholds in benefit structures can, however, have perverse effects. A threshold creates an incentive for claimants near the threshold to try to meet it. This, in turn, can create a flow-on, if the same measure is used to set benefit levels. If claimants below the threshold are pushed over, others must also be pushed up, to avoid anomalies, and the benefit cost is increased for claimants that genuinely meet the threshold. This extra cost can sometimes exceed the saving from the claims that are eliminated. Care is needed in costing and to ensure that the threshold has the desired effect. These problems are eased, but not eliminated, if a deductible can be used instead of a pure threshold. (sub. 88, p. 11)

Commutations

In all jurisdictions, it is possible to redeem (or commute) weekly benefits as a lump sum. Redemptions or commutations absolve the scheme of ongoing liability to compensate the recipient. They may also involve recipients relinquishing claims to future medical expenses.

Provisions for payment vary significantly between jurisdictions. For example, in New South Wales a commutation may be paid if the claimant has a permanent disability of at least 15 per cent, has been paid compensation for non-economic loss and has lodged the

[2] An impairment percentage is a measure of the extent to which the capacity to undertake the activities of daily living has been reduced.

workers' compensation claim not less than two years previously. In Victoria, a lump sum settlement of weekly payments (not including medical expenses) is available if the claimant has no prospect of work, has been on benefits for more than 104 weeks and is over 55 years of age. The Australian Government schemes allow lump sum settlements only when weekly payments fall below a minimum level (currently $81.81) and the claimant's incapacity is unlikely to change. Any claimant who receives a redemption under an Australian Government scheme retains entitlement to reimbursement for future medical expenses. In South Australia, there are no restrictions on access.

Commutations provide greater flexibility for insurers/self-insurers in dealing with claimants for whom return to work is not a realistic option, or in circumstances where periodic payments have fallen to very low levels. The benefits of commutations were noted by several participants (for example, Woolworths, sub. 98, p. 1; Northern Territory Government, sub. 144, p. 21).

However, the payment of lump sums is problematic in accident compensation. Key concerns are that establishing eligibility may unnecessarily delay rehabilitation and/or the payment may be dissipated, forcing the claimant to fall back on social security payments by the Australian Government (chapter 8).

In setting out its principles of 'best practice' benefits design, HWCA noted: 'redemptions of future benefits are not desirable and should be available only in limited circumstances' (1997, p. 87). However, HWCA also noted that administrative costs could be reduced by redeeming small weekly payments. It recommended that payments falling below 20 per cent of average weekly earnings should be subject to redemption (1997, p. 25).

Adequate safeguards are needed to ensure commutation is in the worker's best interest. Incentives should also be put in place — by schemes and by insurance companies — to ensure that commutation is not simply seen as an expedient means of closing a claim, but is an option of last resort in cases where the chances of successful rehabilitation are minimal.

9.2 Evaluating statutory benefits

An evaluation of benefit structures needs to take into account a number of factors, including other features of the scheme such as access to common law (often traded-off against statutory benefits) and dispute resolution mechanisms. These other features can be important determinants of the degree of satisfaction derived by injured employees in the resolution of their claim.

Moreover, any evaluation of workers' compensation benefits should be undertaken in the context of alternative sources of accident compensation and the social security and taxation systems. The Department of Family and Community Services commented:

> When employees become ill or injured in the workplace and are not covered by a statutory workers' compensation scheme or private insurance arrangements and have no other alternative means of financial support the social security system becomes their means of support and acts as a de-facto workers' compensation scheme. (sub. 167, p. 10)

The success of a benefits structure can be evaluated against:

- how *adequately* it compensates injured workers (both in terms of compensation paid and coverage);
- how well it reinforces *incentives* for employers and employees. In particular, incentives: for safer workplaces; for employees to participate in rehabilitation and return to work; and for employers to facilitate return to work; and
- the degree to which the *costs* of workplace injury and illness are funded from employer contributions rather than shifted elsewhere (primarily, to the Australian Government).

These criteria involve obvious trade-offs. A 'generous' benefits structure may provide poor incentives for rehabilitation and return to work. Conversely, benefits that impose limits on income replacement (as a means of encouraging return to work) may be regarded as inequitable for workers with serious injuries which respond slowly (if at all) to rehabilitation.

Similarly, if benefits are reduced to provide incentives to employees to participate in rehabilitation and return to work, this may encourage claimants to seek other forms of compensation (which shifts costs away from the workers' compensation scheme). If benefits are increased, cost shifting on to the workers' compensation scheme, by people who have sustained injuries or illnesses outside the workplace, can be encouraged.

The benefit structures of the various workers' compensation schemes also reflect the historic compromise between the stakeholders in each jurisdiction. As schemes have evolved in response to these competing influences, some have taken on characteristics akin to long term social security:

> During the course of this century the scope of workers' compensation accessibility and responsibility has been extended both by legislation and by judicial interpretation. The system has developed 'into an elaborate but rather disordered scheme for social security benefits'. (QBE Insurance, sub. 99, p. 8)

Adequacy

Adequacy is a measure of the extent to which benefits meet the needs of ill or injured workers. Compensation for workplace injury or illness occurs in a number of ways: wages which have an in-built risk premium; workers' compensation; or private insurance (including insurance as part of a superannuation policy). Evaluation of adequacy should take these into account together with the social environment in which the scheme operates (for example, alternative forms of compensation will condition expectations as to appropriate benefit levels).

Furthermore, there are some losses that are extremely difficult to insure against. Non-economic losses such as pain and suffering are impossible to quantify prior to harm occurring. Those policies that are purchased by individuals against the event of a traumatic injury, illness or death normally only cover the expected financial loss to dependants and/or the individual.

Compensating wage differentials

Even in the presence of explicit workers' compensation, wages will adjust, at least partially, to compensate for known workplace risk:

> All other things equal, the typical US worker in a job with a likelihood of injury at about the labour market average earns 2 – 4 per cent more than a person working in a totally safe job. (Kneisner and Leeth 1995, p. 9)

Although workers in riskier jobs may receive higher wages, there are compelling reasons to believe that the compensation will be less than complete. There is a potential information asymmetry in that job applicants may not fully appreciate all of the potential risks involved in employment. Risks may only become apparent after employment has commenced, in which case the worker can leave, renegotiate wages or accept the existing wage in conjunction with statutory workers' compensation benefits.

There is evidence that changes in workers' compensation benefits are reflected in wages. Using US data, Gruber and Krueger (1990) found that a $1 increase in expected benefits led to a $0.86 fall in wages. A more recent study, by Kaestner (1996), which analysed US workers by age group, found that a $1 increase in expected benefits reduces wages by more than $1. This is consistent with the earlier results of Moore and Viscusi and may be evidence that some of the indirect costs of workplace harm are also passed on to workers (1990, pp. 67-68). Kaestner also found that, amongst the youngest age group of workers who were covered by mandated minimum wages, a 1 per cent increase in expected benefits and associated costs led to a 1.5 per cent increase in unemployment.

First-party insurance

Insurance policies can be purchased to provide income replacement in the event of injury or illness, or lump sums in the event of death, total and permanent disability, or a traumatic medical event. Private insurance policies include offsets to prevent 'double-dipping' (receipt of workers' compensation and other insurance benefits for the same injury).

Income protection policies have features consistent with workers' compensation (an immediate step-down to 75 per cent of pre-injury earnings and a time limit on benefits). However, they also normally have a waiting period before benefits can be accessed.

Using US data, Viscusi and Evans (1990) provide evidence that most employees will not typically purchase full income replacement insurance. Using the actual levels of workers' compensation benefits, together with estimates of compensating wage differentials, the authors conclude that the average worker would insure around 70 per cent of their income if given the choice. Hyatt (1996) surveyed a group of workers' compensation claimants. By asking what wage would induce them to give up their workers' compensation benefits, he estimated that the preferred replacement rate (the ratio of compensation benefits to earnings) was between 80 and 90 per cent.

Less than complete compensation may also be adequate since employees may incur fewer expenses (for example, transport to and from work and child minding) when they are off work (IC 1994, p. 112).

Superannuation

Adequacy also involves consideration of future income needs. No scheme currently pays superannuation contributions on behalf of employees who are away from work because of work-related illness or injury. HWCA recommended that:

> … employers should be required to maintain statutory superannuation contributions on behalf of injured workers who have not returned to work for such period as they are required to hold a job open. These contributions are made in addition to the benefits payable directly to the worker. (1997, p. 17)

Inclusion of superannuation contributions could provide for some of the needs of injured workers after the cessation of benefits — at the latest, schemes cease weekly benefit payments at normal retirement age (65 years of age). Most jurisdictions include superannuation contributions in the definition of remuneration for the purpose of calculating premiums. Inclusion of superannuation contributions in the benefits structure would therefore be consistent with the recommendation of the Institute of Actuaries that '… benefits are not provided where no premium is payable and premiums are not charged where no benefit is payable' (sub. 88, p. 9).

Incentive provision

The levels of benefits, conditions of access and the manner in which the benefit is paid (periodic or lump sum) all provide incentives for particular forms of behaviour. Taxation and interaction with other income support mechanisms, such as social security, are also important. These incentives are complex and may depend on other scheme features — for example, access to common law and dispute resolution (Institute of Actuaries of Australia, sub. 88, p. 11).

Empirical evidence suggests that benefit increases lead to a greater incidence and duration of claims. Worrall and Butler reviewed US evidence on the impact of benefits on claim duration, and concluded:

> People respond to incentives. If social insurance benefits increase, applications for beneficiary status will increase. The evidence from the [workers' compensation] program indicates that applications (claim filing) ... [are] quite sensitive to changes in the level of benefits. (1989, p. 122)

A range of US studies suggest that a 10 per cent increase in benefit levels leads to an increase in claims of between 4 and 10 per cent (Butler 1983; Butler and Worrall 1983; Worrall and Butler 1989; Johnson and Ondrich 1990; Thomason 1993; Currington 1994; Meyer, Viscusi and Durbin 1995; Hirsch, Macpherson and Dumond 1997).

The Industry Commission (IC) (1994, p. 106) reported that when compensation payments in South Australia were increased from 74 per cent to 100 per cent of average weekly earnings in 1974, there was an increase of 55 per cent in time taken off work following an accident. In Western Australia, increasing payments from 53 per cent to 95 per cent of average weekly earnings in 1973 preceded a 22 per cent increase in compensated time off work.

Krueger examined the impact of benefit increases on claim duration in a US scheme. He concluded:

> … the duration of injuries increased by 8 per cent more for the group of workers that experienced a 5 per cent increase in benefits than for the group of workers that had no change in their benefit. (1990, p. 1)

However, in the case of death and serious injury, the natural human desire to avoid harm, together with a potential increase in premiums following an increase in benefits, appear to be the dominant influences on behaviour. Using US data, Moore and Viscusi (1989) found that increases in workers' compensation benefits resulted in improved health and safety measures by firms and a reduction in the number of fatal accidents.

Income replacement

Periodic payments, which are closely linked to pre-injury earnings, may reduce incentives to return to work. The Institute of Actuaries of Australia provide evidence that, beyond a certain range, benefit increases lead to a disproportionate increase in claim costs. For income replacement rates of between 50 per cent and 75 per cent of pre-injury earnings, increases in benefits approximate increases in scheme costs (in other words, there does not appear to be a significant distortion in claims behaviour). For income replacement above 75 per cent of pre-injury earnings, there is evidence that an increase in benefits results in a more than proportionate increase in claims:

> The utilisation of weekly benefits depends, in part, on the ratio of those benefits to pre-injury earnings. If the ratio is low, a proportion of potential claimants will "soldier on" and claimants who recover will try to return to work earlier, rather than later. If the ratio is high, there is a greater incentive to malinger and there will be less incentive to return to work early.
>
> Analysis of disability insurance data collected by the Society of Actuaries in the US has suggested that, over a range of perhaps 50% to 75%, the utilisation rate is proportional to the income replacement ratio … When the income replacement ratio approaches 100%, the utilisation rate can increase quite sharply.
>
> … This effect is strongest where job satisfaction is low, in unattractive, low-paid jobs, and can be exacerbated if there is a fixed minimum weekly benefit. (Institute of Actuaries of Australia, sub. 88, p. 10)

As all schemes initially replace at least 80 per cent of lost income (see table 9.1) there may be disincentives to participate in rehabilitation and return to work. However, the schemes also have design mechanisms to deal with this moral hazard — in particular, benefit step-downs and caps.

Benefit step-downs

Compensation for lost earnings typically starts at a level related in some way to pre-injury earnings and tapers down over time before falling to some 'minimum' support level (or ceasing altogether). As noted earlier, in most schemes, initial step-downs occur at either 26 weeks or 52 weeks. In Western Australia, the step down occurs after 4 weeks (cumulative) away from work; while in South Australia the only step-down occurs at 52 weeks. Tasmania reduces benefits twice — at 13 and 52 weeks.

Empirical evidence from Australian workers' compensation schemes suggests that step-downs provide incentives for return to work:

> ... evidence that the timing of changes in benefit levels are ... significant in determining duration. In both workers' compensation and social security schemes, high exit rates by

> beneficiaries are typical just prior to the time at which benefits are significantly reduced. (Sloan and Kennedy 1993, p. 16)

Woolworths also believes that step-downs provide positive incentives:

> Anecdotally, our Rehabilitation staff in all states confirm that the knowledge of an impending reduction in benefits motivates workers to progress towards a full return to work, where there was previously a lack of motivation. (sub. 156, p. 2)

As part of its preferred benefits structure, HWCA (1997, p.16) recommended that full income replacement occur for the first 13 weeks before stepping down to 70 per cent of pre-injury normal weekly earnings. Benefits would continue at this level for five years and, possibly, until retirement age if an impairment threshold was met.

Employers and employees can negotiate 'make-up' pay to compensate workers for benefit step-downs. This occurs mainly in unionised sectors and as part of enterprise bargaining agreements. 'Make-up' pay can reduce incentives to employees to return to work (Aon, sub. 73, p. 9). However, since the 'make-up' is paid for by the firm directly, there are also strong incentives on the employer to prevent illness or injury and facilitate return to work.

Benefit caps

Benefit caps place an upper limit on scheme liability and are intended to encourage injured employees to return to work. The caps are usually expressed as a multiple of average weekly earnings in the particular jurisdiction (either state or national). HWCA (1997, p. 16) recommended that weekly benefits be capped at 150 per cent of average weekly earnings once the step-down in benefits occurred.

'Notional' earnings

In Victoria and South Australia, rehabilitated workers unable to return to their previous job are deemed able to earn income from alternative employment. Compensation payments are reduced to reflect the difference between pre-injury earnings and these deemed earnings. Notional earnings apply irrespective of whether the worker is able to find employment in the alternative occupation. The concept of 'notional' earnings is a method of limiting the cost to the scheme of long-term claimants. In its preferred benefits structure, HWCA (1997, p. 16) recommended that benefits be reduced to take account of notional earnings six days after the workers' compensation claim was lodged.

Method of payment

Although periodic payments can weaken return to work incentives, lump sum payments, which depend on the severity of the injury, can delay rehabilitation (PWC 2001, p. 10).

The relationship between lump sum payments and rehabilitation were discussed in chapter 8.

Cost shifting

Basic safety nets for dealing with social dislocation, injury and illness are provided by the social security and health systems. These are jointly provided by all Australian governments. Where injuries and illnesses are demonstrably work-related, it is appropriate that the cost be attributed to employment.

In some cases, the attribution of cost is not obvious. This may occur where the attribution of the injury or illness to the workplace is itself problematic, such as with degenerative musculo-skeletal conditions. For injuries of a very minor nature, coverage under workers' compensation may not be cost-effective (although these injuries should still be reported to ensure that the complementary OHS system is fully effective).

For a number of reasons (including convenience or concern about the impact of a claim on their employment) injured or ill workers may use Government-provided income support and medical benefits that should properly be provided by workers' compensation schemes. Benefit structures reflect a number of competing influences, including the need to provide appropriate incentives for rehabilitation and return to work. Where these incentives are not provided, unintended cost shifting may result.

Cost shifting can occur either away from, or to, workers' compensation schemes. The IC made extensive estimates of the distribution of costs of work-related injuries and illnesses:

> The Commission estimates that the total cost to injured employees, their employers and the rest of the community of work-related injury and disease is at least $20 billion a year. This estimate is conservative as it does not include any allowance for pain, suffering and anguish.
>
> Around 30 per cent of the total cost has to be met by injured workers and their families. Employers bear about 40 per cent in workers' compensation costs, lost productivity and extra overtime. The community funds around 30 per cent, mostly in social security benefits and health subsidies. However, the community's share increases with the severity of the consequences — it is about 40 per cent for permanent disability compared with around 10 per cent for temporary disability. (IC 1995, pp. xviii – xix)

Using the methodology of the IC, the National Occupational Health and Safety Commission (NOHSC) estimated the cost of workplace fatality, injury and illness to be in excess of $31 billion annually (2003c, p. 2). In 2003, this figure represented a little over 4 per cent of GDP. If the distribution of costs between employers, employees and the wider community remained essentially unchanged from the IC's 1995 estimates, this would imply that:

- around $9 billion is borne by workers and their families[3];
- around $12 billion is borne by employers; and
- around $9 billion is borne by the general community.

Insurance Australia Group expressed the view that the distribution of costs was unlikely to have changed greatly since the IC's estimates were produced:

> Since that time, [the Industry Commission's 1995 Inquiry] little has changed although the extent of cost shifting may well be greater as a result of further restrictions on benefits since that time. (sub. 89, p. 39)

Based on IC methodology, the community cost includes extra spending by the Australian Government of $5 billion (of which $3 billion represents additional social security payments and the remainder health, medical and rehabilitation expenses). The cost to State and Territory budgets would be around $1 billion (health and medical payments; costs related to inspection and investigation; and travel concessions). The remainder of the community cost is an estimate of the value of lost human capital.

However, the potential for cost shifting on to workers' compensation schemes was also noted:

> It is also important to recognise that this analysis is likely to identify significant areas of hidden cost shifting *from* Commonwealth programs *to* state and territory workers' compensation schemes. Insurance Australia Group believes this to be an important and growing issue for workers' compensation reform.
>
> There is also some evidence in at least some schemes, including Comcare, that the overall ageing of the population is beginning to be felt in workers' compensation. As the average age of claimants increases, so does the time for recovery and the odds of achieving a sustainable return to work. Questions increasingly arise in individual claims as to the extent to which degenerative factors, as distinct from work-related factors, have contributed to the condition. (Insurance Australia Group, sub. 89, p. 39)

In general, the potential for cost shifting exists whenever the benefits offered by workers' compensation differ significantly from those offered by alternative accident compensation schemes or income support mechanisms. These differences relate not only to explicit statutory benefits, but also to other scheme attributes such as access to common law. According to the Institute of Actuaries of Australia:

> There may also be a choice between workers' compensation and other means of redress, such as CTP, public liability and Social Security. Such choice can result in large diversions of costs between the various schemes, depending on which is the most attractive. If Common Law remedies are not available under workers' compensation, they will be sought under public or product liability. If long-term workers' compensation income benefits are less attractive than unemployment or disability

[3] This includes an estimate of pain and suffering (IC 1995, p. 118).

benefits, for example, most workers' compensation claimants will discontinue when the long-term rate kicks in. Conversely, unemployed workers will seek to establish a compensable injury, if this gives better results. (sub. 88, p. 11)

The Insurance Council of Australia expressed a similar view:

> There is a disturbing trend emerging whereby cost shifting from workers' compensation to public liability is occurring in certain jurisdictions. The cause of this appears to be the alternative benefits structures of these different types of claim and the rise of what could rightly be termed "remedy shopping". Simply put, remedy shopping occurs whereby a potential claimant under a workers' compensation policy, instead opts to pursue their claim under an alternative insurance line, such as public liability. The motivation for doing this is the ability to gain access to financial recompense that he/she would not have had access to, or only limited access to, under the workers' compensation policy, such as common law damages. (sub. 74, p. 36)

Cost shifting away from workers' compensation schemes

Cost shifting away from workers' compensation schemes can be an indication that injured workers are inadequately compensated. According to the Department of Employment and Workplace Relations:

> One result of the design of the State schemes is that the Australian Government's social security schemes have become a 'de-facto' workers' compensation scheme. The taxpayer funded income support (mainly the Disability Support Pension, Age Pension and Newstart) and health schemes (mainly Medicare), are required to support a substantial number of workers who have suffered a work-related injury or disease. (sub. 166, p. 4)

According to HWSCA (2003, p. 8), social security payments were the main source of income for one in twenty injured workers. The Department of Family and Community Services noted that the extent of cost shifting to the Australian Government's income support programs may be significant:

> … there are many circumstances when an ill or injured person may turn to the Commonwealth for support following a work injury. For example they may be waiting for periodic compensation payments to start; periodic payments may be insufficient so that they remain eligible for partial income support; the claim for compensation may be challenged by a workers' compensation scheme; or they may be waiting settlement of a lump sum payment. Each of these can result in **cost shifting** to the Commonwealth.
>
> Commonwealth Department of Family and Community Services (FaCs) data shows that around 250,000 people currently receiving income support have claimed compensation at some time. On current estimates, each year around 36,000 people are affected by workers' compensation payments receive social security at a cost to the Commonwealth of $180m per annum. An additional (unquantified) number of people ill and injured in the workplace who are not covered by statutory schemes, self-insurers or private insurance also turn to the income support system for assistance. Social

> security income support remains a safety net for people that are ill or injured at work but its purpose is not to be a de-facto workers' compensation scheme. People who become ill or injured as a result of their employment should be supported by workers' compensation schemes and occupational health and safety arrangements.
>
> Of concern is that failure of workers' compensation arrangements can result in long-term income support receipt for some individuals. Of all customers receiving DSP, 13.2% have claimed compensation at some point, raising questions both about the adequacy of workers' compensation payments and the effectiveness of rehabilitation. (sub. 167, p. 1) [Emphasis in original]

The Department conceded that cost shifting was not simply a matter of benefit design in workers' compensation schemes alone:

> It is recognised that the framework for some Commonwealth programs, including both taxation and social security payments, may also inadvertently provide incentives for cost shifting. (sub. 167, p. 1)

Cost shifting can undermine scheme objectives of providing incentives to prevent work-related injury or illness; and incentives for early intervention, rehabilitation and return to work. When costs are shifted away from scheme participants, incentives to avoid them are reduced. Employers who are not required to meet the full costs of work-related injury and illness face a reduced incentive to prevent them. Workers who accept a disability support pension and sever ties with the workplace may also have poorer rehabilitation outcomes (see chapter 6).

Although compensation for work-related injury or illness can occur from a number of sources, there are mechanisms in place to prevent 'double-dipping'. Private insurance benefits are reduced dollar-for-dollar if workers' compensation benefits are also received. Access to Australian Government income support is restricted in a similar manner:

> The Social Security Act (1991) incorporates provisions that seek to limit recipients' of workers' compensation access to Commonwealth income support. For recipients of periodic compensation payments that contain economic loss, compensation paid is deducted dollar for dollar from the amount of income support otherwise payable. A person whose fortnightly compensation income exceeds $446.10 will not receive any pension payment. (Department of Family and Community Services, sub. 167, p. 3)

However, despite these mechanisms, there is still the potential for costs to be shifted away from the workers' compensation scheme. This potential can be exacerbated by the design of the benefits structure. Where benefits are inadequate, additional financial costs may be borne by the individual or the income support mechanisms of the Australian Government (principally, the disability support pension (DSP)). Weekly benefits which are subject to a time or dollar limit may result in an injured or ill worker relying on the DSP if recovery does not occur before the limit is reached.

The use of lump sum payments — either through common law or commutation — is another potential source of cost shifting to the Australian Government. This could occur either through a common law settlement or a commutation of weekly benefits. As discussed in chapter 8, such lump sums can be dissipated or poorly invested. As a result, they can prove inadequate to the longer-term income requirements of recipients, who may then fall back on alternative income support:

> Periodic payments provide a continued and reliable source of income, whereas lump sums often prove inadequate and are easily and frequently mismanaged. Periodic payments enable injured workers to remain connected to support services aimed at returning them to employment and longer term financial security. The Periodic payments provide better long-term security for the individual and prevent the early transfer of individuals to the social security system due to hardship (Department of Family and Community Services, sub. 167, p. 4)

The Australian Government has mechanisms in place to minimise cost shifting from this source:

> Recipients of lump sum compensation that contains an economic loss component are subject to a social security preclusion period during which time they cannot access income support. When a matter settles by consent, half the gross settlement money is divided by the amount a single person can earn under the social security income test before pension is not payable. A preclusion period (in weeks) is calculated in this way. As a rule of thumb, each $32,000 of assessable lump sum compensation will preclude social security income support payments for 12 months. (Department of Family and Community Services, sub. 167, p. 3)

Nevertheless, incentives to accept a lump sum are provided through the taxation and social security systems, which means that the potential for cost shifting from this type of payment may not be completely removed:

> … different parts of the Commonwealth treat compensation payments differently leading to mixed signals for insurers, lawyers and individuals. The taxation system and parts of Social Security Law provide incentives for people to take a lump sum. Under current taxation arrangements lump sum payments are not taxed while periodic payments are treated the same as wages. Similarly, the social security system treats periodic compensation as a dollar for dollar direct deduction to the compensation recipient that can impact on partners, whereas for lump sums only the compensation recipient is precluded and the preclusion period calculation treats lump sum compensation as ordinary income.
>
> The current different treatment of periodic and lump sum workers' compensation payments means that the same amount of compensation will result in different periods of ineligibility. For example, a single person receiving $447 per fortnight in periodic or regular compensation for three years would be ineligible for most social security payments during that time. However, if that person were to redeem the same amount into a lump sum, $34,866 ($447 x 78 fortnights) it would only result in a six month preclusion period. In this case, the person would be eligible for income support, including concessions, two and a half years earlier than they would have, had they

> received the same amount in regular instalments. (Department of Family and Community Services, sub. 167, p. 4)

The potential for cost shifting also exists in the area of retirement benefits. The government has instituted measures (such as tax advantages for superannuation and the superannuation guarantee levy) to encourage workers to save for their retirement. Inclusion of superannuation contributions in workers' compensation benefits could reduce the potential cost shifting to the Australian Government once a permanently incapacitated worker reaches normal retirement age. According to the Department of Family and Community Services:

> The introduction of compulsory superannuation aims to improve the incomes of people in retirement. Long-term unemployment can have significant implications on superannuation for both workers and their families. As injured workers that have not returned to work have a decreased amount of superannuation, many will have increased reliance on age pension in retirement and lower overall income, as age pension only provides a basic level of support … Periods out of the workforce have a significant impact on the capacity of individuals to save for retirement. For example a person earning $45,000 per year will have accumulated $521,000 by the time they retire at 65. However if they were to leave the workforce for 5 years at age 30 and then return part time they will only accumulate just over $300,000. (sub. 167, p. 9)

Income taxation is another area in which cost shifting can occur. Taxes which would have been paid, but for the injury or illness, represent part of the social cost of that injury or illness. Under current arrangements, periodic workers' compensation benefits are taxed in the same way as the income they replaced. However, commutations of periodic payments are currently not taxed. This provides an incentive for schemes to offer commutations in lieu of periodic payments and reduces Australian Government taxation revenue. In a draft tax ruling, the Australian Taxation Office has proposed that commutations be taxed as income in the year they are received (ATO 2002). The draft ruling has been withdrawn pending the outcome of test cases before the Federal Court (ATO 2004). According to the Northern Territory Government:

> Current tax arrangements for commutation benefits are an attractive feature of the current NT workers' compensation system for injured employees. The current NT commutation arrangements provide for claim settlement for partially incapacitated workers in that it provides closure and encouragement for some long term injured employees to get on with their lives. The commutation benefit however is currently under threat from the Australian Taxation Office which has announced an intention to tax such payments as income. (sub. 144, pp. 21–2)

Taxation of commutations is consistent with the principle that compensation should be treated in the same way as the earnings it replaces. It also eliminates the incentives for schemes to provide these payments unless genuinely warranted and reduces the potential for cost shifting to the Australian Government through the offering of lump sum instead of periodic payments.

Lump sum payments which represent compensation for non-economic loss are not taxed. This is appropriate since payments for non-economic loss are intended, as far as money can, to compensate the worker for the loss of lifestyle they had prior to the injury or illness.

There is also the potential for medical expenses to be transferred away from the schemes and towards to Australian Government. According to the Department of Employment and Workplace Relations:

> There is significant potential for double dipping and cost shifting involving payment of Medicare benefits for medical services which are, or should be, covered by workers' compensation. The Health and Other Services (Compensation) Act 1995 (HOSCA) provides for the recovery of Medicare benefits and residential aged care subsidies where medical and aged care expenses are the subject of compensation arrangements. The multiplicity of workers' compensation schemes in Australia prevents tracking of compensation cases across jurisdictions, reducing the effectiveness of the HOSCA arrangements. (sub. 166, p. 35)

Cost shifting towards workers' compensation schemes

A number of participants noted that costs may also be inappropriately shifted away from the Australian Government and on to workers' compensation schemes (for example, DEWR, sub. 166, p. 13; the Workers' Compensation and Rehabilitation Commission of Western Australia, sub. 11, p. 6). Cost shifting towards workers' compensation schemes undermines scheme affordability and limits the ability of schemes to provide for those suffering from a work-related injury or illness. Some injuries or illnesses which are compensable under workers' compensation schemes may have been caused or aggravated by conditions outside the workplace. Musculo-skeletal injuries, which may be exacerbated by ageing, are a notable example.

However, this is not primarily an issue of benefit design or the interaction between benefits and the Australian Government's taxation/social security system. It relates to the nature of these injuries or illnesses and the difficulty in attributing an exact cause. Moreover, it is not necessarily an issue of misrepresentation on the part of injured or ill workers. Since the onset of these conditions can occur slowly, or represent the cumulation of a number of years of stress to the body, both in and out of the workplace, it may be difficult for employees to establish the contribution of work to the injury. Since it is impossible to attribute an exact share of these conditions to the workplace, it is also impossible to quantify the extent of this form of cost shifting. It is also difficult to identify mechanisms which would minimise it.

The issue of cost shifting and coverage was discussed in chapter 6.

9.3 National framework issues

Workers' compensation benefits vary significantly across schemes, both in terms of the levels of benefits paid and the conditions of access. These differences reflect a number of influences, foremost of which are the historic trade-offs between key stakeholders. Interactions with the Australian Government's taxation and social security systems and with other accident compensation schemes have also impacted on the development of benefit structures.

Some participants argued for equality of benefits across schemes. For example, the Department of Family and Community Services contended: 'Workers with the same injuries can receive different levels, forms and duration of assistance depending upon their state of residence. This is clearly inequitable.' (sub. 167, p. 3). Furthermore, differences in benefit structures can imply differential access to other forms of income support:

> Variations in policies across schemes means that individuals will be entitled to different levels and forms of Commonwealth assistance depending upon their state of residence. For example, some States (such as South Australia) include medical expenses in lump sums paid to injured workers, thereby increasing the social security preclusion period for that individual. Other States do not include medical expenses in the lump sum. Individuals and employers in similar circumstances should be treated in the same way to ensure a fairer, simpler, more transparent system. (sub. 167, p. 8)

However, evaluation of statutory benefits should be undertaken in the context of other scheme features, in particular access to common law, which can provide an alternative means of compensation for seriously injured workers (chapter 8). A uniform benefits structure across jurisdictions, in isolation of these other scheme features, would therefore not necessarily promote equality of treatment among injured workers. Different wages and working conditions between jurisdictions also render any simple comparison of benefits problematic.

For multi-state firms and their employees, different benefits have the potential to increase scheme compliance costs. According to Coles Myer Ltd (CML), Australia's largest private employer:

> Under the different Workers' Compensation systems there is significant impact on CML as a national organisation in relation to the payment of weekly compensation … Different entitlement payments and step down points affect participation and motivation of injured employees in the rehabilitation process affecting overall claims cost, Return to Work outcomes and duration rates.
>
> Varying benefit structures impact significantly on overall cost of claims and hence employer premium, dependant on the jurisdiction. (sub. 155, p. 5)

These additional costs were also identified by a national insurance broker:

> For employers, the cost is amplified by discrepancies between the various models in terms of regulation, compliance, benefits, appeals mechanisms and insurance options. For employees, the cost is amplified by discrepancies in benefits for similar injuries or diseases, different appeals mechanisms and various limits to geographical coverage. As for the price of life, it takes on different values for the surviving family, including any dependant children. The result of this complexity is higher derived costs across all schemes as employers, employees and insurers all engage legal counsel to establish levels of liabilities, opportunities for recoveries from third parties and appropriate durations for benefits. (Aon, sub. 73, p. 3)

The Department of Family and Community Services saw merit in a nationally consistent benefits structure which improved transparency for claimants:

> Individuals in similar circumstances should be treated in the same way, rather than facing a myriad of different payment types with their confusing array of eligibility criteria and conditions. This would ensure a simpler, more transparent system. A workers' compensation scheme with a nationally consistent framework would help to overcome problems of consistency between the current schemes and the social security system whilst reducing the bewildering complexity of the current arrangements. It would provide benefits for both employees and employers by reducing costs, reducing complexity and removing cross border coverage issues. (sub. 167, p. 11)

In contrast to these views, some participants considered differences in benefits as necessary to reflect circumstances unique to each jurisdiction:

> Whilst the Law Council readily concedes the need for commonality with respect to definitions for key terms and the application of one common policy for employers with employees travelling inter-State, it would be inequitable to provide for uniformity "across the board" in respect of "benefits" or obligations upon employers for re-employment. The States substantially differ. We need only contrast:
>
> (i) geographically — Western Australia and Tasmania
>
> (ii) industrially — Queensland and Victoria
>
> (iii) population base — Tasmania and New South Wales. (Law Council of Australia, sub. 62, pp. 8–9)

Ideally, the level of benefits should be sufficiently flexible to reflect regional differences in earnings. However, this could be achieved through a nationally consistent benefits structure with the same rate of income replacement, step-downs, caps and conditions of access in each scheme. Income replacement, through its relationship to pre-injury earnings, would reflect much of the economic variation between jurisdictions.

The development of a benefits structure for a national workers' compensation scheme should support the broader objectives of OHS and workers' compensation.

Firstly, the benefits structure should provide incentives for the prevention of workplace injury and illness and, if harm occurs, for early intervention and appropriate participation in rehabilitation and return to work.

Secondly, compensation should be appropriate to the illness or injury. This need not be incompatible with scheme affordability. The Commission notes that Comcare benefits replace a relatively high proportion of lost income and can be paid until normal retirement age. The Comcare scheme is fully funded and in 2001-02 had the lowest standardised premiums of any jurisdiction (HWSCA 2003, p. 40). Scheme affordability will be determined not only by the level of benefits but also by injury management and claims management practices.

Finally, the benefits structure should minimise the degree of cost shifting, such as to the Australian Government's social security program. This ensures, as far as practicable, that the costs associated with workplace injury and illness are attributed to the activity that generated them.

RECOMMENDATION

The Commission recommends the following principles be used in the development of nationally consistent benefit structures:

- ***the provision of sufficient incentives for injured or ill employees to participate in rehabilitation. Benefit step-downs and caps are generally the most appropriate mechanisms for providing these incentives;***
- ***benefits not to be so 'low' as to result in workers bearing an unacceptably high burden of workplace injury or illness. Employers to face appropriate incentives to promote workplace safety. Income replacement to be related to pre-injury average weekly earnings, including any regularly received overtime;***
- ***all reasonable medical and rehabilitation expenses to be reimbursed by the scheme;***
- ***access to lump sum payments, which are intended to compensate those suffering a permanent impairment, to be based on meeting minimum impairment thresholds, while minimising the extent to which the availability of such payments delays rehabilitation and return to work; and***
- ***such structures, and health and income support schemes, to minimise the extent of any cost shifting.***

The question of benefit design is not relevant for the proposed first step in the Commission's reform (model A), since it would utilise the existing Comcare benefits structure. The main features of Comcare benefits are a comparatively high level of income replacement (see table 9.1); a long period before the step-down in benefits occurs; and restricted common law access. Under an alternative national self-insurance scheme (model B) either the Comcare benefits structure could be adopted, or some variation to that

structure should be negotiated which more closely reflects the principles recommended by the Commission.

Should there ultimately be a move to an alternative national insurance scheme (model C), this would involve the development of a new benefits structure. The benefits structure would be heavily contingent on the other features chosen (for example, whether common law access is to be included). Under the national cooperative model (model D), which could also commence immediately, the national workers' compensation body could determine an appropriate benefits structure consistent with 'best practice' principles and in consultation with key stakeholders. A similar exercise has already been undertaken by HWCA (1997) in setting out its 'best practice' principles of benefit design.

10 Premium setting

The Commission is required by its terms of reference to report on 'premium setting principles necessary to maintain fully-funded schemes while delivering to employers equity, stability and simplicity' and, in doing so, to identify 'models that provide incentives for employers to reduce the incidence of injury and improve safety in the workplace'.

Employers (other than self-insured employers) pay insurers a premium based on their total wages or remuneration bill. The premium rate (or percentage rate of the wages bill) charged to any one employer depends on a range of factors such as the size of the employer, the industry in which the employer operates (industry class rating), individual claims experience (experience rating), the financial position of the insurer, and the stage of the insurance market cycle.[1] Small to medium-sized employers are subject to industry class rating, whereas large employers are subject to experience rating.

Premiums are efficient if they are set so as to cover employers' expected scheme costs of work-related injury and illness[2]. An employer's expected scheme cost depends on the likelihood of work-related injury or illness and includes the:

- the medical and income payments made to injured or ill workers;
- the cost of rehabilitating and facilitating the return to work of injured or ill workers;
- compensation for the pain and suffering of injured and ill workers; and

[1] The insurance market is affected by cyclical behaviour. Conditions in the market typically cycle between 'hard' and 'soft' as insurers seek to maintain both market position and profitability. In a hard market, insurers focus more closely on profit and may decline to insure some risks. As profits improve, new insurers may enter the market and premiums fall in the ensuing more competitive environment. At some point, the market turns 'soft'. Here insurers incur losses and some may fail. After a time, upward pressure is placed on premiums and insurers withdraw from insuring some risks. Conditions will again move towards a hard market (ACCC 2002b and PC 2002).

[2] An employer's expected scheme cost is to be distinguished from the expected cost to the community of work-related injury or illness. The latter, broader concept, includes not only the expected scheme cost, but also the costs to the employer of lost productivity (for example, through downtime and lost production) and of recruiting and training replacements for injured or ill workers as well as costs to the employee that are not covered by the scheme. These costs are not considered when assessing whether premiums are efficient as they are 'internalised' to the employer in its cost of production or to the employee. There may also be cost shifting, for example, from employers to employees and from workers' compensation schemes to other programs (such as other State or Territory programs or the Australian Government's Medicare and social security programs) and vice versa.

- the administration costs for insurers of managing premium pools.

If insurers do not set premiums efficiently or cost-effectively (so as to achieve scheme objectives at least cost to the community) a number of potentially adverse outcomes could arise for the stakeholders of workers' compensation schemes as well as for the wider community:

- unfunded liabilities, where a scheme's liabilities are not covered by its assets;
- cross-subsidisation between employers of different sizes, within a particular industry, in different industries, and over different generations;
- insufficient levels of compensation;
- distorted incentives on the part of employers to improve workplace health and safety; and
- distorted prices of final goods and services (as premiums are part of the cost of doing business).

Many participants of this inquiry have expressed concerns about premium setting in both publicly and privately underwritten schemes. These are that:

- the politically sensitive nature of the premium rates introduces a risk of rates being depressed for political purposes and this is clearly a contributing factor to the unfunded liabilities and insurance losses seen in all schemes at some point in their history (for example, the Institute of Actuaries Australia, IRsub. 182, p. 2);
- schemes with unfunded liabilities as a result of 'inefficient and cumbersome' arrangements are under financial pressure to increase premiums to employers regardless of their workplace safety (for example, Sing Tel Optus, sub. 57, p. 9);
- premiums are increasing despite safer workplaces and falls in the number of work-related fatality, injury and illness (for example, Xstrata Coal, sub. 32, p. 1);
- employers with a good health and safety record are not being rewarded through lower premiums, while those who do not place the same emphasis on health and safety are not penalised (for example, Media, Entertainment and Arts Alliance, sub. 86, p. 12);
- premium formulae are complex and difficult to understand (for example, the National Meat Association of Australia, Queensland, sub. 83, p. 5);
- differences among jurisdictions in premium rates and premium setting methods are inconsistent and confusing, and result in increased costs (for example, Pacific Terminals, sub. 85, p. 1); and
- small to medium-sized employers are 'penalised' by premiums despite good safety practices and claims records (for example, LMR Roofing Pty Ltd, IRsub. 199, p. 3), they have no bargaining power in negotiating premiums (for example, BDS, sub. 36,

p. 3) and premiums offer them limited incentive to mitigate and improve the management of claims (for example, the Labor Council of New South Wales, sub. 147, p. 54).

This chapter addresses the Commission's terms of reference on premium setting principles and concludes with a discussion on how these principles could be accommodated in a national framework.

10.1 Premium setting objectives

In setting premiums, consideration must be given to a range of competing objectives of workers' compensation schemes, including to:

- ensure an appropriate level of funding to meet the cost of claims;
- provide an incentive for employers to invest in safety in the workplace and rehabilitation;
- be affordable for employers;
- be stable; and
- be administratively simple to understand and apply.

An appropriate level of funding

There are two main approaches to the funding of workers' compensation schemes (Institute of Actuaries Australia, sub. 171).

Pay-as-you-go funding meets the immediate cash requirements of the scheme. Immediate obligations are met such as management expenses and entitlements to weekly compensation, medical and hospital costs, and common law settlements. No assets are accumulated to meet future compensation entitlements or management expenses, in respect of incidents that have already occurred (this approach applies in Europe and New Zealand).

Full funding is where sufficient assets are accumulated in the scheme to meet all expected entitlements to compensation, regardless of when they may be paid, and all costs associated with managing claims that have occurred. It is expected that investment income earned on the funds set aside to meet future claims will also be available to meet emerging costs. These earnings, and changes in them, can have a significant impact on the level and stability of premiums.

Under the Australian Government's *Insurance Act 1973*, the Australian Prudential Regulation Authority (APRA) has made prudential standards which ensure that private

insurers in Australia must operate on a fully-funded basis. The prudential standard governing liability valuation, for example, requires 'insurance liabilities' to be valued by an approved actuary on the basis of a 75 per cent probability of adequacy, with allowance for discounting at sovereign debt rates (APRA 2002b). Insurance liabilities include both 'outstanding claims liabilities' — all claims incurred whether or not they have been reported to the insurer by the calculation date — and 'premiums liabilities' — future claim payments arising from future events insured under existing policies assessed on a prospective basis.

Indeed, the Insurance Council of Australia expressed the general view that the prudential standards imposed a 'strong control both on the pricing side and on the liability side' which:

> ... requires a much heavier focus by insurers on the actual conduct, identification, and management of all the risks across the operation of their business and the proper pricing of all of those risks, including premium risk. (sub. 174, p. 2)

Full funding is also generally accepted explicitly or implicitly as an objective for public insurers in workers' compensation schemes in Australia. Under government accrual accounting standards, liabilities are required to be reported on a fully-funded basis. However, these requirements for both private and public insurers do not require insurers to 'price efficiently' or discriminate between different risks in setting premiums — only that the insurance reserves are adequate to meet any present and future claims. Premium setting is discussed further in section 10.3.

Many participants considered that a workers' compensation scheme should be fully funded. Moreover, the Institute of Actuaries Australia recommended that:

> … the difference between the actuarially appropriate premiums and the premiums actually charged, must be correctly assessed and made transparent to the financial stakeholders in the system. (sub. 88, p. 15)

However, some publicly underwritten schemes have not been fully funded. The Insurance Australia Group noted that:

> … in Australia, all government underwritten schemes are structured on insurance lines and usually have an explicit or implicit commitment to full funding in their statutes or objectives. Yet we have seen this commitment eroded over time, usually by attempts at the political level to balance the competing interests of employers and injured workers.
>
> It is always easier politically to transfer the costs of the scheme to future premium payers than to increase premiums or limit access to benefits. … (sub. 89, p. 41)

With only partial funding, a number of adverse outcomes can arise. Chief amongst these are the creation of inter-generational cross-subsidies and, allied to this, expectations of future premium increases irrespective of levels of workplace safety and rehabilitation. The Institute of Actuaries Australia noted that:

> The problem with pay-as-you-go (or partial funding, which lies between the two extremes) is that it involves inter-generational cross-subsidies. That is, the current generation of employers pays for the costs of past employment. This creates economic distortions. These are not too bad in a stable scheme, as the cash flow is not greatly different from the incurred cost. In a new scheme, however, or in a partially funded scheme which is allowed to slide further towards pay-as-you-go, costs are progressively deferred. This creates unreal expectations. If the experience improves, then the improvement will not be reflected in premiums until later.
>
> A pay-as-you-go approach to individual employer premiums is totally unsustainable, because claim payments can continue for years after an employer goes out of business. (sub. 88, pp. 14–15)

QBE Insurance noted that:

> Sustained (insurance) losses may result in the withdrawal of the private sector, with the resultant loss of competition. In managed fund environments, the unfunded liability can sit outside government accounts with no accountability attached to any stakeholders to seek to have it managed and returned to a fully funded state.
>
> Further, there will result a misallocation of resources, which would also ensue from cross-subsidisation of industry groups. (sub. 99, p. 51)

The Insurance Australia Group also noted how claims costs can quickly escalate if full funding is not achieved:

> At the time the level of intergenerational transfer of a single decision may seem insignificant, but once the principle of full funding is eroded the costs can accumulate quickly. In NSW, motorists paid a $43 loading on motor registration for more than a decade to fund the losses incurred during a three-year experiment with pay as you go funding for compulsory third party motor accident cover between 1984 and 1987. The state's workers' compensation scheme is now facing a funding crisis of similar magnitude due to chronic under-funding through the 1990s. (sub. 89, p. 41)

The Commission considers that workers' compensation schemes, whether underwritten by public or private insurers, should be fully funded. There should be no inter-generational cross-subsidisation between employers. The premiums required to achieve full funding of publicly underwritten schemes should be published by insurers in their annual reports. Reasons for any differences between these premiums and the levels actually proposed should also be given.

Reducing the incidence of work-related injury and illness

An important objective of premium setting is to create incentives for employers to improve workplace safety as well as to fund the cost of claims. Clearly, premiums are not the only way of achieving this. The regulatory measures embodied in occupational health and safety (OHS) legislation are also important to this end.

For premiums to send clear signals to employers, they should reflect workplace risks (or the expected scheme costs of work-related fatality, injury or illness).[3] If risks are high, this should feed through into premiums, which in turn should signal to employers the need to invest in workplace safety and rehabilitation. Where there are improvements in safety and rehabilitation, and workplace risks are accordingly lowered, this should be reflected in reduced premiums. As Sing Tel Optus said:

> Workers' compensation schemes need to be more consistent in making sure that their premiums accurately reflect the risks posed by the various industry and company profiles. This will provide a strong incentive for companies to improve their workplace safety so they can reduce their premiums and compliance costs. With clear price signals from premiums, workers are likely to see better workplace safety and claims management arrangements. (sub. 57, p. 11)

However, because the fundamental nature of insurance rests on pooling risks among a larger group of employers facing similar risks, the potential for premiums to send such signals are inevitably blunted.[4] Indeed, there is something of an inherent conflict between running a workers' compensation scheme as an insurance scheme, which requires risk pooling, and running it to reduce the incidence of work-related fatality, injury and illness, which requires 'user pays' principles. QBE Insurance expressed this issue as follows:

> There are important design considerations concerning the manner in which the premium system is itself structured. Worker's compensation insurance systems contain an inherent conflict between two fundamental principles – the insurance risk and the concept of user pays.
>
> Insurance by its very nature involves sharing of risk and cost. This acts against the principles that a party incurring costs will only respond in the proper way to reduce these costs if the full impact of its behaviour is allocated to it. (sub. 99, p. 34)

Quite apart from whether premiums reflected workplace risks, some participants were sceptical of their actual incentive effect. For example, Employment Advocacy Solutions Pty Ltd said that small to medium-sized enterprises are not equipped or skilled to establish the connection between 'costs savings/premium savings/worker safety and involvement at a management level' (sub. 41, p. 2). The Australian Psychological Society said:

> Generally speaking, in Australia, [workers' compensation] insurance premiums tend to be important considerations only at the top of organisational hierarchies. Even at the

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[3] Risk is a combination of the likelihood (or probability or frequency) that an adverse event (or hazard) will occur and the magnitude of the consequences of the adverse event. Where the magnitude is expressed in dollar terms, risk becomes equivalent to an expected cost.

[4] The Insurance Council of Australia described risk pooling as follows:

> The premiums paid by policyholders to insurance companies are pooled to meet any insurance claims. The cost of meeting claims arising from personal injury or property damage or loss, is spread among a large number of policyholders. Not all policyholders will make a claim, yet they are all covered for certain risks and can lodge a claim if necessary. (sub. 74, p. 8)

> CEO level, lower [workers' compensation] premiums are only one of a number of "moral" and commercial considerations.
>
> Middle-level operational managers and supervisors – the levels where the specific OHS action takes place – are typically not affected, or even consulted, about premium-related issues, and are not rewarded for improved premium levels, even though they may accept some personal responsibility for safety in the work area. Such a lack of personally-meaningful linkage cripples any attempt to use insurance premiums as an effective driver of better OHS performance at those middle and lower levels. (sub. 38, p. 50)

Clayton (2002) has expressed particular concerns about the link between premiums based on experience rating and workplace safety. These concerns are presented later.

The Commission notes that premiums, particularly for small to medium-sized employers, reflect a balance between maintaining the benefits of risk pooling and signalling workplace risks to individual employers. Methods which can achieve this balance are considered in section 10.3.

Employer affordability

As workers' compensation schemes oblige employers (other than self-insurers) to purchase a compulsory insurance policy to cover their liability for work-related fatality, injury and illness, 'affordable' premiums are keenly desired. If premiums are too high, employers' competitiveness and financial viability would be affected. They might also encourage premium avoidance (Northern Territory Government, sub. 144, p. 23). On this latter point, QBE Insurance considered that 'premiums must ensure equity between employers in similar situations and the avoidance of leakage and fraud' (sub. 99, p. 34).

Even where premiums are set to reflect the workplace risks facing employers, they may not necessarily be affordable for all employers. Cross-subsidisation in premium setting may be introduced to ensure affordability across all employers. It should be noted that cross-subsidisation amongst employers with different workplace risks is quite distinct from risk pooling which applies to employers with the *same* risk (box 10.1). With cross-subsidisation, for example, the premium does not fully reflect an employer's workplace risk and the premiums of other employers facing different risks must increase or decrease to offset this. In practice, however, it is difficult to detect the precise extent of cross-subsidisation.

Nevertheless, some participants supported a degree of cross-subsidisation in premium setting. The Australian Industry Group acknowledged cross-subsidisation was a matter of 'active debate' amongst employers which has 'at its heart the desire to shift costs from one sector to another'. It nonetheless considered that cross-subsidies between industries are

'acceptable to a level just short of what distorts price signals unacceptably' (sub. 104, p. 39).

However, cross-subsidisation through premium setting dulls the incentive for both high and low risk employers to reduce work-related fatality, injury and illness. As the Institute of Actuaries Australia said, cross-subsidisation 'masks the economic signals given by charging the actual expected cost' (sub. 88, p. 19).

Removing cross-subsidisation does not mean that an employer must always pay premiums exactly equal to the cost of claims it generates (say) in a year. This would undermine the benefits of risk pooling. QBE Insurance considered:

> ... the interest of equity between employers points towards the principle of minimalisation, as far as possible, of the element of cross subsidisation between employers. (sub. 99, p. 50)

Some participants made suggestions as to how premium affordability as well as cross-subsidisation could be better tackled. The Insurance Council of Australia considered that cross-subsidies should be transparent and 'demonstrably necessary' (sub. 74, p. 11). Moreover, it considered that if workers' compensation insurance is 'properly priced but not affordable for sections of the community, it is incumbent upon government … to address the cost drivers of the class of insurance' (sub. 74, p. 11). The Institute of Actuaries Australia recommended that if subsidies are given they should be provided explicitly and outside premium setting (sub. 88, p. 19).

In its response to the Interim Report, WorkCover Queensland, however, considered that it would be unrealistic for the Commission to recommend that there be no or minimal cross-subsidisation:

> ... as there will always be some element of cross-subsidisation in any risk-based underwritten insurance scheme. Cross-subsidisation exists in order to protect businesses particularly small and medium enterprises … from the effect on their business of unusually high cost claims. There are various arguments for and against cross-subsidisation, which exists in most public utilities. For example, to post a letter

Box 10.1 **The difference between risk pooling and cross-subsidisation**

A number of participants have expressed the view that workers' compensation insurance necessarily involves cross-subsidisation amongst employers and, indeed, equates risk pooling — which is the basis of insurance — with cross-subsidisation. From an economic efficiency perspective, however, there is a difference between the two concepts and the difference is important. This can be illustrated using the following stylised example.

Risk pooling

Suppose there are 1000 employers each facing an *identical* 1 per cent probability of a claim for work-related injury or illness involving $10 000 loss a year. On average, there would be 10 such claims amounting to $100 000 a year. Each employer thus faces an expected loss of $100 (0.1 times $10 000) a year. However, in any give year, most employers face no claims, and around 10 employers would be exposed to claims amounting to $10 000. Without insurance, employers are in a lottery for significant payouts which could threaten their continued viability.

Each employer could diversify or pool the risk by banding together to insure one another. In that case, each employer would pay a certain premium of $100 a year (given no transaction costs) into a common fund and an individual employer facing a claim would finance its costs from the pooled premiums.

Cross-subsidisation

Suppose that there are now two groups of employers with different risk profiles:

- group A consists of 500 employers facing a 10 per cent probability of a $10 000 claim a year. On average, there would be 50 such claims for the group amounting to $500 000 a year; and
- group B consists of 500 employers facing a 1 per cent probability of a $10 000 claim a year. On average there would be 5 claims amounting to $50 000 a year.

Effective risk pooling would ensure that the premiums charged to the two groups would reflect their different risk profiles. Hence, group A employers would pay a premium of $1000 a year and the group B employers would pay $100.

If, however, no account is taken of the different risk profiles of the two groups in setting premiums, cross-subsidisation would ensue. Suppose premiums are set to ensure that the expected total losses for all 1000 employers of $550 000 ($500 000 for group A and $50 000 for group B) were distributed equally. Each employer would then need to pay a premium of $550 a year. Group A would be paying far less than was actuarially fair given its risk profile (namely, $1000 a year), and group B would be paying much more that was actuarially fair for its risk profile (namely, $100 a year). This would significantly reduce the financial incentives for employers in group A to reduce workplace risks while adding an unnecessary cost burden on employers in group B.

from Cairns to Kalgoorlie costs 50 cents, the same as the cost of a letter posted from one side of Brisbane to the other. Philosophically, WorkCover Queensland believes

> there is a social responsibility to ensure that workers compensation is managed so that costs and benefits are borne equitably by all participating parties. (IRsub. 205, p. 6).

However, there is a difference between the pooling of risk and the cross-subsidisation of a service through uniform pricing.

The Commission considers that if systemic cross-subsidisation of premiums is to occur, it should be transparent, publicly justified and kept at levels which would not unacceptably distort incentives to employers to reduce workplace risks. Independent regulatory monitoring of premiums would be a way of achieving this (see section 9.4). Employer affordability of premiums should be directly and transparently dealt with through explicit subsidies, such as given to implement workplace safety and rehabilitation programs, and not through premiums.

Premium stability

An objective of premium setting desired by a number of participants is to ensure stability — or to reduce 'volatility' — in premium changes that result from employers' claims experience, particularly from atypical claims and random variations in claims. Also influencing premium stability has been the volatility of investment returns, especially those returns earned by private insurers. Premium stability can assist business planning and investment for future growth. QBE Insurance said:

> One of the needs of business is for a reasonable degree of transparency, predictability and consistency in the operating environment in order to assist budgeting and planning. A feature which has characterised most, if not all, Australian and North American workers' compensation jurisdictions over the past two decades has been periods of extreme volatility in insurance premium rates. A key design feature, therefore, should be to devise premium arrangements which are characterised by reasonable stability and predictability. (sub. 99, p. 49)

Premium stability can also ensure the viability of employers. For example, a small to medium-sized employer could have a relatively good record but then encounters a particularly expensive claim (say) of the order of $1 million. If the cost of this expensive claim has to be met immediately through a substantial increase in premium, it could have implications for the viability of the employer.

In support of premium stability, Australian Business Limited said:

> In our experience one of the key issues for employers with respect to workers' compensation premiums is predictability and stability. We believe most employers would prefer a stable premium environment that remains fairly constant over time rather than one which is highly volatile where premiums may be low for a period but then high as insurers seek to recover losses and restore profitability. (IRsub. 249, p. 15)

The Victorian Government commented:

> … premium stability is a key priority for governments and employers. From an employer perspective, premium stability is essential to give companies some certainty in their business planning. (IRsub. 256, p. 22)

Most workers' compensation schemes impose limits on the amount of premium volatility that employers — particularly small to medium-sized employers — may face. Volatility is suppressed through various forms of premium controls — either directly (for example, through caps on premium increases) or indirectly (for example, by placing limits within experience rating formulae on the extent to which an employer's experience is reflected in premiums). In the Comcare scheme, for example, premium volatility is dampened by capping the highest cost claims and through 'evolving estimates' of claim frequency and average claim size for each employer (Comcare 2002, p. 6). Suppressing volatility in these ways means that employers bear the costs of claims for employers over a long period rather than closer to the time the costs of claims are incurred.

A degree of premium volatility is necessary to transmit incentives to employers about workplace safety and rehabilitation. Suppressing volatility through caps and other premium controls could mute these incentives.

The Commission favours a measure of premium volatility in which employers bear a greater proportion of the costs of claims closer to the time they are incurred, rather than have these costs spread over a longer period.

Administrative simplicity

Simplicity is a desired objective of premium setting. It can reduce transaction costs for insurers and employers; for example, it takes time and effort to apply complex premium formulae. If premiums are reflective of workplace risks, simplicity can increase employers' understanding of the link, thereby strengthening their incentive to invest in workplace safety and rehabilitation. Simplicity can also reduce premium avoidance as well as mistakes. Moreover, it can ease the compliance burden of multi-state employers for whom complexity in an individual jurisdiction can be compounded across many jurisdictions.

In stressing the importance of simplicity in premium setting, The National Meat Association of Australia, Queensland and Australia Meat Holdings Pty Ltd argued that the current complexity results in some cases of premiums being in excess of the amount of actual claims paid on behalf of the employer (sub. 83, p. 5; sub. 96, p. 22). QBE Insurance noted that premium setting:

> … should be capable of easy comprehension by employers. Undue complexity in premium measures, as in similar revenue systems, can lead to increased legalism and the search for loopholes. As well, such complexity can also blunt any message, such as

> an incentive for prevention, which the system can be designed to deliver. (sub. 99, p. 50)

The Commission supports the objective of simplicity in premium setting. Premium formulae should be transparent, easily understood and not involve undue costs in their application. Unnecessary complexity should be avoided within each jurisdiction, and across jurisdictions. However, care needs to be exercised in balancing the desire for simplicity with the use of cross-subsidisation.

10.2 Elements of premium setting

Setting premiums to meet the range of objectives set out in the previous section requires a degree of judgment in achieving the right balance. The Institute of Actuaries Australia said:

> An important defining feature of any rating system is the balance between incentives and prediction. Actuarial theory aims to maximise the predictive power of the premium calculation. This seeks to find the best compromise, between responsiveness to real changes and stability in the face of random fluctuation. To this theoretical approach, we usually add features, intended to create or enhance incentives for workplace safety, injury treatment, and return to work, and to stabilise premium rates, so that rate changes are less disruptive. Striking the right balance between these three factors: responsiveness, incentives, and stability, is a difficult and often highly political matter. (sub. 88, p. 16)

There is no single method of setting premiums amongst schemes. However, the following are a number of common elements of premium setting, with schemes varying in the detail:

- the remuneration basis;
- rating workplace risk;
- bonuses and penalties;
- upfront discounts for workplace safety and rehabilitation; and
- employer excess.

Remuneration basis

All schemes define remuneration (or wages) either in legislation or in administrative guidelines. The definition is inevitably linked to who is considered to be a ‘worker’ or ‘employee’ under the scheme. An example from the New South Wales scheme is given in

box 10.2 which notes that the scheme changed its definition of 'wages' to ensure harmonisation with the definition contained in the State's payroll tax legislation.

Box 10.2 **Definition of wages in New South Wales**

At the beginning and end of each workers' compensation insurance policy period, an employer must supply their insurer (agent) with a declaration of their wages.

In December 2002, the New South Wales Government passed legislation aimed at improving employer compliance with workers' compensation law. The law now requires employers to calculate their wages for workers' compensation premiums in much the same way they do for payroll tax. This led to an expansion of the definition of wages.

'Wages' is now defined as including total gross earnings (before tax deductions) and some payments not generally thought of as wages.

The definition includes: salary/wages; overtime, shift and other allowances; over-award payments; bonuses, commissions; payments to working directors (including directors' fees); payments to piece workers; payments for sick leave, public holidays and the associated leave loadings; value of any substitutes for cash; employer superannuation contributions (including the superannuation guarantee levy); grossed-up value of fringe benefits (allowances subject to fringe benefits tax are counted at the grossed up value, that is the value of the benefit multiplied by the relevant Australian Tax Office fringe benefit formula); long service leave payments (including lump sum payments instead of long service leave); termination payments (lump sum payments in respect of annual leave, long service leave, sick leave and related leave loadings); trust distributions to workers where the distribution is in lieu of wages for work done for the trust.

The definition of wages does not include: directors' fees paid to non-working directors; compensation under the scheme; any GST component in a payment to a worker.

When introducing the new definition, the Government attempted to ensure revenue neutrality by reducing the average premium rate and altering the factors in the experience component of its premium setting formula.

Source: WorkCover New South Wales (2003b).

The main reason for using remuneration as an element of premium setting is that it is regarded as a practical and effective estimator of the cost of claims or 'exposure' (Institute of Actuaries Australia, sub. 88, p. 15).[5]

Ideally, remuneration should be defined as broadly as possible. This would reduce the opportunity for employers to undertake gaming, such as by offering workers a salary

[5] There is a question about whether remuneration is in fact appropriate. In principle, to be efficient, premiums should reflect the expected scheme costs of work-related injury and illness. A major driver of scheme costs are the statutory benefits that are payable to injured or ill workers as well as common law determined damages. Remuneration is not necessarily a perfect mirror of these and other costs.

package that reduces their total declared remuneration bill and, hence, their premium. Indeed, the Institute of Actuaries Australia said that:

> Given the prevalence of salary packaging, care is needed to ensure that the actual measure [of remuneration] chosen is not open to manipulation and reasonably reflects the relative sizes of similar employers. (sub. 88, p. 15)

Participants drew attention to the compliance problems caused by differences amongst the schemes in their definitions of remuneration. Areas of difference include the treatment of:

- various types of leave (for example, long service leave and lump sum payments for annual leave and sick leave);
- apprentice and trainee wages;
- directors' fees;
- employee share schemes;
- reimbursements;
- superannuation; and
- allowances (for example, for overtime means, car/motor vehicle/travel, tools, clothing, living away from home and meals) (The Association for Payroll Specialists, sub. 15, attachment, pp. 1–3).

The Association for Payroll Specialists noted that these and other differences 'lead to the likelihood of payments and calculations being incorrect' (sub. 15, p. 1). The Association elaborated on the nature of the differences in the definitions of wages:

> New South Wales has a very good list of what is 'wages' for workers' compensation, but we found, for example, Western Australia, they have I think about three paragraphs on their web site about what 'wages' is, and when you ring them and you say, " Well, we know fringe benefits is supposed to be included in your definition of wages, but what sort of fringe benefits and what is the value? do we use the taxable value, do we use the grossed-up taxable value, do we use any other sort of value?" We know the answer in New South Wales. The answer from WorkCover in Western Australia was, "Call the Tax Department." We thought, well, the Tax Department can tell us how to value the fringe benefits, but they can't tell us what value you want us to include in our wages declaration for premium calculation. So that's the problem that payroll officers often face, is the lack of information available just to make a good decision, even though the definition may vary from jurisdiction to jurisdiction. (trans., pp. 1194–5)

Reflecting on the impacts of this complexity on multi-state employers, Sing Tel Optus noted that it is:

> … subject to audits by a number of governments on wages declarations for workers' compensation. The different wages definitions in each jurisdiction make it extremely difficult for a national organisation like Optus to respond to these audits as efficiently as possible. (sub. 134, p. 1)

While supporting the use of remuneration as the basis for calculating premiums, WorkCover Queensland said that the:

> … remuneration base should be consistent between jurisdictions. (IRsub. 225, p. 32)

An option to harmonise definitions of remuneration across schemes is to adopt the terminology used in Australian Government income taxation legislation. It could also align the remuneration base with a definition of employee that could be used for determining coverage of workers by all jurisdictions, as discussed in chapter 6. The opportunity to do so is presented by the introduction by the Australian Government of tax reforms in 2000, particularly the introduction of the Australian Business Number together with the Business Activity Statement.[6]

In their review that led to the recent change in the definition of wages in New South Wales, Le Couteur and Warren considered that:

> After the wages definitions for NSW pay-roll tax and workers' compensation purposes have been aligned, compliance costs for employers could be further reduced. Harmonisation with the Commonwealth definitions [in income taxation legislation] has the potential to further increase the effective use of data for compliance and in the longer term, collection and assessment of taxes and workers' compensation premiums could be administered by one central agency. (2002, p. 41)

In addition to compliance cost savings, there would also be other potential benefits from harmonisation with income taxation legislation, such as improving the comparability of premium rate information (for example, Clark, sub. 127, p. 15). If the Australian Taxation Office were to be involved in cooperation or administration, another benefit would be greater scope for dealing with employer fraud. Also, if such harmonisation were to occur, the jurisdictions may need to adjust other scheme elements (such as premium rates) to maintain revenue neutrality.

As an alternative, The Association for Payroll Specialists considered that the various schemes could provide a more detailed and comprehensive list of what is contained in their definitions of 'wages' (trans., p. 1194).

Risk rating

Insurers in all schemes set premiums by differentiating or classifying employers in terms of their workplace risks. Various approaches to risk differentiation are used.

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6 When registering for an Australian Business Number, a business needs to provide information such as the ultimate holding company, the type of company, business activity details and industry classification (ANZSIC). When lodging a Business Activity Statement, businesses are required to supply information on the Australian Business Number, sales (for GST and other taxes), purchase of inputs (for GST) and wages paid (for Pay As You Go withholding).

Industry class rating

Insurers, both public and private, frequently use some form of industry class rating for setting premiums. For example, in most publicly underwritten schemes:

- in New South Wales, industry class rates are based on the last three years' claims experience of each class. Rates are calculated by actuaries using 'objective, data-based rating methodology'. An actuarial credibility model is applied to small industry classes;
- in Queensland, industry class rates are determined by taking the aggregate industry claims performance into account, and also include a provision for outstanding claims liabilities. The average rate paid by all employers in a particular industry is used as a base rate for new employers; and
- in South Australia, levy rates for each industry class are calculated on rate relativities taking account of an employer's individual experience over a 30 month period to produce rates (with a rate scale between 0.4 and 7.5 per cent, increasing in increments of 0.10 percentage points) that weigh claims cost and claim frequency in a ratio of 3 to 1 (HWCA 2002, pp. 42–4).

Industry classification systems vary from scheme to scheme, but are generally based on the Australia and New Zealand Standard Industry Code (ANZSIC). The Victorian and South Australian schemes, however, rely on the ABS Australian Standard Industrial Classification code (ASIC) which predated the ANZSIC.

Industry classification systems, such as the ANZSIC and ASIC, are not specifically designed for the purpose of risk rating, but to differentiate industries on an economic basis. This means that employers with appreciably different risk profiles are grouped together in a particular class. As the Insurance Australia Group said:

> Where ANZSIC is used as a proxy for workers' compensation risk identification, there is an inherent problem in that it does not adequately differentiate between different levels of risk within the same industry. The roles and occupations within a single industry such as forestry can be wide ranging, from clerical to logging, and have quite different risks. (sub. 89, p. 38)

Other examples given by participants included the construction, labour hire and group training industries. The Housing Industry Association noted that residential construction has a lower incident rate than commercial construction and argued that it should be subject to a separate statistical classification (sub. 35, p. 15). The Institute of Actuaries Australia noted that with labour hire, the industry mix was fluid, depending on client demands (sub. 88, p. 15). And Group Training Australia noted that insurers rate group training organisations in the high risk labour hire category, despite the actual industries in which they operate, or their claims history (sub. 65, p. 11).

With broad industry classification systems, there is scope for cross-subsidisation among employers with different workplace risks. This mutes the incentive effect of different industry class rates for employers to reduce workplace risks.

Perversely, industry class rating can create incentives for employers to avoid high rate classes. For example, the Australasian Meat Industry Employees Union observed that one of the reasons for the trend in the meat industry for companies to replace their employees with workers provided by labour hire companies is that the industry 'is always at the top end of the premiums and labour hire firms are at a much lower level of premiums that are paid'. Taking on workers from labour hire companies is a way of 'avoiding workers' compensation for them' (trans., p. 839).

A better way of classifying employers would be according to discrete risk-based categories defined by occupations (Institute of Actuaries Australia, sub. 88, p. 15). However, this has proven unworkable, largely because of the difficulty of collecting relevant detailed data such as remuneration at this disaggregated level.

Participants made several suggestions to improve the overall use of industry class rating. The Institute of Actuaries Australia suggested:

> Because standard classifications such as ANZSIC are not primarily intended as risk classification systems, some subdivision may be needed to reflect risk differences, particularly in the residual or "not elsewhere classified" classifications, or when different processes are used to produce similar products. Equally, it can be helpful to use a common rating for some groups of classifications where the activities are essentially the same. ... we believe that a common risk classification system, compatible with ANZSIC, is needed. (sub. 88, p. 15)

The Insurance Australia Group was of the view that the introduction, in 2001, of the New South Wales WorkCover Industry Classification System, which modified the ANZSIC:

> ... has removed many of the issues under the previous ANZSIC system. [The WorkCover Industry Classification System] provides many more categories than previously available, meaning that most organisations can be appropriately assigned a category. The significant issue with this method is the lack of information available in each category which can mean that the rating assigned to a category may not always be appropriate. However, [the WorkCover Industry Classification System] is a much more effective system than ANZSIC, as it was specifically designed for workers' compensation. (sub. 89, p. 38)

The New South Wales Bar Association endorsed the Insurance Australia Group's view that the WorkCover Industry Classification System provides for many more categories of industry, which may enhance premium setting and employer response (sub. 64, p. 36).

The Commission considers that industry class rating is a practical, albeit imperfect, mechanism for assigning employers to categories of workplace risks. Industry classes, for

which cross-subsidisation among employers is a concern, could be disaggregated further to reflect more meaningful risk categories (for example, occupational groupings).

Experience rating

Experience rating takes account of the recent claims experience or history of the employer (for example, in Queensland claims experience includes three years of statutory claim experience and the two years prior to that of common law claim experience). Although there is substantial commonality amongst schemes in their overall approach to experience rating, there are quite significant and, at times, fundamental differences in the detail (Clayton 2002, p. 15).

Full or partial experience rating can apply. Full experience rating means that the previous period's premium (which is assumed to already contain information about the employer's past periods of experience) is adjusted by recent claims experience weighted according to a sizing (or 'credibility') factor' (see next). Partial experience rating uses the industry class rate rather than the previous year's premium as the base to be adjusted.

Factors such as sizing factors and F-factors are included in the experience rating formulae of some schemes.

- Sizing factors reflect an employer's size which, as discussed later, is considered to be linked to the credibility of its claims experience. For example, in New South Wales, the larger the employer, the greater the sizing factor (called the S factor) and the greater the weight placed on the employer's own claim experience. The S factor is currently set so that the very largest employers have their premiums reflect 90 per cent on their own experience and 10 per cent on the basic tariff premium (or industry class rate) (WorkCover New South Wales 2003d, p. 7).
- F-factors are used generally to rescale the claims costs for each employer so that they sum to the value of a scheme's actuarially assessed claims costs. For example, in Victoria, they apply to employers who have reported claims to an agent as a loading to claims costs to: standardise differences in premium estimates between agents; adjust for the costs of claims that are excluded from individual employer's premium calculations; and ensure that the claims costs reflect the underlying system costs as valued by actuaries (Victorian WorkCover Authority 2003a, p. 4).

The Institute of Actuaries Australia noted that these factors are not well understood. Neither are they arbitrarily determined nor easily simplified:

- The most common formula can only be simplified at the expense of fairness, as between new and established employers, or by using a shorter experience period, which makes it less reliable.

- The credibility factors are set on the basis of actuarial advice, resting on a well established theoretical foundation. They are intended to provide an appropriate balance between stability in the face of the random variation that dominates the experience of smaller employers and sensitivity to the real differences seen in the experience of larger employers.
- The F-factors are calculated to achieve the required total levy collection.
- A key issue with F Factors is that they become distorted by cross-subsidies, implicit loadings, etc. The problems associated with F factors might therefore be attributed to them being used for purposes other than those consistent with the pricing principles of transparency and equity, which in turn leads to problems in communicating their nature and function. (IRsub. 182, p. 2)

Compared with industry class rating, experience rating is more tailored to the risk profile of an individual employer and is more likely to create a greater incentive to reduce risk. For these reasons, many participants were supportive of experience rating. For example, Centennial Coal Company Ltd said:

> Methods of determining premium should be focused on being experience based. This provides rewards for companies who have in place good safety management plans and also provides an incentive to continually strive to improve health and safety systems and to promote structured return to work programs. By adopting an experience based system it ensures that cross-subsidisation between companies and industries does not occur and keeps a focus on the individual business unit to continually improve its safety performance. (sub. 145, pp. 7–8)

These views were echoed by the Australian Chamber of Commerce and Industry (sub. 81, p. 5), the Plastics and Chemicals Industries Association (sub. 114, p. 34), Business SA (sub. 53, p. 20) and LMR Roofing Pty Ltd (IRsub. 199, p. 6).

However, the application of experience rating is not without difficulty. For example:

- complex formulae frequently apply, which may reduce the capacity of employers to understand the link between premium changes and levels of workplace safety and rehabilitation, and which may compound the compliance loads of multi-state employers;
- the factors used in experience rating formulae could be inappropriate and reduce the full extent to which individual claims experience is reflected in premiums for an employer;
- experience rating is not able to be applied to small to medium-sized employers because they lack ‘credibility’;

- experience rating is unlikely to work well for occupational diseases which typically have a long latency period (often fifteen or twenty years or even longer), a poorly understood causation and uncertain prognosis;
- experience rating does not deal with future risks (or prospective claims) or involve an assessment of current workplace safety; and
- experience rating can encourage claims suppression rather than risk reduction or improvements in safety.

The Australian Industry Group expressed concern about the sensitivity of experience rating to wages increases:

> ... there's a general acceptance of the principle [of experience rating for large employers] but one of the cynicisms that creeps in from our members is the levels at which things are set, and the other question about how often that is adjusted with rising wages and things like that.
>
> So I would describe it in a way that's not unlike bracket creep. As your wages level rise from time to time with wage rises, inflation and those effects, then slowly more and more employers become more and more prone to the experience rating portion of the thing. (trans., p. 1062)

Clayton noted there was little empirical support for the view that experience rating achieved safer workplaces and, in any event, there were inherent limitations in it 'constituting a generalised vehicle for injury and illness prevention' (2002, p. 20). The following were among the limitations noted:

- Australian and United States studies indicate that a high proportion of compensable injuries and illnesses do not find their way into workers' compensation schemes and hence into claims data;
- claims data, upon which experience rating depends, are not a proxy for incidence of injury and illness; and
- indirect costs for employers (such as disruption to the production process and the costs of recruiting and training replacements) are a more powerful driver for action than direct claims costs (2002, pp. 20–5).

A number of participants considered that better data would improve the application of experience rating. The Insurance Australia Group said:

> Better data about actual claims experience would lead to more accurate assessments of risks and more accurately priced premiums. Most states collect some claims data but a more realistic and accurate picture of different industries and occupations would emerge if national data could be made available. This is currently not possible due to differences in schemes and in reporting methods. (sub. 89, p. 38)

Size of employers

The risk properties of small and large employers differ and, thus, insurers apply different risk rating approaches to each.

A small to medium-sized employer suffers from a lack of 'credibility' of their claims experience. Analysis of claims statistics show that, as a group, small to medium-sized employers are expected to have a low number of claims with a smaller proportion of large claims. These ratios are relatively stable. However, an individual employer faces a far more changeable claims experience. It is difficult for an insurer to interpret an individual employer's claims experience[7].

Accordingly, as the Insurance Council of Australia noted, it is often necessary for insurers to pool small to medium-sized employer risks such that the premium reflects a category based on some common element such as size or industry. Small to medium-sized employers are thus often charged the industry class rate.

While this has risk pooling benefits, as QBE Insurance said, the rates charged to small to medium-sized employers:

> ... may not have a high degree of flexibility. While this is sufficient from an insurance/funding perspective, it does not generate prevention incentives for employers. (sub. 99, p. 52)

Moreover, as noted earlier in relation to industry class rating, the industry classes may be too broad to capture the statistically average risk for small to medium-sized employers engaged in a common activity.

There may be scope for insurers to pool more directly the experience of small to medium-sized employers in order to gain the advantages of experience rating. The Institute of Actuaries Australia observed:

> The idea is that the group could work together on occupational health and safety and return to work, and could share resources, such as a safety manager. Groups could be based on existing industry, employer, district, service provider or union organisations. Care would be needed to avoid manipulation, however, such as if the group expels employers on the basis of one or a small number of claims. (sub. 88, p. 18)

Premiums charged to small to medium-sized employers could also include additional financial incentives for reducing workplace risks such as bonuses and penalties for claims performance, and explicit financial incentives for workplace safety and rehabilitation.

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[7] For example, suppose a small- to medium-sized employer in an industry is statistically likely to have two claims in every ten years. If an individual employer actually has two claims in one year, does this mean that the employer is riskier than others in the industry, and thus its premium should rise commensurately, or has all the employer's claims for the next ten years come at once?

Some participants accepted the difficulties in extending experience rating to small to medium-sized employers. The Housing Industry Association Ltd said:

> Whilst our preference is for experience rated premiums to be across the board, we accept that this would be very difficult to implement. Therefore HIA supports industry based premium settings for small to medium employers, providing the cost effective financial incentives are also available. (IRsub. 193, pp. 7–8)

In applying experience rating to small to medium sized employers, WorkCover Queensland said:

> WorkCover Queensland uses a sizing factor to ensure small to medium size employers are more closely aligned to the rates of their industries whereas large employers are closely aligned to their own claims experience. In this way, both groups are encouraged to reduce and minimise claims cost and ensure injured workers return to work. For SME's, the small variation in premium rate allowed by the sizing factor is still significant enough to achieve this objective. (IRsub. 225, p. 43)

The credibility problem associated with a small to medium-sized employer does not apply to the same extent for a large employer. Being large, its risk is in effect internally pooled and more predictable over time. Thus, for this group of employers, experience rating can be applied.

If large employers are subject to experience rating, then their exit from a scheme (say to become self-insurers) should not unduly affect the financial position of insurers who administer the premium pool. They would be paying their own way, including paying appropriate amounts towards the fixed administration costs of managing the pool. This of course might not be the case if large employers were cross-subsidising others in the pool and/or are not contributing appropriately towards the fixed costs. This is discussed further in chapter 5 on national frameworks for workers' compensation.

The Commission considers that, for premium setting, large employers should be subject to experience rating. Some of the deficiencies of experience rating could be dealt with explicitly to ensure it works better. For example, consideration could be given to simplifying formulae. For small to medium-sized (and new) employers, for whom claims experience is not a good proxy of workplace risk, industry class rating should apply, accompanied by well designed explicit financial incentives for achieving workplace safety and rehabilitation.

Bonuses and penalties for claims experience

Some schemes provide for specific bonuses or penalties to be deducted from, or added to, premiums which are linked to the claims experience of employers or a class of employers. For example, in South Australia, a bonus/penalty scheme applies to employers with a minimum of two years claims experience and who pay over $200 a year in levy. Under the

scheme, WorkCover adjusts the base industry rate of an employer according to its individual claims experience. Employers who maintain lower claims costs through safe work practices and providing suitable alternative employment for injured workers are rewarded with a lower levy. Penalties collected under the scheme for poor claims performance are redistributed. In addition to any penalty under the scheme, a levy of up to 50 per cent of the employer's base industry levy is imposed under the Supplementary Levy Program for poor claims performance. Payment of the levy can be avoided by employers meeting a formal OHS program.

Although an improvement on reliance on industry class rating alone, bonus/penalty schemes are not without problems and are generally inferior to experience rating. For example, if bonuses and penalties are awarded on the basis of intra-pool (or industry class) comparison:

- an individual employer may have little control over factors determining the claims experience of other employers in the pool; and
- an employer's premiums may increase even if its individual claims experience has improved on previous years. This would happen if the employer's claims experience was still inferior to others in the class.

WorkCover Queensland considered that:

> Bonuses and penalties for claims experience … are not necessary with the proper application of Queensland's EBR [experienced based rating] system. (IRsub. 225, p. 44)

Explicit financial incentives for workplace safety and rehabilitation

Some schemes currently offer upfront discounts on premiums for prescribed achievements in workplace risk reduction or improvements in safety and rehabilitation. For example, in:

- New South Wales, a premium discount scheme was introduced in 2001 for employers who implemented programs to improve workplace safety and injury management for injured workers (box 10.3);

Box 10.3 **The New South Wales Premium Discount Scheme**

The Premium Discount Scheme provides incentives for employers to implement programs for improved workplace safety, and return to work strategies for injured workers. The primary incentive is a discount on the employer's premium, for a maximum of three years.

To receive the discount, an employer must pass several audits of their OHS and injury management systems that are measured against WorkCover New South Wales benchmarks. Service providers, known as premium discount advisers, are responsible for conducting the audits. At an audit, the adviser verifies an employer's entitlement to a discount.

Source: WorkCover New South Wales (2003c).

- South Australia, the SafeWork Incentive provides lower levy rates for those large employers who have successfully implemented safe work strategies; and
- Western Australia, a 15 per cent discount on premium is available to farmers if: they undertake a Managing Farm Safety Course; they implement a plan; and there are no accidents on the farm for 12 months (National Farmers' Federation, sub. 94, p. 24).

The main advantages of explicit financial incentives, such as an upfront premium discount, are their immediacy. Employers know that if they implement changes, their premiums will be reduced now, rather than eventually when their better experience feeds through experience rating or bonus/penalty formulae. Also, as small to medium-sized employers are largely unaffected by experience rating, they may be potentially advantaged by upfront discounts. The Australian Chamber of Commerce and Industry said:

> Given the difficulties associated with applying a fully experience rated premium system to small businesses, it is important that all workers' compensation schemes contain additional incentives which will encourage accident prevention in small businesses. These incentives need not be included in the premium system. (sub. 81, p. 6)

Similarly, Skilled Engineering commented:

> … workers compensation premiums should be fair and reflective of an employer's risk, based principally on claims experience. However, strong incentives should be available to all employers who improve and maintain their occupational health and safety and injury management performance. (IRsub. 208, p. 4)

Some participants expressed reservations. For example, the Chamber of Commerce and Industry Western Australia said of incentive schemes established in some jurisdictions that:

> Structured incentives are underpinned by procedural requirements on participating employers that frequently cost as much and in some cases more than the premium

> reduction or return. In such cases, employers are often reluctant to make or continue the investment. (sub. 55, p. 21)

The Workers' Compensation and Rehabilitation Commission (Western Australia) did not support:

> … the use of direct financial incentives for employers because in a privately underwritten scheme, market forces will apply and there is usually no direct relationship between the financial incentives offered and improved OHS and claims performance. Depending on the funding arrangements, incentive schemes can also involve significant cross-subsidisation. (sub. 111, p. 4)

The Insurance Australia Group noted two 'unwanted' outcomes of incentive programs were the under-reporting of claims and incidents and the inadvertent 'rewarding of good luck' (IAG 2003, p. 5).

Other participants were of the view that small to medium-sized employers were unable to take advantage of upfront discounts. Pacific Terminals (Australia) Pty Ltd said that strategies to encourage employers to adopt 'systematic approaches' to managing OHS and workers' compensation claims 'have little or no impact' on small to medium-sized employers and provide little or no real financial benefit (sub. 85, p. 1). The Workplace Injury Management Services said such schemes:

> ... tend to be attractive and feasible for large employers only. For example, the low level of discounts available under the NSW Premium Discount Scheme and former South Australian Safety Achiever Bonus Scheme are not likely to outweigh the considerable costs to small to medium employers of establishing and maintaining the required workplace safety and injury management systems. (sub. 37, p. 7)

Also, reservations were expressed by some participants that upfront discounts would not be offered willingly in privately underwritten schemes. The Northern Territory Government noted:

> Due to the size of the system within the NT and the prevalence of a large small business sector characterised by most employers engaging less than 10 employees, approved insurers provide little incentive in their premiums to encourage improved OH&S systems, including in reducing claims performance or in promoting rehabilitation or return to work objectives.
>
> The same is not the case for large employers who generally enjoy greater resources and improved flexibility in terms of focussing on such matters as well as more relevant premium incentives for improved OH&S management and performance. (sub. 144, p. 23)

If upfront discounts are given, then care is required by insurers to ensure that they are subject to adequate actuarial costing. Otherwise, there is a danger that the discounts are given at the expense of full funding or cross-subsidisation between employers. This could be avoided through adequate premium monitoring (see later).

The Commission supports the use of appropriately costed explicit financial incentives for specified achievements in workplace safety and rehabilitation for all employers, and particularly small to medium-sized employers. This is provided that the costs of implementation are not high relative to the benefits intended to be achieved by the discount.

Employer excess

Most schemes (including the Tasmanian privately underwritten scheme) require the employer to pay some part of the cost of claims directly. Employer excess can take the form of the first few days or weeks of income payments and/or the first few hundred dollars of the medical costs (table 10.1). Excess buyouts may also be possible whereby the employer eliminates the excess in exchange for a higher premium.

The main advantage of an employer excess is that it creates an incentive for employers to deal directly with small claims. This in turn provides a more timely cost feedback for employers on their workplace safety as well as assists them in building a closer relationship with their workers.

Table 10.1 **Employer excess**

Jurisdiction	*The nature of the excess*
Comcare	No excess.
Seacare	Varies between employers.
NSW	Category A employers (annual premiums greater than $3000) pay the first $500 of weekly payments for each claim.
	Category B employers (annual premiums less than $3000) pay the first $500 or payment of excess surcharge on premiums of 3%.
Vic	First 10 days of incapacity and first $480 of medical costs. Buy out option also exists (25% of premium).
Qld	Four days excess plus day of injury. Option to buy out excess at the greater rate of 8.5% of premium or $10.
WA	No excess.
SA	First two weeks of incapacity per worker per calendar year. Option for buy out first two weeks by paying an extra percentage of the levy rate (8% in 2002-03).
Tas	First five working days of each injury and first $200 of other benefits.
ACT	No excess.
NT	No excess.

Source: HWCA (2002).

There are some disadvantages of excesses. First, cost-shifting may result if an employer tries to avoid paying an excess. Excesses on medical costs are particularly open to cost-shifting, because of the ease of access to the Australian Government's Medicare system.

Second, and allied to this, there may be some incentive on employers not to report small claims within their excess, as this could convey information about their safety to their insurer, with possible adverse ramifications for their premiums. Third, employers with little experience in administering claims may not provide quality service to workers.

However, measures could be applied to deal with these problems:

- restrict excesses to income payments, not medical costs — this would reduce the potential for employers to cost-shift onto the Medicare system;
- impose effective penalties on employers for failure to notify claims within a certain time limit — this could deal with under reporting by employers of small claims; and
- ensure that appropriate claims management requirements apply and that there is provision for the resolution of disputes about employers' management of small claims — this would reduce concerns about the quality of claims management.

The different use of excess payments across jurisdictions was an issue for some participants. The Association for Payroll Specialists said:

> … Payroll professionals face some difficulty in knowing what payment will be made for claims due to the differences in excess amounts and the ability of employers in some states to buy out that excess. (IRsub. 227, p. 4)

Some participants recommended certain changes to employer excess. Clark considered that excess buyouts were undesirable and enabled 'employers to avoid' all excess payments and that there is scope for selective phased increases in the excess in all schemes. This would:

> … facilitate employer handling of the larger numbers of minor claims while focusing insurer handling and administration on longer duration claims and to improve the social and economic performance of the workers' compensation system overall. (sub. 127, pp. 15–16)

Increases in the excess, along with other measures, were also supported by Workplace Injury Management Services which said:

> Consideration should be given to increasing the maximum claim excess amount, and providing for a range of excess reductions to promote and reward desired behaviours on the part of small and medium-sized employers. For example, recently legislative changes in NSW provide for claims excess amounts to be varied according to the timeliness of initial injury notifications.
>
> This approach could be extended to provide for lower excess payments, or excess payment refunds for specific actions such as timely participation in a facilitated case management process and timely preparation of an agreed return to work plan. (sub. 37, p. 7)

The Commission considers that excesses serve a valuable role in increasing the incentive for employers to reduce workplace risks and develop closer relationships with their

workers. Their effectiveness in creating incentives for risk reduction could be enhanced by increasing the amounts of excess available under the scheme, reducing the tendency for 'paper swapping' to occur for low level claims, and permitting employers the flexibility to purchase their own preferred level of excess. However, measures to deal with certain of their disadvantages would need to be taken.

10.3 Premium controls

In the publicly underwritten schemes, controls are applied to premiums directly (through premium caps) and/or indirectly (through caps on claims costs that are included in premium calculations). One objective for premium controls, as noted in section 10.1, is to seek premium stability. Another is to ensure affordability for employers.

In Victoria, for example, caps are applied to protect employers from sharp increases in their premium rates. For small to medium-sized employers, the cap prevents the premium rate from increasing by more than 20 per cent from one year to the next (Victorian WorkCover Authority 2003b, p. 4). In New South Wales, the average premium rate has been set at 2.8 per cent of wages (net of GST) since 1997-98 to ensure that employers 'remain competitive' (sub. 151, p. 14).

As noted earlier, premium controls have real costs. They can: mute signals and incentives to improve workplace safety and rehabilitation; create cross-subsidies; and lead to the underfunding of schemes. The Insurance Council of Australia described the problems as follows:

- adverse selection — as state workers' compensation schemes are subject to price controls, only "bad risks" have an incentive to seek insurance [rather than self insurance] though government providers. This adverse selection leads to unfunded liabilities in state schemes.
- moral hazard arising from under pricing — where price caps and price floors exist there does not exist either an incentive for poor performers to improve their workers' compensation outcomes, nor rewards for those who have exemplary records. ... The economic effect of such practices is an increase in workers' compensation claims.
- cross-subsidies — where price controls are in place, it is inevitably the case that the poor risks are subsidised by the good risks. Again, this practice distorts and retards the economic incentives which would exist in the private market. ...
- under-reserving — the … effect of a non-market based pricing mechanism is that the liabilities exceed the revenues or assets. By failing to properly price policies initially, the flow on effect is that liabilities are unfunded.
- cost-shifting — as a state scheme fails to fund itself, the costs are borne by other programs, such as public health, or by future policy holders, so that past losses become a burden for new businesses and employers. (sub. 74, pp. 17–18)

The Commission considers that the use of premium controls should be avoided as far as practicable. More transparent measures should be employed to achieve objectives such as premium affordability and stability for employers. These measures include direct subsidies to particular groups of employers.

10.4 Premium monitoring

The argument for the independent regulatory monitoring of premiums is that, if left to themselves, insurers (both public and private sector) might charge premiums based on factors not directly related to risks.

In privately underwritten schemes, the problem may be manifested by private insurers:

- discounting premiums to obtain market share which, in turn, could reduce their financial viability and drive the more efficient insurers out of the market. For example, the Institute of Actuaries Australia said:

  > Unless proper controls are in place, private insurers have a demonstrated ability to indulge in self-destructive competition: under-reserving and under-pricing. Strong competition for large employer accounts and the influence of brokers add to this risk. This was the underlying cause of the NEM and Palmdale failures in the 1980s and the more recent failure of HIH. (sub. 88, p. 22);

- cross-subsidising between employers with different risk profiles and between their less profitable workers' compensation business and their more profitable lines of insurance business, when they have market power to do so; and
- offering incentives for large employers, but not for small to medium-sized employers, because the latter have less bargaining power and there is less margin to be traded in their premiums.

In publicly underwritten schemes, premiums can also be based on factors other than risks:

- cross-subsidising between different employers with different workplace risks;
- a lack of competition leading to complacency; and
- political pressure on public insurers to suppress premium increases when workplace risks increase to meet objectives such as premium affordability and stability or when elections are imminent.

In commenting on the politicisation of premium setting by public monopoly insurers, Clark observed:

> A significant problem with government monopoly insurance — and government oversight — in industrial relations-related areas such as workers' compensation is the superimposition of political agendas unrelated or only indirectly related to the arguably key scheme objectives of prevention, equity, care and revenue neutrality. For example,

> political intervention to skew premiums outside responsibly-determined levels has been an adverse feature of some current Australian schemes. The 'conventional wisdom' of criticising private sector insurers for '*unsustainable discounting of premiums*' applies equally to government and government-controlled insurers, who can rely on legislation to recover any losses. The combination of legislatively-enforced insurance and monopoly market control is not necessarily associated with optimal public utility. (sub. 127, p. 11)

Insurers, both public and private, might not closely relate premiums to risk where the transaction costs of doing so are too large (particularly in respect of small to medium-sized employers).

The Commission agrees that there is scope for some type of independent regulatory premium monitoring of both private and public insurers. However, this should be light-handed. Regulatory monitoring should seek to ensure that workplace risks are reflected in premiums and to make transparent the basis for setting premiums, including exposing any cross-subsidies. It is to be distinguished from the monitoring that should occur under prudential regulation. The objectives of the latter include ensuring that long-term financial commitments can be met.

Premium monitoring occurs in some of the privately underwritten schemes (for example, in Tasmania, the Australian Capital Territory and the Northern Territory). The Northern Territory scheme, for example, establishes a premiums monitoring committee which is required, among other things, to monitor the viability and performance of the scheme, and the premium rates offered for workers' compensation. The committee is also required to consider and report on the effectiveness of the premiums offered by insurers: in encouraging employers to develop and maintain safe working practices; and in penalising employers which do not ensure the maintenance of safe working practices (*Work Health Act 1986*, division 4).

One form of premium monitoring favoured by the Law Council of Australia and the Insurance Council of Australia for private insurers is 'file and write'. This means that insurers file, with the appropriate regulatory body for approval, the details of their proposed premiums prior to writing business in accordance with that premium schedule. The Insurance Council of Australia considered that file and write:

> ... gives underwriters some flexibility in the pricing of policies and government the capacity to reject prices that may be too low to properly fund the liabilities being underwritten by the insurer, or too high in terms of affordability and fair returns. (sub. 74, p. 19)

Actuarial certification can also play a useful role in regulatory monitoring. The Institute of Actuaries Australia noted in relation to premiums set in a 'competitive' environment that:

> … actuarial certification should be required for workers' compensation premium structures set in a competitive environment and that, as is current practice, supervisory authorities should seek actuarial advice on those aspects of the premium setting process that they control. (sub. 88, p. 19)

Although independent monitoring of premiums set by public insurers is not as widespread as that for private insurers, there are moves in this direction. The Victorian Essential Services Commission, an independent economic regulator of utility services, has reported on premiums set by the Victorian Traffic Accidents Commission and is about to review premiums set by the Victorian WorkCover Authority. In Queensland, the regulator, Q-Comp, conducts independent reviews of the premiums set by WorkCover Queensland. Such independent monitoring has the potential to depoliticise the process of premium setting by public insurers.

The Commission supports the use of light-handed independent regulatory monitoring of premiums as set by both public and private insurers. 'File and write' is one way in which this could be achieved for private insurers. The premiums set by public insurers should be reviewed by an independent body.

10.5 National framework issues

Although Australian workers' compensation schemes differ in their premium setting, the case for national uniformity is not clear cut.

Workers' compensation schemes should be seen in their entirety. While there is diversity in the characteristics of the various schemes, national uniformity in premium *levels* (including rates, levels of penalties and bonuses, and levels of up front discounts for workplace safety) is not appropriate. For example:

- There is an inextricable link between premium levels and the levels of statutory benefits and common law damages available to workers. It would be difficult to achieve national uniformity in premium levels alone, in the absence of uniformity of these other scheme elements.
- As jurisdictions have different industry structures and, hence, different workplace risk profiles, variations in premium levels should reflect these differences, although under more consistent scheme benefit structures, premiums for the same level of risk category across jurisdictions could converge.
- In a competitive insurance market, variation in such aspects as premium rates, upfront discounts for workplace safety and employer excess are, not only expected, but also desirable attributes of price competition.

On the other hand, differences in elements of premium setting do involve extra compliance costs for employers and insurers who operate across jurisdictions. Standardisation in the technical aspects of premium setting, therefore, would not only be achievable, but also beneficial. Participants identified several such areas:

- the definition of remuneration (for example, the Australian Chamber of Commerce and Industry, sub. 81, p. 4; Clark, sub. 127, p. 15; the Institute of Actuaries Australia, sub. 88, p. 8; The Association for Payroll Specialists, trans., p. 1195) ;
- aspects of premium setting formulae, including industry classification as part of industry class rating and experience rating (for example, QBE Insurance, sub. 99, p. 53; Australia Meat Holdings Pty Ltd, sub. 96, p. 23; the Insurance Council of Australia, sub. 74, pp. 21–2; and the Australian Chamber of Commerce and Industry, sub. 81, p. 4; Skilled Engineering, IRsub. 208, p. 6); and
- the number and timing of premium assessments undertaken for employers (for example, the Australian Industry Group, sub. 97, p. 5).

Of the models identified in chapter 5, two provide some scope to promote national consistency in these areas of premium setting:

- an alternative national (insurance) scheme (model C) — this would ideally embody the premium setting objectives identified earlier and endorsed by a number of participants in their response to the Interim Report. As the model is predicated on private underwriting, compliance with prudential standards set by APRA under the Insurance Act would be a necessary feature (chapter 11). Consideration could also be given to premium monitoring by the Australian Competition and Consumer Commission. This body is already monitoring, for a limited period, pricing in the general insurance sector, including public liability and professional indemnity insurance (two classes of insurance business which, like workers' compensation insurance, involve long-tail claims); and
- a national cooperative body (model D) — jurisdictions could seek to resolve the differences on the technical areas of premium setting such as on definitions of remuneration.

Models centred on the Comcare scheme (model A) and on an alternative national self-insurance scheme (model B) propose that employers who meet certain requirements are issued a self-insurance licence. Thus premium setting has no role in either of the models.

Nonetheless, how premiums are set under State and Territory schemes may (other things equal) affect an eligible employer's decision to seek national self-insurance. For example, a factor attracting Sing Tel Optus to self-insurance under a national scheme is premium costs and, in particular, the prospect of rising premiums in schemes under financial pressure (sub. 57, p. 9).

As noted earlier, if there are currently cross-subsidies between employers within the State and Territory schemes, such as between large employers and small- to medium-sized employers, the exit of premium payers from schemes into either the Comcare scheme or a new national self-insurance scheme could affect the premiums charged to those employers who do not exit. These impacts are considered more fully in chapter 5 on a national framework for workers' compensation.

RECOMMENDATION

The Commission recommends the following be used as premium setting principles to meet the objectives of: the full funding of schemes; incentives to prevent workplace fatality, injury and illness and to promote rehabilitation and return to work; stability; and administrative simplicity for employers:

- ***no cross-subsidisation between employers through premiums as it distorts pricing signals. If cross-subsidisation is to exist, it should be minimal and transparent;***
- ***premiums be set efficiently. In essence, premiums for large employers to be based on experience rating. Premiums for small to medium employers to be based on industry class rating (where the classes reflect common risk profiles) accompanied by experience rating to the degree appropriate, and by explicit, cost-effective financial incentives for preventing workplace fatality, injury and illness, and for promoting rehabilitation and return to work;***
- ***compliance by private insurers with relevant requirements under the* Insurance Act 1973 *(particularly the prudential standard governing liability valuation for general insurer), to ensure full funding of schemes. There should be separate but light-handed regulatory monitoring of the premiums set by private insurers; and***
- ***premiums be set by public insurers so as to achieve full funding, with independent monitoring by a separate body to ensure transparency of any differences between appropriate and actual premiums.***

11 The role of private insurers

This chapter reports on the Commission's investigation into 'a regulatory framework which would allow licensed insurers to provide coverage under all schemes' and, in doing so, it identifies and assesses the 'likely impact on employers, employees and the wider community from the introduction of competition, including on the level of premiums'.

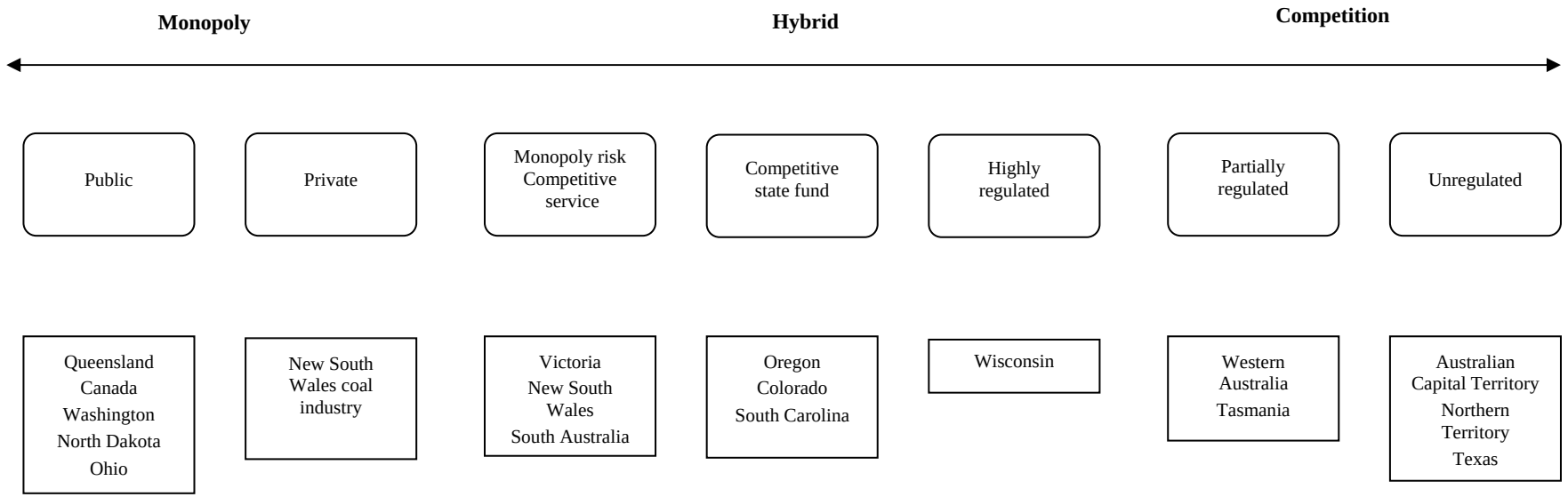
Insurers, whether public or private, play an important role in workers' compensation schemes in Australia. In providing policies to employers, the specific functions that insurers undertake include any or all of the following:

- underwriting the risk of claims liabilities;
- setting, calculating and collecting premiums;
- managing claims, including rehabilitation and return to work programs;
- paying benefits; and
- managing investments.

There is considerable variation among the schemes in the degree to which private insurers are involved in these functions. Individual schemes can be seen as fitting along a continuum from monopoly provision to competitive provision of workers' compensation insurance (figure 11.1 and table 11.1). For example:

- monopoly schemes — in the Queensland and the Comcare schemes, most if not all insurer functions, including underwriting, are provided by a public monopoly insurer;
- competitive schemes — in the Northern Territory, Australian Capital Territory, Tasmanian, Western Australian and the Australian Government's Seacare schemes, the private sector provides most, if not all, insurer functions, including underwriting. In the Northern Territory, a public insurer operates in competition with private insurers; and

Figure 11.1 **A continuum of private and public sector involvement in workers' compensation schemes**



Source: Toh, Playford and Neary (PriceWaterhouseCoopers) (2000).

Table 11.1 **Workers' compensation insurance industry structure**

Scheme	*Insurers that underwrite*		*Private insurer agents*[a]	*Self-insurers*
	Public	*Private*[a]		
Publicly underwritten schemes				
Qld	WorkCover Queensland	-	-	24
Comcare	Comcare (the Australian and ACT Governments only)[b]	-	-	10
NSW	WorkCover New South Wales[c]	22 specialised insurers (selected risk pools only)[d]	6 licensed insurers	60
Vic	Victorian WorkCover Authority	-	6 authorised agents	37
SA	WorkCover Corporation of South Australia	-	4 claim management agents	67 (and all State agencies)
Privately underwritten schemes				
Tas	-	9 licensed insurers[e]	-	17
ACT	-	8 approved insurers	-	9
Seacare	-	4 authorised insurers and 1 approved protection and indemnity association[f]	-	0
NT	Territory Insurance Office[g]	3 approved insurers	-	6
WA	The Insurance Commission of Western Australia (Western Australian Government only)[h]	10 approved insurers	-	29

[a] Reflects separate licence holders some of which are related or part of the same corporate group. For example, CGU and Insurance Australia Group are separate licence holders. However, the two merged late in 2002 (ACCC 2002a). [b] Comcare administers the workers' compensation arrangements of the Australian and ACT Governments only. The Australian Government effectively acts as self-insurer and ultimately the underwriter for all premium-paying agencies under the scheme. [c] WorkCover New South Wales does not have statutory responsibility for underwriting the New South Wales scheme. [d] This consists of 6 specialised insurers which have a restricted licence to underwrite workers' compensation risks specific to a particular industry or class of business or employer and 16 specialised domestic workers compensation insurers. Coal Services, StateCover Mutual, Catholic Church Insurances and Guild Insurance are among the specialised insurers. Specialised domestic workers' compensation insurers underwrite risks associated with domestic workers employed in the home. [e] Two of the seven licensed insurers traditionally restrict the issuing of policies to specific types of industry. [f] Two of the four authorised insurers offer workers' compensation policies to specific employers only. [g] The Territory Insurance Office is an approved insurer which manages claims for the self-insured Northern Territory Government. [h] The Insurance Commission of Western Australia is an approved insurer which manages the State public sector workers' compensation arrangements on behalf of the Western Australian Government.

Sources: Workcover authorities, submissions, annual reports and websites.

- hybrid schemes — in the Victorian and South Australian schemes, there is a mixture of public and private sector involvement. Underwriting, funds management and premium setting are undertaken by public monopoly insurers, and other functions, such as claims management, are undertaken by private insurers operating as agents. In New South Wales, the public agency WorkCover New South Wales sets premiums and manages the fund.

In schemes where private insurers operate as agents, the range of functions they undertake can vary. Agents are responsible for:

- in the New South Wales scheme, issuing and administering insurance policies, managing the collection of premiums, informing employers of their responsibilities, and administering most claims processes;
- in the Victorian scheme, collecting premiums, lodging claims, and delivering benefits and rehabilitation; and
- in the South Australian scheme, managing and coordinating the rehabilitation and return to work of an injured worker, determining the eligibility of claims for compensation, managing an injured worker's claim for compensation, providing an advisory service for employers and workers on rehabilitation and compensation, and providing an advisory service for employers on health and safety in the workplace.

Private insurers also provide services — such as reinsurance policies and claims management — to employers which self-insure.

The crucial issue regarding the role of private insurers in schemes is the underwriting of workers' compensation insurance. Due to the arrangements in the larger States, the public sector dominates in underwriting. Data collected by the Australian Prudential Regulation Authority (APRA) show that, of an Australian total premium revenue for the 'employer liability' class of insurance in 2001-02 of $6.3 billion, public insurers[1] collectively accounted for $5.5 billion or around 85 per cent (APRA 2002e, section 1 (authorised general insurers) table 6 and section 2 (public sector insurers (table 3)). This compares with compulsory third party insurance, another class of long-tail statutory insurance, where public insurers accounted for around 45 per cent of total premium revenue collected.

Jurisdictions with public monopoly insurers (or public agencies that control fund management and premium setting) have reviewed this restriction on competition as part of their National Competition Policy Agreement commitments (National Competition Council 2003). The results have been as follows:

[1] APRA treats as public insurers Workcover New South Wales, WorkCover Queensland, the Victorian WorkCover Authority and WorkCover Corporation of South Australia.

- Although a review of the Comcare scheme was completed in 1997, the Australian Government has not responded to it.
- The review of the New South Wales scheme (Grellman 1997) recommended private underwriting. In response, the Government legislated for private underwriting to commence in October 1999. However, it deferred the introduction of private underwriting until 2001, at which time it repealed the enabling provisions. A recent report by McKinsey & Company, while not a review under National Competition Policy, recommended that privatisation be ruled out until the scheme achieves full funding and financial stability as well as changes to outsourcing arrangements (2003, p. 8*)*.
- In Victoria, a review of the scheme completed in 1997-98 recommended private underwriting. The first review was rejected by the Government. A second review completed in 2000 recommended maintaining the public monopoly insurer but a third party review of premiums and 'market testing'. The Government accepted the second review.
- The review of the Queensland scheme completed in 2000 recommended the retention of the public monopoly insurer, the creation of a separate regulatory entity and a review of the scope for the competitive outsourcing of claims management. The Government responded by enacting legislation establishing Q-Comp in 2002.
- A national competition policy review of the South Australian scheme was completed in mid 2002 and recommended the retention of the public monopoly insurer. A subsequent review of the scheme by Stanley et al. (2002) recommended that outsourcing of claims management revert to the monopoly provider. The Government has yet to respond to either of the reviews.

In this chapter, the role of private insurers in workers' compensation insurance underwriting and other functions is examined. A guiding criterion for assessment is cost-effectiveness. This asks whether the manner, or industry structure, in which workers' compensation insurance is provided achieves scheme objectives at least cost to the community.

Also considered in the chapter are the regulatory arrangements to which private insurers are subject and national framework issues.

11.1 Public monopoly versus competitive private provision

Proponents of public monopoly and competitive private provision of underwriting and other functions put forward numerous arguments to support their respective cases. The key ones are examined below.

The case for public monopoly provision

Some participants argued that a public monopoly insurer is needed to capture potential economies of scale and scope as well as achieve the potential benefits of being a single purchaser (monopsonist) of services. The Victorian Government noted that the ability of the Victorian WorkCover Authority to underwrite all the State's workers' compensation insurance enables the Authority 'to take advantage of the benefits of scale and intermediation through the pooling of risk' (sub. 164, p. 25). The Queensland Government drew attention to the relatively high proportion of its labour force based in regional and remote areas (compared with other States and Territories) and the importance of delivering high quality services to these areas. It said:

> … WorkCover Queensland is able to deliver the State's objectives of low cost service provision through economies of scope and ensure the provision of consistent, high quality and medical/para-medical services to injured workers. WorkCover's market structure allows it to focus on the development of workers' compensation services as the sole purchaser of services from a number of sellers such as the Host Employment Program, without distractions such as market share issues, shareholder distributions and brokerage issues. (sub. 154, p. 11)

In its previous report, the Industry Commission noted that the evidence for scale economies was largely confined to administration and that this of itself would not justify sole provision (1994, p. 209). The Commission also notes that private insurers manage small risk pools in Tasmania, the Northern Territory and the Australian Capital Territory and have demonstrated long term viability.

Another argument is that, given that workers' compensation insurance is mandatory, public monopoly provision would ensure that premiums are affordable and stable for employers. Competitive private provision, on the other hand, is argued to lead to significant fluctuations in premiums for employers, particularly small employers. This would be a consequence of private insurers responding to long term insurance market cycles, premium competition with each other and the inability to cross-subsidise between non-tied employers. The Victorian Government noted:

> The mandatory nature of workers' compensation insurance imposes a corresponding burden upon the Government to ensure that workers' compensation insurance premiums are available and affordable to all employers. This requirement suggests limitations upon the role and benefits of competition. (sub. 164, p. 25)

Australian Industry Group, which recommended against the privatisation of workers' compensation insurance, said:

> Workers' Compensation is a social system designed to provide workers with protection if they are injured at work. To protect small employers from the impact of a single very expensive claim, cross-subsidies need to be in place. Financial incentives are also needed to facilitate return to work and improved OHS performance. This cannot be

> achieved in a scheme that does not have central control over premium setting mechanisms. (sub. 104, p. 41)

However, in the pursuit of such objectives as affordability and stability, public monopoly insurers can end up setting premiums which under fund schemes and create cross-subsidies among employers, with attendant adverse consequences. The Insurance Council of Australia noted the size of unfunded liabilities in New South Wales, Victoria and South Australia and said:

> It has been demonstrated that a major cause of "failures" in statutory insurance schemes has been the method of pricing or setting of premiums by governments, which has led to the development of significant unfunded liabilities in some schemes. (sub. 74, p. 16)

It also considered that the exposure of governments to 'significant unfunded liabilities' creates a 'risk to public funds and implications for the financial rating of a jurisdiction' (sub. 74, p. 16).

The problems of using premium setting to achieve affordability and stability were considered more generally in chapter 10.

Another argument by proponents of public monopoly provision is that, because of the long-tail claims nature of workers' compensation insurance, claimants could be exposed to private insurer failure or private insurers could avoid catering for certain workplace risks by (say) setting prohibitively high premiums. Long-tail claims arise, for example, where symptoms of many diseases may not become apparent for years after an incident occurred or where injured or ill workers require compensation for the rest of their lives. The Victorian Government noted:

> The long-tail claims structure [of workers' compensation insurance] means that capacity to meet claims liabilities must be maintained for decades. This claims structure involves risks that private insurers are reluctant to accept. In addition, this claims structure also means that claimants are, potentially, exposed to a high risk of insurer insolvency. (sub. 164, p. 25)

The risk of private insurer failure and underwriting avoidance by private insurers could be addressed in a competitive scheme by way of appropriate prudential regulation backed up by a 'nominal insurer' arrangement. In this respect, the Tasmanian Government observed that when private insurers in its State withdrew reinsurance for acts of terrorism, it extended its nominal insurer arrangements to fill this gap (sub. 135, p. 10).

A final key argument is that public monopoly insurers are better at injury management outcomes, including rehabilitation, than private insurers in a competitive scheme. The Australian Rehabilitation Providers Association considered that public monopoly insurers are better than private insurers at ensuring that the expertise of the rehabilitation provider is 'recognised, valued and appropriately remunerated' and that this in turn leads to lower

claims costs and continuance rates (sub. 160, p. 35). OT Australia, Victoria noted that, in Victoria, where claims are managed by different insurers:

> To the detriment of rehabilitation, varying approaches are less likely to be shared between agents competing with each other. It can be expected that a lack of sharing prohibits the building up of a body of professional knowledge within WorkCover to highlight strengths and weaknesses of different approaches and thus their association with more effective outcomes. (sub. 16, p. 5)

The case for competitive private provision

Proponents argue that competitive private provision brings choice to employers, leads to more efficient premiums, encourages greater innovation in service provision and drives cost-efficiencies. The Insurance Australia Group said:

> A competitive market ensures that the benefits of risk reduction and efficient scheme management flow through the economy as and when they arise. Insurers will aggressively market to employers with a good track record and there will be clear economic incentives for insurers to develop innovative strategies to support employers' efforts to change workplace culture and reduce risks. (sub. 89, p. 42)

The Insurance Council of Australia argued that private underwriting is more likely to lead to full funding of schemes:

> Licensed insurers are best placed to assess, price and underwrite risk to fully fund statutory lines of insurance, free of the political imperatives placed on government insurers or schemes to price in a way that does not reflect the real cost of the risk. Risk reflective premiums provide a fair economic incentive to minimise risky behaviour, which in turn reduces costs for the scheme and ultimately for policy holders. (sub. 74, p. 17)

However, as noted in chapter 10, private insurers can set premiums to reflect non-risk factors, with attendant adverse consequences. For example, the desire to acquire market share could lead to unsustainable premium discounting which in turn could lead to insurer insolvency or inadequate funding to meet claims' liabilities. WorkCover Queensland expressed the concern that there is a 'continued' risk that private underwriters would cross-subsidise across their different lines of business and, indeed, 'utilise workers compensation insurance on a loss leader basis to acquire other more viable business from their customers' (IRsub. 225, p. 8).

It is also argued by proponents that, with competitive private provision, the financial risks are taken by private insurers rather than governments on behalf of their taxpayers. This can introduce a measure of financial discipline and accountability. The Insurance Australia Group argued:

> Importantly, competitive underwriting … provides real financial discipline and accountability to the regulatory framework. If it loses control of costs, the effects on

> price will create immediate pressure for remedial action. Postponing reform to suit a political timetable will destroy the market. (sub. 89, p. 42)

Although not supportive of competitive private provision, the Labor Council of New South Wales acknowledged that:

> … In a privately underwritten system insurers are financially accountable for the financial status of the scheme. If premium rates are inadequate then insurers fund any shortfall, not employers as in publicly managed schemes. ... insurers bear the risk for the financial performance of the scheme whether it is good or bad.
>
> Different financial accountability changes the financial incentives on insurers to manage claims and other aspects of their responsibilities. For example private underwriting creates greater incentives on insurers to reduce the cost of claims than in a public system. (sub. 147. p. 58)

However, WorkCover Queensland argued that the performance of private insurers was not necessarily superior to that of the public insurers:

> WorkCover does not believe that private insurers necessarily provide a better service delivery of workers' compensation functions compared to that of a well managed public insurer. (IRsub. 225, p. 35)

That said, when a large private insurer collapses, this can have ramifications for governments, the industry and the rest of the community. The Australian Council of Trade Unions were of the view that it was the taxpayers who would ultimately meet the risk of the failure of a privately underwritten scheme:

> … the political reality is that ultimately the public purse will pay the bill for workers' compensation. The spectre of incapacitated workers' denied benefits would be too difficult for any government to contemplate. As a result the taxpayer will ultimately be at risk if private underwriters default. (IRsub. 186, p. 74)

This view was endorsed by the Community and Public Sector Union/ State Public Services Federation Group (IRsub. 246, pp. 1–2).

The Victorian Government maintained that:

> The majority of risk is borne by employers, whether they are located in a public or private scheme while the State or Territory remains the insurer of last resort under both a public or private underwriting structure. (IRsub. 256, p. 14)

The Tasmanian Government noted that the collapse of HIH highlighted how 'privately underwritten, multi-insurer schemes do face difficulties in dealing with losses of high magnitude' and outlined how it introduced a levy as a result (sub. 135, p. 10).

Another argument put forward by the Insurance Council of Australia is that competitive private provision of workers' compensation insurance would enable the industry as a whole to become more competitive:

> Ongoing exclusions of general insurers as underwriters of many workers' compensation schemes have a significant effect on the size of the insurance market in Australia, and therefore its capacity to be competitive. If general insurers were able to underwrite all lines of statutory insurance in all jurisdictions, the size and strength of the insurance market would increase, and significant economies of scale could be achieved. (sub. 74, p. 18)

A final argument is that private underwriting can impose pressure on governments to rectify flaws in scheme design. At the public hearings on the Interim Report, the Insurance Council of Australia noted:

> … where there is a design defect or a benefit blow-out or a major problem within the scheme, the private insurance process actually forces governments to examine the issue and hopefully to remedy the issue … . (trans., p. 1281)

Assessment

Several participants reflected on the competing merits of public monopoly provision and competitive private provision in achieving scheme objectives. The Institute of Actuaries Australia noted that:

> There is a long history of reviews and analyses of various approaches to risk underwriting and claim servicing for workers' compensation, both in Australia and abroad. None of these has clearly shown any particular model to be the best. (sub. 88, p. 22)

And WorkCover New South Wales observed that:

> Views on whether privately underwritten or publicly managed workers' compensation schemes are better usually come down to philosophical differences as does the criteria for assessing performance. North American researchers have for many years attempted to determine whether competitive or monopolistic systems are more cost effective.
>
> One study concluded that "private and competitive systems have been able to maintain benefit levels while placing a lighter burden on employers through lower average premiums per employee".
>
> Another suggested that "cost reductions need not occur — indeed costs may increase — by shifting from monopoly provision to a US model of private insurance".
>
> The research studies find it difficult to compare the different systems and often draw inconsistent conclusions. What is notable is that protagonists on either side of the debate seem to select specific aspects from comparative studies that support their particular argument. (sub. 151, pp. 15–16)

The Commission notes that there have also been significant failures under each approach (box 11.1). These failures are not necessarily evidence of inherent flaws in public or private underwriting. For example, at the public hearings on the Interim Report, the Insurance Council considered that the difficulties encountered by the Western Australian

scheme were due to defects in scheme design rather than private underwriting per se (trans., p. 1281).

The lack of clear evidence in favour of either public monopoly provision or competitive private provision is evident in recent United States research (Thomason, Schmidle and Burton 2001). The researchers used cost, benefit, and injury data from 48 states for 1975–1995 to analyse how the manner of insurance provision affected such aspects as employers' costs and workplace safety. They found that:

- employers' costs in states where the 'state fund' is the sole provider of workers' compensation insurance were comparable to those where there was a private market. On the other hand, employers' costs in states where the state fund competes with private insurers were substantially greater than in those where there were no state funds;
- the behaviour of the regulatory agency and the stage of the insurance cycle affected differences in employers' costs among the states; and
- there was little evidence that workplace health and safety (measured by lost-time injury rate) was affected by the manner of insurance provision.

Box 11.1 There have been problems on both sides

Competitive private provision — Western Australia

The Western Australia scheme was amended in 1993 to deal with the high cost of common law claims. Private insurers, optimistic about the projected impact of the amendments and seeking greater market share began to significantly discount premium rates below the recommended rates. This resulted in average discounts of around 30 per cent. Although the Statutory Premium Rates Committee increased recommended premium rates as soon as adverse claims trends became apparent, the insurance industry continued the unsustainable level of discounting. This resulted in significant underwriting losses for many insurers over the period 1996–99.

Central fund management — New South Wales

WorkCover New South Wales does not have statutory responsibility for underwriting workers' compensation insurance. Until recently, private insurers were required to establish statutory funds, the assets of which were limited to workers' compensation business. New legislation (the *Workers Compensation Amendment (Insurance Reform) Act 2003*) was introduced recently which provides for the establishment of a Workers Compensation Insurance Fund to replace the current managed funds of private insurers. The fund will be subject to a statutory trust. The State Government will have no responsibility for liabilities and no entitlement to assets or surplus. The fund will be audited by the Auditor-General but will not form part of the Total State Sector Accounts. The legislation also establishes nominal insurance arrangements with WorkCover New South Wales to act as nominal insurer.

WorkCover New South Wales recommends premiums which are subject to ministerial approval, licenses private insurers or administrators to manage claims and scheme funds, and establishes investment criteria (for example, in relation to asset allocation and security selection) for the management of scheme funds.

The scheme experienced an accumulated deficit for the best part of ten years. At December 2002, the accumulated deficit was $3.2 billion which was reduced marginally to $2.9 billion as at 30 June 2003 (Hepworth 2003). Between 1992-93 and 2001-02, there were significant increases in real terms in claims costs ('net claims incurred') as well as outstanding claims liabilities. Reforms enacted in 2001 have led to an estimated $1.5 billion reduction in scheme liabilities, due almost entirely to savings in legal and other dispute-related costs. Since 1996-97, it has been Government policy to cap increases in average premium rates to a level of 2.8 per cent (excluding GST). For 2003-04, a broader definition of wages was introduced and, to compensate, the average premium rate was reduced to 2.57 per cent (excluding GST).

Sources: WorkCover New South Wales; WorkCover Western Australia.

Each scheme is a complex set of interacting elements, reflecting the outcome of a history of negotiations between various stakeholders. Factors which will have a significant influence on cost-effectiveness are those elements and their interactions. WorkCover New South Wales said:

> A range of factors affecting the system dynamics have been identified as important to effective performance, including reinforcement of the relationship between prevention, compensation, return to work and claims administration. (sub. 151, p. 16)

Although the structure of the scheme is important, the quality and culture of management is another factor that has a major influence on cost-effectiveness.

The literature does not provide a powerful case for either public monopoly or competitive private provision of workers' compensation insurance. However, the Commission considers that, on balance, private provision is preferred on grounds that: private capital is directly at risk; competition in the marketplace is likely to generate incentives for efficiency and innovation; and there is greater transparency of any governmental influence over premiums. Further, the risk of private insurer failure can be reduced by prudential regulation. However, even in competitive schemes, the Commission notes that pressure can be applied to governments as funders of last resort in the case of significant market failure.

11.2 Private insurers as agents

Where there is public monopoly provision (or control by a public agency) of workers' compensation insurance, claims management and other non-underwriting functions can be contracted out to private insurers, or other appropriate service providers, on a competitive basis. As noted, this already occurs to a limited extent in schemes in New South Wales, Victoria and South Australia. Self-insurers also may be permitted under some schemes (but not in Queensland) to outsource claims management.

Recent reviews of the South Australian and New South Wales schemes recommended changes to the role of agents and outsourcing. McKinsey & Company (2003, pp. 11–16) proposed a number of significant changes to the role of agents and outsourcing in the New South Wales scheme, including the creation of specialist agents to deal with specific classes of claims (claims less than three years old, claims older than three years, and catastrophic claims), the outsourcing of assets management, the replacement of open-ended licences for insurers with contracts, and the introduction of tendering for work. On the other hand, Stanley et al. (2002, vol. 2, p. 81) expressed a number of concerns about the performance of claims management agents in the South Australian scheme and recommended that outsourced claims management revert to the public monopoly insurer.

Competitive outsourcing can, in principle, capture some of the benefits that would arise from the full competitive provision (and underwriting) of workers' compensation

insurance. These benefits include greater choice for employers and cost-efficiencies in service provision.

Outsourcing can also enable some private insurers to achieve economies of scale in specific functions such as claims management across different classes of insurance.

However, outsourcing can give rise to a principal-agent problem. As the contract is between the public monopoly insurer (the principal) and its agent, there may be insufficient incentive for the agent to deliver services satisfactorily to those outside the contract — namely, employers and workers. Australia Meat Holdings observed:

> As agents of WorkCover in many states, the private insurers' primary customer is WorkCover and not the policyholder paying the premiums – the employer. Therefore there is a lack of incentive for these insurers to perform. (sub. 96, pp. 23–4)

Another problem with outsourcing is that, as their risk capital is not at stake, it can lead to lack of 'ownership' by insurer agents and, thus, reduce their incentive to achieve efficient service provision. The Insurance Australia Group said that:

> The means of management of the schemes often leads to lack of "ownership". For instance, outsourcing of claims management creates difficulties in creating the motivation for achieving efficient claim settlement outcomes. (sub. 146, appendix D, 'Prudential Supervision of Government Monopoly Schemes', p. 2)

Participants gave examples of problems with contractual arrangements in specific schemes. The South Australian Rehabilitation Providers' Association noted the difficulties in ensuring good rehabilitation outcomes under South Australian contracts and said:

> … there are no measures of Agents that lead to bonuses based on restoration and recovery indicators other than reduction in claims liability. Despite their need to conform to the legislation, Agents must be under commercial pressures to refer to rehabilitation services that deliver their bonuses, rather than those that may assist injured workers, their employers or even the scheme. (sub. 67, p. 8)

Injuries Australia said of insurers under contract to WorkCover New South Wales that:

> … attempting to rehabilitate work injured employees to return to work was not a priority. It was to [the insurers'] advantage to not practice early return to work and they were paid in full even when they failed. This is a clear case of conflict of interest and should not have been allowed to be practiced. (sub. 125, p. 3)

Accordingly, careful attention is required to the appropriate design of contracts including the identification of measurable performance indicators, and the appropriate linking of these indicators to incentive structures such as financial remuneration or penalties. QBE Insurance considered that:

> Service delivery arrangements should be enduring over time and provide for continuous improvement. Service delivery needs to include standards of service (both outcomes

and process) against which current practice can be measured (benchmarked) and improvements identified. (sub. 99, p. 59)

WorkCover New South Wales were of the view that:

> In publicly underwritten schemes outsourcing to service providers through the use of contracts should be accompanied by appropriate remuneration measures linked directly to scheme outcomes. This will allow transparency of outcomes so employers can more easily judge the relative performance of providers. (IRsub. 255, p. 5).

The Institute of Actuaries Australia said:

> An effective control and incentive system for claim managers is both vital and elusive. Controls are essential to ensure that insurers strike a proper balance between the needs of claimants and the need to control costs. Unless there are incentives that align insurer and scheme motivation, those controls are unlikely to be fully effective. (sub. 88, p. 23)

Performance monitoring could be enhanced by surveys of employers and workers as to the level of their satisfaction with agents. Employers and workers should also be able to express concerns about agents to an appropriate independent body.

One participant argued that, while private insurers should be able to participate in all schemes where possible, there was no reason why outsourcing of functions, such as claims management, should be restricted to them. Australian Business Limited considered that:

> … scheme performance is likely to be enhanced by the introduction of new skills and approaches to injury management. Services to both employers and injured workers would be improved by increased and varied competition. (sub. 106, p. 17)

Other participants questioned the quality of claims management provided by agents. WorkCover Queensland noted:

> There is a perception that private external claims managers deliver a better service than a publicly funded insurer. WorkCover Queensland sees this as incongruous with the profit-driven requirement of a private company compared to the cost recovery basis of a public entity. The results of the National Return to Work Survey … prove that WorkCover Queensland is on par or better than those states that outsource claims management and underwriting.
>
> WorkerCover Queensland believes that its service provision on claims management to injured workers is unsurpassed and accordingly has no intention of outsourcing this fundamental and successful component of its business. (IRsub. 205, p. 6)

The Commission considers that competitive outsourcing to appropriately skilled and resourced service providers has merit, provided that contracts are carefully designed and monitored and that incentives are properly aligned.

11.3 Industry-specific schemes

The shipping and New South Wales coal industries are each covered by specific workers' compensation schemes.

The Australian Government's Seacare scheme, administered by the Seacare Authority, covers seafarers employed on prescribed ships engaged in intra-territorial, interstate or overseas trade or commerce. The scheme was first put in place at the beginning of the last century. The scheme is currently modelled on the Australian Government's Comcare scheme. However, a significant difference between the two schemes relates to insurance provision. The Seacare scheme has competitive private provision, whereas the Comcare scheme involves a monopoly public insurer.

The New South Wales coal industry scheme, formerly operated by the Joint Coal Board, is administered by Coal Services which is an incorporated body owned jointly by the New South Wales Minerals Council and the Construction, Forestry, Mining and Energy Union (CFMEU). Workers' compensation insurance is provided by a private monopoly insurer, Coal Mines Insurance, which is a subsidiary of Coal Services. The scheme was first put in place in the late 1940s under joint Commonwealth-New South Wales legislation. It now has quite different provisions to that applying under the mainstream New South Wales scheme, particularly in respect of statutory benefits and access to common law settlements. The current arrangements have been in place since 1 January 2002. A review of the scheme, scheduled for completion at the end of March 2004, is addressing whether the monopoly should continue (Coal Services, IRsub. 232, p. 3).

The Commission received a number of submissions from participants on the New South Wales coal industry scheme. Industry participants were critical of the industry-specificity of the scheme (and how it substantially differed from the mainstream New South Wales scheme) and the performance of the private monopoly insurer.

BHP Billiton considered that the New South Wales coal mining industry was financially penalised by having an industry-specific scheme with a monopoly insurer and no provision for self-insurance. In particular, it observed substantial differences in premiums in Queensland and New South Wales as well as a recent tripling in premiums in New South Wales despite improved safety performance:

> No Australian ... industry, other than NSW coal industry, has industry specific workers compensation legislation and its own mandatory insurer to administer claims. BHP Billiton finds the cost of workers compensation in New South Wales unsustainable and submits that all workers in New South Wales, irrespective of the industry they work should be covered by the same piece of Workers Compensation legislation. (sub. 110, p. 6)

Centennial Coal Company expressed the view that the current arrangements are becoming 'cost prohibitive' and that 'irrespective of what industry people work in they should be covered by the same workers compensation legislation' (sub. 145, p. 8).

Xstrata Coal Australia was concerned that reforms to 'engender positive behaviour' of workers in respect of return to work and rehabilitation under the mainstream New South Wales scheme have not been applied to the industry scheme (sub. 32, p. 2).

The New South Wales Minerals Council was of the view that:

> The implications of this unnecessary industry based workers compensation scheme, coupled with the industry's monopoly arrangements, is that the industry cannot continue to afford this scheme. The coal industry scheme is increasingly out of kilter with:

- The workers compensation scheme in NSW;
- Workers compensation schemes in Australia;
- Community standards for NSW citizens seeking damages under tort law (eg motor accidents; public liability; medical negligence; professional negligence); and
- International workers compensation schemes (with comparable economies). (sub. 172, p. 12)

The Minerals Council of Australia put forward similar views at the public hearings on the Interim Report (trans., pp. 1363–66).

The CFMEU (Mining and Energy Division) supported the retention of Coal Mines Insurance as the single industry insurer (sub. 153, p. 2). It noted that the administration of the company had recently been handed from the New South Wales Government to the industry with full agreement of all stakeholders. It further noted that the reasons for the substantial premium increases included: the need to improve the prudential margin within a short time frame of three years; to cover the cost of claims lodged following major retrenchment in the industry in the last five years; and the inadequacy of company-based opportunities for return to work, alternative employment and rehabilitation management.

In response to these various comments, Coal Services (IRsub. 232) submitted that:

- premium setting under the scheme is experientially based with the cost of premiums correlated to the cost of claims for each policy holder;
- the current scheme rate is 9.8 per cent compared with the New South Wales WorkCover rate for underground mining of 9.9 per cent; and
- scheme solvency has improved by about $70 million.

The Commission notes that the New South Wales coal industry and the Australian Government's Seacare schemes, like more broadly applicable workers' compensation schemes, are the product of a long history of development and stakeholder negotiations. However, it sees little justification for workers in one industry to be subject to substantially different scheme requirements compared with other workers in that State.

11.4 Regulation of private insurers

Private insurers who are licensed to operate in workers' compensation schemes, whether as underwriters or agents, are required to comply with a range of Australian Government, State and Territory regulatory requirements. Among the Australian Government requirements are those contained in the *Insurance Act 1973* and the *Corporations Act 2001*. Under workers' compensation schemes, private insurers must also comply with requirements pertaining to, for example:

- prudential and financial matters;
- premium setting or supervision of prices;
- compensation and benefits;
- those providing services for a scheme, such as the medical, health and legal professions;
- claims handling;
- dispute resolution; and
- dealings with non-insured parties (Insurance Council of Australia, sub. 74, p. 7).

The compliance burden in meeting these varying regulatory requirements was a major concern for private insurers. The Insurance Council of Australia noted:

> … The absolute cost of compliance as well as the potential for wasted resources due to regulatory overlap is a significant concern for the industry in the field of statutory insurance. As such, regulatory duplication and associated costs should be eliminated where possible. (sub. 74, p. 10)

It also noted that where governments provide specific types of insurance, this causes 'fragmentation in the Australian insurance market and adds to the complexity of the market to those who do business in it' (sub. 74, p. 13).

The Insurance Australia Group provided the Commission with estimates of the added compliance costs to it of meeting different scheme requirements (sub. 89, p. 10). These are presented in chapter 2.

Of particular concern to private insurers and considered next are prudential regulation and, to a lesser extent, nominal insurer arrangements under the schemes.

Prudential regulation

Prudential regulation seeks to reduce the likelihood that private insurers will become insolvent and be unable to meet contractual commitments to those with whom they deal — that is, to pay claims as they arise — especially over the long term.

Private insurers are regulated for prudential purposes under the Australian Government's Insurance Act, which is administered by APRA (box 11.2). They are also subject to limited prudential requirements as part of their licence to underwrite in workers' compensation schemes (an example of requirements under the Western Australian scheme is given in box 11.3). The regulators of the schemes generally rely on APRA's prudential supervision of the private insurers with which they are concerned.

Box 11.2 **Prudential requirements under the Insurance Act**

The Australian Government amended the Insurance Act in 2001 to reform the prudential regulation of the general insurance industry. The reforms created a three-tiered regime involving the Act (high order principles), prudential standards determined by APRA (key regulatory requirements) and guidance notes (the practical application of the standards).

APRA issued prudential standards that came into effect from 1 July 2002 which, among others, govern: capital adequacy; liability valuation; risk management; and reinsurance.

Capital adequacy

- An insurer may choose one of two methods for determining its minimum capital requirement — internal model-based method or prescribed method. Insurers with sufficient resources are encouraged to develop an internal model based method which is then subject to approval by APRA and the Treasurer.

(Continued next page)

Box 11.2 (continued)

- An insurer's minimum capital requirement is determined having regard to a range of risk factors. Under the prescribed method, these are insurance risk (the risk that the true value of net insurance liabilities could be greater than the value determined under the standard governing liability valuation), investment risk (the risk of an adverse movement in the valuation of an insurer's assets and/or off-balance sheet exposures) and concentration risk (the risk associated with an accumulation of exposures to a single catastrophic event).
- An insurer must at all times have 'eligible capital' in excess of its minimum capital requirement.

Liability valuation

- The insurer must obtain written advice from an approved actuary on the valuation of its insurance liabilities.
- Insurance liabilities include both the insurer's outstanding claims liabilities (all claims incurred prior to the calculation date) and its premium liabilities (future claim payments arising from future events insured under existing policies).
- The valuation of insurance liabilities must include a risk margin to give a 75 per cent probability of sufficiency.
- Insurance liabilities must be discounted at the risk-free rate of return.

Risk management

- Persons occupying key positions within the insurer must have the degree of probity and competence commensurate with their responsibilities.
- Each insurer must obtain APRA's approval for its appointment of an auditor (approved auditor) and, if required, an actuary (approved actuary).
- The minimum composition of the board is prescribed.

Reinsurance

- The insurer must have a reinsurance management strategy, appropriate for its operations, to ensure that it has sufficient capacity to meet obligations as they fall due. The strategy must be approved by APRA.

In November 2003, APRA issued a discussion paper which outlined proposals for another round of general insurance reforms. The proposals are to: revise the existing prudential standards and guidance notes in light of experience and market developments since their introduction; and increase disclosure about the activities of general insurers to promote market discipline.

In addition, APRA intends in 2004 to release a separate consultation paper and draft prudential standard on 'fit and proper' requirements in the general insurance, life insurance and the authorised deposit-taking sectors.

Sources: APRA (2002a, b, c, d; 2003a, b, c).

In contrast to private insurers, public insurers are not subject to Australian Government prudential requirements under the Insurance Act. However, they are subject to financial oversight, such as by government auditors. In Victoria, for example, the Victorian WorkCover Authority (like other Victorian public agencies) is subject to oversight by the Auditor-General and through the engagement of independent actuarial services (Victorian Government, sub. 164, p. 27).

The concerns of participants about prudential regulation were chiefly focused on:

- overlap between the Insurance Act and the schemes; and
- the non-application of prudential requirements to public insurers.

Box 11.3 **Prudential requirements under the Western Australian scheme**

The Western Australian *Workers' Compensation and Rehabilitation Act 1981* provides that approved insurers must have 'material and financial resources' available 'sufficient' to enable them to discharge their legislative obligations (section 161(3)(a)). In guidelines prepared by WorkCover Western Australia, there are, among others, provisions applying to solvency and credit rating.

Solvency

Approved insurers are required to:

- comply with the minimum solvency margins stipulated for authorised general insurers as prescribed by APRA; and
- provide specific information annually such as an actuarial assessment of non-current outstanding claims reserves and an independent auditor's certification attesting that the approved insurer's assets have been properly assessed at 'net market value' according to an Approved Accounting Standard (Accounting Standards Review Board 1023).

Credit ratings

Approved insurers must maintain a satisfactory credit rating (where applicable) as determined using the credit ratings agency Standard and Poors. Approved insurers that do not have a credit rating are required to comply with APRA requirements.

Source: WorkCover Western Australia (2003b).

Overlap with the Insurance Act

Participants from the insurance industry were critical of the overlap between the Insurance Act and workers' compensation (and other statutory insurance) schemes. They considered that prudential regulation should be administered by APRA alone. The Insurance Council of Australia accepted:

> … that State and Territory regulators may rely on an approval regime for general insurers and other underwriting entities to underwrite workers' compensation insurance in a particular jurisdiction to ensure that objects of the scheme and minimum standards are met.
>
> However, general insurers and other underwriting entities should only be required to gain authorisation from APRA in order to underwrite insurance, including workers' compensation. This logically flows from the above proposal that APRA should be the only regulator for the prudential regulation of general insurers and other underwriting entities in their capacity as underwriters of insurance, including workers' compensation insurance. (sub. 74, p. 15)

They supported the recommendation of the HIH Royal Commission that the States and Territories not undertake any prudential regulation of general insurance and that APRA be the 'sole prudential regulator' (2003, vol. 1, ch. 11, rec. 49, p. 264). The HIH Royal Commission also recommended that, if such regulation is to continue, the States and Territories should ensure that it is consistent with requirements of the Insurance Act and that relevant information be exchanged between the States and Territories and APRA (rec. 49 and rec. 50). The Commission notes that the Government has referred the recommendations to the States and Territories for their consideration (Costello 2003).

Governments have a legitimate role in licensing private insurers to provide underwriting and other functions under their schemes. Licensing arrangements seek to ensure that private insurers are able to meet scheme objectives and provide a minimum quality of service. They additionally require that prudential standards are met.

The interest of governments in the financial viability of private insurers arises both from ensuring that workers' compensation will be funded and because of nominal insurer arrangements under the schemes. If the nominal insurer arrangements were unfunded, then that may constitute a potential argument for extra prudential requirements. However, as seen later, nominal insurance arrangements are typically funded by contributions from private insurers through the imposition of levies. The Commission notes that the Australian Government's Seacare scheme does not impose additional prudential requirements on insurers authorised under the Insurance Act, despite having nominal insurance arrangements in place.

There is a concern that the requirements, which are imposed for workers' compensation insurance alone, can affect the entire business of the private insurer as well as undermine the ability of APRA to regulate for the private insurer as a whole. The HIH Royal Commission said:

> The imposition of additional prudential requirements by a state or territory for the protection of policyholders in a particularly statutory class may undermine APRA's ability to regulate for the benefit of policyholders of a general insurer as a whole. … the actions of a state or territory regulator can impact on the entire business of the insurer,

even though the interest of that regulator is on a single line of business. (2003, vol. 1, ch. 11, p. 264)

The Insurance Council of Australia illustrated how the duplication of prudential requirements affected two specialised insurers in New South Wales which were permitted to underwrite insurance outside of the State scheme:

> Under the scheme in NSW, CCI [Catholic Church Insurances] and Guild [Guild Insurance and Financial Services] are required to lodge a deposit with, or provide a bank guarantee to WorkCover which, when calculated in accordance with WorkCover's Licensing Policy, can exceed $50 million. This means that both insurers must apply a considerable amount of their reserves against WorkCover's security requirements, which security is held by WorkCover in a limited range of government bodies. The effect of this is that investment portfolios may become heavily skewed and the insurers' investment management performance and risk profile can be undermined.
>
> Further, under APRA's capital adequacy requirements so much of the amount held on security by WorkCover as exceeds APRA's capital adequacy calculation is excluded from APRA's solvency calculations. This has a potentially adverse effect on CCI and Guild's solvency for APRA's purposes. (sub. 174, p. 3)

The Insurance Council of Australia also questioned the capacity of the States and Territories to prudentially regulate and supervise private insurers:

> … state authorities that are only concerned with one line of insurance do not have the technical capacity or proper access to necessary information to undertake prudential regulation. This type of regulation requires significant resources and technical expertise which should rightly reside with APRA as the regulator of general insurers and the industry overall. (sub. 74, p. 15)

The Commission considers that it would be sufficient for government regulators to rely on APRA's authorisation of private insurers under the Insurance Act as evidence that prudential concerns are satisfied. It notes that this already occurs in respect of the Australian Government's Seacare scheme.

Public insurers

Several participants, for example, the Insurance Australia Group and the Insurance Council of Australia, submitted that public insurers be subject to prudential regulation under the Insurance Act or equivalent. They argued that such regulation would add financial discipline to public insurers, particularly monopoly providers, help to ensure full funding of schemes, promote greater transparency and consistency in the public insurers' accounting statements, and enable comparisons to be made with private insurers' performance.

The Institute of Actuaries Australia was of the view that APRA's prudential standard governing liability valuation would be most relevant to public insurers and that the other standards would need to be applied where appropriate:

> ... premium and claim liabilities should be determined by an Approved Valuation Actuary in accordance with the principles set out in [General Prudential Standard] 210 [governing liability valuation], for all providers of workers' compensation insurance. Since a public sector insurer is supported by the taxing power of the State, it may be appropriate to adopt a lower standard of adequacy than for private sector insurers.
>
> For the same reason, the minimum capital requirements set out in [General Prudential Standard] 110 are not applicable. It is possible for a public sector insurer to operate for some time with a funding ratio of less than 100%, but there should always be a rigorous and transparent actuarial calculation of scheme costs, so that the true economic cost is, in the long run, fully funded.
>
> The other prudential standards are less directly applicable than [General Prudential Standard] 210, but the issues that they address need to be considered in the public sector context. (sub. 88, pp. 25–6)

The Insurance Australia Group acknowledged that it would not be feasible in the short term to impose APRA standards directly on public monopoly insurers because of the 'magnitude of their under-capitalisation'. Nonetheless:

> As an alternative to direct capital injections, it is open to governments to require their insurance authorities to be subject to APRA assessment of their minimum capital requirement and then provide an explicit guarantee to cover the capital shortfall. (sub. 146, p. 4)

Participants from the insurance industry supported the recommendation of the HIH Royal Commission that the States and Territories apply relevant prudential requirements to public insurers and statutory fund schemes (2003, rec. 52, p. 268). The HIH Royal Commission considered that requirements could apply to the valuation of liabilities and risk and reinsurance management processes. It noted that capital adequacy requirements could also be imposed, although these would need to acknowledge the implicit capital backing of the relevant State or Territory government. The Commission notes that the Government has referred this recommendation to the States and Territories for their consideration (Costello 2003).

On the other hand, the Victorian Government was of the view that prudential regulation is an essential feature of private insurance markets and is inappropriate for public insurers (sub. 164, p. 27).

There are constitutional limits on the ability of the Australian Government to extend the Insurance Act to State and Territory public insurers. Section 51 (xiv) of the Constitution enables the Commonwealth to make laws with respect to 'insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned'.

According to advice provided by the Australian Government Solicitor, 'State insurance' is insurance carried out by a State or Territory as insurer. Thus, the Australian Government would not be able to extend the Insurance Act to State and Territory public insurers, but could to its own insurers such as Comcare. (Currently, Comcare is not required to apply the Insurance Act.)

While recognising there are constitutional limitations, the Commission considers that there are sound public policy grounds for public insurers applying the principles inherent in APRA's standard governing liability valuation (box 11.2). This would make their operations more transparent and enhance their competitive neutrality vis-a-vis private insurers.

Nominal insurer and policyholder arrangements

A number of competitive schemes have established nominal insurer, or nominal defendant, arrangements.[2] The nominal insurer meets the liability involved when the employer is not insured or cannot be located or in cases where a private insurer is unable — because of insolvency, for example — to meet the costs of a claim. Private insurers (and self-insurers) may be required to contribute to a fund into which claims against the nominal insurer are made. Box 11.4 provides an example of a nominal insurer arrangement.

Following the collapse of HIH Insurance in 2001, some workers' compensation schemes (Western Australia and Tasmania) introduced policyholder-funded arrangements whereby additional levies were imposed on employers and self-insurers. The Tasmanian Government noted:

> To fund the liability arising from the HIH collapse, the Government was forced to introduce a levy (special contribution). Without this levy, insurers and self-insurers would have been subjected to an unsustainable cost burden in contributing to funding the HIH liability which could lead to the withdrawal of some insurers from the market and dramatic increases in premiums. The levy is currently set at 4% of premium (notional premium for self-insurers) and is subject to annual review. It is expected that the levy will be required for approximately nine or ten years to cover the HIH liability. (sub. 135, p. 10)

[2] Nominal insurance arrangements do not typically apply to publicly underwritten schemes. However, the New South Wales Government introduced legislation (the *Workers Compensation Amendment (Insurance Reform) Act 2003*) in November 2003 which establishes such arrangements, with WorkCover New South Wales to act as the nominal insurer.

Box 11.4 **The nominal insurer arrangement in the Tasmanian scheme**

The Tasmanian scheme provides that where an employer is not insured, is bankrupt, has left the State or where the employer or private insurer is being wound-up, then the employee's claims are made against the nominal insurer. (Similar provisions apply to self-insurers.)

The nominal insurer is a body corporate established under the Act. It consists of four members appointed by the Minister following consultation with licensed insurers and self-insurers, a member nominated by the Minister (without consultation), and a member nominated by the Treasurer.

The nominal insurer fund meets claims made in the circumstances listed above as well as the nominal insurer's expenses. Insurers and self-insurers make contributions to the fund. Where claims are paid out of the fund, the nominal insurer will then attempt to recover the amount paid from the employers or insurers involved.

Sources: CCH (2003b); WorkCover Tasmania (2003b).

Participants, such as the Insurance Council of Australia and the Insurance Australia Group, supported the HIH Royal Commission's recommendation that the Australian Government introduce a national scheme to support insurance policyholders in the event of the failure of any insurer (2003, vol. 1, ch. 11, rec. 61, p. 301).

Essential elements of the HIH Royal Commission's proposal are that:

- the scheme would extend to all policies issued by general insurers authorised under the Insurance Act including (with agreement of State and Territory governments) policies issued by licensed insurers under workers' compensation and other statutory insurance schemes;
- the scheme would take over the nominal insurer role of the State and Territory governments in this respect;
- the scheme would be limited to individuals and small businesses who hold policies or who have claims against holders of policies issued by licensed general insurers;
- the level of support would be limited to counteract the problem of moral hazard. For example, support could be unlimited in respect of salary-continuance policies, and personal injury claims or payments could be limited to 90 per cent of the cost of an eligible claim;
- funding would be provided through a post-event levy on all licensed insurers and be based on their premium income; and
- all providers of insurance and insurance-like products would be required to disclose to potential policyholders the extent of the support provided by the scheme (2003, pp. 301–2).

A desirable feature of the HIH Royal Commission proposal is that it involves a post-event levy. This obviates the need to estimate the anticipated cost of an insurer insolvency that has yet to occur and is of unknown probability, to tie up capital for an indeterminate period as well as to put in place administrative arrangements to manage the capital. An additional benefit is that it reduces the likelihood of moral hazard among insurers. Moral hazard arises where insurers adjust their commercial decisions in response to the existence of the fund and, in particular, take on financial risks that they would not otherwise have borne.

However, the Australian Chamber of Commerce and Industry noted that a policyholders support scheme would:

> ... introduce an extra levy on employers over and above any premiums payable and over and above any financial arrangements for self-insurers. This is a potential cash flow issue for employers. (IRsub. 196, p. 24)

The Commission notes that the Government has responded to the recommendation of the HIH Royal Commission by commissioning a technical study of financial system guarantees (Costello 2003 and the Treasury 2003). The study is to consider the merits of introducing an explicit guarantee of part or parts of the Australian financial system (not just for general insurers), and the merits of possible coverage and design options. The Commission understands that a discussion paper is intended to be released in March 2004.

Should the HIH Royal Commission's proposed policyholders support scheme be implemented by the Australian Government, the Commission considers there would be little need for the various State and Territory schemes to continue nominal insurer arrangements to cater for the consequences of insurer insolvency. However, the proposed policyholders support scheme would not obviate the need for individual schemes to have nominal insurer arrangements where (say) an employer has not taken out a policy of workers' compensation insurance.

11.5 National framework issues

In considering the desirability of developing a national framework for workers' compensation which addresses private sector involvement in the schemes, it is useful to distinguish between the:

- industry structure that should govern the provision of workers' compensation insurance; and
- specific requirements within licensing arrangements that should apply to private insurers.

In relation to industry structure, there were calls by participants from the insurance industry for a 'genuine national market' involving full private sector participation in all statutory schemes. The Insurance Council of Australia said:

> The creation of a genuine national market for lines of statutory insurance including workers' compensation has the potential to enhance the stability of the industry as a result of economies of scale and incentives for innovation by insurers through:

- increased market size
- increased knowledge and expertise in the line of insurance
- better quality and consistent data collection and
- greater incentives for insurers to fund national research and development initiatives. (sub. 74, p. 10)

The Insurance Australia Group noted that the benefits from across-the-board private sector growth in underwriting workers' compensation insurance would include an increase in domestic capacity to service the broader liability insurance market, a 'significant proportion' of which is currently either insured overseas or serviced through the use of discretionary trusts, as well as 'less tangible' but 'significant spinoffs' such as 'greater depth of expertise in commercial underwriting and claims management' (sub. 89, p. 40). It estimated that:

> In the event that the capital base of the industry grew as a result of a national move to private underwriting in workers' compensation, there is potential for Australian capacity in the public liability and professional indemnity insurance market to grow by 50 per cent. This is the equivalent of an increase in capital supporting these lines by around $1 billion to $2 billion on a stand alone basis. (sub. 89, p. 40)

However, as some participants observed, seeking national consistency in industry structure for workers' compensation insurance across schemes may not be feasible. The Institute of Actuaries Australia said:

> While there are substantial advantages in a high degree of consistency throughout Australia, these are greatest in relation to the benefit structure, definitions and claim management practices. While a single national scheme, whether public or private sector based, does offer advantages, these may not be sufficient to over-ride the desire of each state, as determined by its representative government, to choose the underwriting system which it believes best balances the competing needs and demands of its stakeholders. (sub. 88, p. 22)

The view of the Institute of Actuaries Australia is consistent with the Commission's assessment that there are benefits and costs applying to both public monopoly and competitive private provision of workers' compensation insurance.

In relation to certain of the licensing requirements that apply to private insurers under the schemes, however, national consistency seems desirable and possible. Notably, the HIH Royal Commission recommended that the States and Territories 'implement a process

designed to reduce inconsistencies in their statutory schemes' (2003, vol. 1, rec. 51, p. 266). The Commission notes that the Government has referred the HIH Royal Commission's recommendation to the States and Territories (Costello 2003). Participants from the insurance industry identified prudential regulation as one area within licensing requirements where national consistency would be particularly beneficial (for example, the Insurance Council of Australia, sub. 74, p. 10).

The HIH Royal Commission also recommended that the Australian Government identify or establish a ministerial council (or other similar body) to provide a forum for discussion and resolution by governments of matters relevant to general insurance and possibly other financial services. It should consider measures to:

- avoid duplication in the prudential regulation of general insurers
- remove regulatory inconsistencies
- achieve a consistent approach to the prudent management of state and territory monopolies.

It could also play a part in:

- moves to introduce greater price flexibility in statutory schemes
- the introduction of a policy holder support scheme
- the removal of anomalies in the taxation arrangements applicable to general insurers. (2003, vol. 1, rec. 54, p. 270)

The Commission notes that the Australian Government has accepted the recommendation and that since March 2002, has convened a meeting between the Australian Government, State and Territory ministers with portfolio responsibility for insurance to discuss issues generally (Costello 2003). The forum is to continue.

Participants from the insurance industry considered that policyholder protection should be an element of a national framework. For example, the Insurance Australia Group considered the HIH Royal Commission recommendation to establish a policyholder protection schemes should:

> … be a critical element of any national framework as it will allow the rationalisation of existing state-based guarantee schemes for workers' compensation. Responsibility for arrangements for payment of claims in the event of an insurer insolvency must be clearly aligned with the Commonwealth's prudential functions. (sub. 89, p. 8)

In the Interim Report, the Commission recommended the establishment of a national policyholders' support scheme to deal with insurer insolvency as proposed by the HIH Royal Commission. It considers it appropriate for this matter to be considered within a wider context by the current study on explicit financial guarantees for the financial sector.

Issues as to the degree and regulation of private sector involvement in workers' compensation insurance are relevant to each of the national framework models identified in chapter 5.

Under the Comcare-based model (model A) and the alternative national self-insurance model (model B), private insurers could play a role in providing reinsurance policies and claims management services to self-insured employers. At the public hearings on the Interim Report, the Insurance Council of Australia considered that greater reliance on insurance by self-insurers would address the prudential concerns of the Australian Government 'by transferring the financial risk into the insurance process' which is then fully regulated by APRA' (trans., pp. 1266–7).

If an alternative national insurance scheme (model C) were to eventuate, both industry structure and licensing requirements could be approached from a fresh perspective. As noted earlier, however, industry structure is not in itself the major driver of the cost-effectiveness of a scheme. Other important features are the management culture, operation and elements of the scheme.

A number of participants, in their responses to the Commission's Interim Report, were opposed to the private provision of workers' compensation through the establishment of an alternative national scheme. WorkCover Queensland said:

> … there could be a number of drawbacks to privatisation of the workers' compensation insurance market. These include:
>
> - loss-leader and cost-subsidisation strategies that may be employed by private insurers in an effort to gain product, industry or regional market share
> - price-setting or 'cartel-like' operations once market dominance is achieved
> - profit-taking by commercial insurance companies, adding around 15 % to existing prices
> - multiplier effect, as private insurance companies outsource claims management and rehabilitation to other private providers, who also take a 15 % profit margin
> - additional supervision required to monitor and regulate privatised insurers will result in additional costs being passed on to employers. (IRsub. 225, p. 19)

The Queensland Council of Unions commented that:

> There is no evidence that the private sector can provide a more efficient system with greater prudential protections than the public system. (IRsub. 241, p. 6)

ABL were also not supportive of an alternative national scheme based on private insurance providers:

> … in the event such a scheme was to be created we remain to be convinced that a privately underwritten model is appropriate … Further, we are not aware of any compelling evidence to suggest that the underwriting model is the primary determinant

> of scheme performance, rather how the scheme is structured and managed seems to have more influence on the scheme results. (IRsub. 249, p. 16)

The Victorian Government maintained that taxpayer and employer capital would be at greater risk under a private scheme:

> Victoria's position is that private underwriting does not provide one of the key benefits identified by the PCIR [Productivity Commission Interim Report], as experience suggests that where there has been a significant market failure in privately underwritten workers' compensation schemes, there may be significant community pressure on governments to act as a financial safety net. (IRsub. 256, p. 15)

In its response to the Commission's Interim Report, the Australian Chamber of Commerce and Industry expressed strong support for opening up an alternative national scheme to private insurers, but considered that:

> ... the selection and use of private insurers should be based on their prior performance and expertise as appointment of private insurers does not in itself always guarantee the implementation of effective claims management process and/or outcomes (IRsub. 196, p. 24).

The Australian Meat Industry Council, in expressing support for such a scheme, said:

> Any national framework for workers' compensation should be underwritten by private insurers. In a privately underwritten scheme it should be sufficient for insurer licensing based on APRA requirements. (IRsub. 234, p. 4)

Should a new national scheme be developed at some point in the future competitive private provision has certain benefits. Private insurers would be placing their capital directly at risk. Further, private underwriting offers greater scope for competition among insurers, with the ensuing benefits in terms of the level of premiums, innovation and administrative efficiencies in service delivery. Private underwriting is also likely to bring greater transparency to any governmental influence over premiums. To deal with any residual risks to the Australian Government, a nominal insurer arrangement could be introduced.

The Commission envisages that private insurers would be required to obtain a licence to supply the market. Among the conditions of that licence would be APRA authorisation in respect of prudential concerns under the Insurance Act and compliance with injury management provisions set out in the scheme itself.

An issue raised by participants in response to the Interim Report is whether the insurance industry has the necessary capital to underwrite a national insurance scheme. The Insurance Australia Group, after noting that the public sector accounts for 85 per cent of premiums collected, said:

> ... competitive underwriting in just the NSW workers compensation market would gradually require — over a period of five years or so — between $1.5 and $2.5 billion

> in additional market capital on a "stand alone" basis. If all the national public sector workers compensation schemes were opened to the underwriting market, the additional capital required would be more than double the amount required for the NSW scheme alone. (sub. 89, p. 40)

The Insurance Council of Australia noted that as workers' compensation would require, as a general rule of thumb, capital to the level of 100 to 150 per cent of premium income, there would not be 'sufficient surplus capital in the market at the moment to cover' the full privatisation of public sector schemes (trans., p. 1269). However:

> By following the steps that the Commission has recommended in the interim report, it would ... give the insurance sector a gradual increase in exposure to ... financial risks over time. It would mean that significant amounts of capital would not be required immediately. It would also mean that insurers and self-insurers could gain experience of a new framework or a new system for covering workers' compensation, and as experience was gained and as the experience was observed, hopefully that experience would be seen to be stable and predictable and manageable over time. That would provide strong encouragement for further support to become available from the insurance industry over time. So the phasing-in through the progressive steps that the Commission has recommended would actually make a huge amount of sense for the providers of capital in an insurance context. (trans., p. 1267)

Under the model involving the establishment of a national workers' compensation body (model D), jurisdictions could seek to achieve national consistency in certain of the licensing requirements applying to private insurers, including in relation to prudential requirements. Prudential requirements applying to public insurers could also be considered by the body.

RECOMMENDATION

The Commission recommends the following regulatory framework which would allow licensed insurers to provide coverage under all schemes:

- ***in privately underwritten schemes, it should be sufficient for insurer licensing requirements to rely on the Australian Prudential Regulation Authority authorisation under the* Insurance Act 1973 *as evidence that prudential concerns are satisfied;***
- ***in publicly underwritten schemes, competitive outsourcing to appropriately skilled and resourced service providers to be supported by carefully designed and monitored contracts; and***
- ***were the Australian Government to establish a national insurance scheme as an alternative to existing schemes, it should be privately underwritten by insurers authorised by the Australian Prudential Regulation Authority under the* Insurance Act 1973.**

12 Self-insurance

This inquiry has been asked to identify and report on a regulatory framework which would allow suitably qualified employers to obtain national self-insurance coverage that is recognised by all schemes.

Under self-insurance, employers are responsible for handling and paying for all their employees claims for work-related fatality, injury and illness, rather than paying premiums to insurers to take on those responsibilities. There are 165 employers that currently hold a self-insurance licence in at least one State or Territory, of which 32 are self-insured in more than one jurisdiction.

Self-insurance is seen by some participants to hold broad advantages. The Australian Industry Group argued that:

> It [self-insurance] provides strong incentives for employers to provide safe workplaces, since a greater proportion of the costs are borne internally. It encourages ownership of the process of rehabilitation and return to work and facilitates the development of an internal culture that prioritises safety, minimising work related injury and illness. (sub. 104, p. 11)

However, other participants raised concerns. The Shop Distributive and Allied Employee's Association argued that self-insurance was inherently flawed because:

> The concept of having self-insurers is premised upon the belief that an employer can dispassionately administer a workplace injury compensation and rehabilitation system without regard to the overriding need of the employer to reduce costs and increase profits. (SDAEA 2003, p. 2)

To self-insure, employers must meet certain requirements. Although jurisdictions vary, their self-insurance requirements cover the following four broad areas:

- prudential standards;
- claims management capability;
- OHS performance; and
- in some jurisdictions, a requirement that the employer has a minimum number of employees in that jurisdiction.

A number of participants (particularly employers and self-insurance associations) have expressed concerns about particular aspects of these legislative requirements, as well as the

extent of inconsistency across jurisdictions. Many supported the incorporation of self-insurance into a national framework. Indeed, some employers (including premium-paying employers) operating across different jurisdictions have attempted to obtain a single self-insurance licence under the Australian Government's Comcare scheme.

The next section examines in more detail each of the four broad self-insurance requirements. Consideration is then given to a regulatory framework that would allow eligible employers to obtain a single self-insurance licence.

12.1 Prudential requirements

As self-insurance provides for the risk of workplace fatality, injury and illness to be paid for by employers on a pay-as-you-go basis, there are legitimate concerns about their ability to meet all claims costs in all circumstances in the future. Kate McKenzie, former General Manager of NSW Workcover, said:

> [Workers' compensation] is a long term business. Some of these claims might not occur in 40-50 years, and out there in the business world businesses often do not last quite that long, so there is a big challenge for regulators to ensure … that the money is always there. (sub. 147, p. 27)

These concerns are met by imposing prudential requirements on employers as part of licensing their right to self-insure. The employer must demonstrate that they have adequate financial capability to meet the costs of self-insuring and obtain a range of financial safeguards to ensure that they, or financial instruments in their name, can pay their claims liability under any circumstance. These requirements are assessed at the initial licence application, and then through annual reporting and periodical licence renewals (table 12.1). They include:

- Financial capability — jurisdictions impose principle-based and/or prescriptive financial requirements on employers, to minimise the risk that a self-insurer will fail to pay their claims liability (such failure would force the scheme to rely on other financial safeguards, such as bank guarantees).
- Bank guarantee — jurisdictions[1] require self-insurers to obtain a bank guarantee or equivalent security deposit. This is essentially a bond that the self-insurer lodges and which the scheme can draw on if the self-insurer fails to pay its claims liability. The size of the bank guarantee is based on the self-insurer's predicted present and future claims liability.

1 For some employers, the Northern Territory does not require a bank guarantee.

Table 12.1 **Prudential requirements**

State	*Financial capability requirements*	*Bank guarantee*	*Reinsurance policy*
Comcare	Principle based, with the following as indicative financials required: net worth of $50m, liquidity ratio of 2:1, gearing ratio of less than 1, a positive net profit trend over 3-5 years, return on equity of 10% or more. Also take into account industry risk, management quality and organisational structure.	Outstanding claims liability calculated to 95th percentile, plus one reinsurance retention amount, or $2.5m which ever is greater. The above requirements apply from July 2004.	Based on Actuary's recommendation and SRCC's view.
NSW	Adequately capitalised, strong net tangible assets, financial position and cash flow.	Outstanding claims liability calculated to the 50th percentile plus a 30% margin.	Within the range: $100 000 to $1m per event.
Vic	Financial viability to meet claims liability.	Outstanding claims liability calculated to the 50th percentile plus a 50% margin.	Adequate reinsurance.
Qld	Net tangible assets of $100m and long term financial viability.	150% of claims liability, or $5m which ever is greater.	Adequate reinsurance.
WA	Principle based and consider: current assets / liabilities, debt/ total assets, total assets /total liabilities.	At least $1m, consideration given to financial position and size and type of industry.	Appropriate catastrophe and common law insurance.
SA	Net worth of $50m (or greater), gearing ratio of 2 (or lower), liquidity ratio of 1.3:1 (or higher), profitability ratio of 10% per annum on shareholders funds, positive rating by Mercantile agency of risk lower than the industry average.	150% of estimated outstanding claims plus estimated claims for forthcoming year minus payments estimated to be paid in the forthcoming year.	A sum insured not less than $100m and an excess amount no less than $300 000 per incident.
Tas	Principle based.	Notional premium multiplied by 100% in year 1, 140% in year 2, 180% in year 3, plus a 30% margin or reinsurance deductible, which ever is greater.	An excess amount no less than $1m per incident.
ACT	Principle based.	Outstanding claims liability plus a 30% margin, or $750 000 whichever is the greater.	An excess amount no less than $500 000 per incident.
NT	Principle based.	Principle based.	Principle based.

Source: Scheme sources.

- Reinsurance policies — all jurisdictions require self-insurers to obtain a reinsurance policy (or excess of loss, or catastrophe insurance) to ensure coverage for a large claim, or a series of large claims from one incident. The reinsurance policy requirements differ between the jurisdictions according to the amount which must be reinsured, measured in terms of the total policy value and the size of the excess.
- Security fund — self-insurers in South Australia are required to pay 1 per cent (subject to a discount based on the self-insurer's safety performance) of the industry premium rate into a security fund. The fund can be used by WorkCover South Australia if the scheme is exposed to a self-insurer's claims liability. For example, if a self-insurer were to collapse and the bank guarantee was not sufficient to cover all the claims liability, then the security fund would provide the funds to pay the claims. This security fund was established in 1996 and as of 30 June 2003 had accumulated approximately $13 million. It is the Commission's understanding that, once the fund reaches $17 million, self-insurers which have contributed since 1996 would not be required to make further contributions. The fund is managed by WorkCover South Australia.

Multi-state self-insurance and mutual recognition

Employers self-insuring in more than one jurisdiction are required to comply with the specific prudential requirements of each jurisdiction in which they self-insure. This involves considerable cost replication in meeting the different financial capability requirements, bank guarantees and reinsurance policies, both initially and on an on-going basis. Each bank guarantee requires a separate actuarial report with different requirements. Different processes are involved in taking out the reinsurance policies. As a guide to the potential costs to multi-state employers, Pacific National argued that 'the introduction of insurance on a national basis could represent a saving of 50-70% on recurrent financial costs alone' (sub. 169, p. 6).

Several participants considered that both mutual recognition of, and an agreed national standard on, self-insurance licensing arrangements (or specific aspects of them such as prudential requirements) should also be considered as models of a national self-insurance framework. The National Council of Self Insurers said that it would '... want to pursue in greater detail the concept and definition of mutual recognition, and consistency in self-insurance licensing requirements between jurisdictions' (IRsub. 223, p. 2). The Queensland Workers' Compensation Self Insurers Association said that members were in broad agreement on the concept of 'a national licensing standard or mutual recognition arrangement and that this arrangement must be voluntary' (IRsub. 253, p. 1). WorkCover New South Wales drew attention to the benefits of 'harmonisation of self-insurance arrangements, such as capital requirements, between the States ...' (IRsub. 255, p. 4).

Mutual recognition requires that a self-insurer which meets the mutually agreed aspects of licensing requirements of one jurisdiction would be able to have them recognised in all jurisdictions in which it operates. Once the agreed aspects are licensed, however, the self-insurer would then need to satisfy the other licence requirements of each jurisdiction in which it operates, such as those governing claims management and the payment of benefits. As the Australian Business Limited put it:

> An alternative approach [to models A to C] would be to accept that there will be continuing differences between States, let businesses that operate across jurisdictional boundaries self insure nationally, but still apply the provisions of the relevant jurisdiction for purposes of workers' compensation benefits. This outcome could be achieved by jurisdictions agreeing to recognise self insurance arrangements in other jurisdictions. For example a business with its principal operations in NSW and self insured under NSW arrangements would be recognised as a self insurer in other jurisdictions notwithstanding the fact the businesses operations in other States may not meet self-insurance requirements in those States. Any claims paid by the business would be under the relevant state legislation. (IRsub. 249, p. 7)

One specific difficulty with mutual recognition of prudential requirements derives from each jurisdiction assessing and providing only for the potential liability from self-insurance to its scheme and not the total liability to all State and Territory schemes. Also as indicated in table 12.1, each jurisdiction has different prudential requirements and supports its requirements with differing arrangements that would apply if the self-insurer failed.

The various options to overcome these issues would require extensive legislative action. For example, one prudential regulator could be empowered to consider all self-insurance operations of a firm. Alternatively, jurisdictions could agree on a single set of prudential requirements and contract out the prudential regulation to an approved public or private body.

It would also be necessary to consider provisions that would apply if prudential regulation failed, restrictions, if any, that should be imposed on self-insurers' choice of jurisdiction and the relevance of minimum employment requirements.

Mutual recognition for prudential purposes would not eliminate the need for self-insurers to comply with the different operational requirements of individual schemes, such as access and coverage, claims handling and injury management.

As compared to mutual recognition, a single national standard would require that all jurisdictions agree to, and adopt legislatively, all of the necessary elements of a single scheme. Such a national standard would lead to national uniformity in aspects of self-insurance licensing, whereas mutual recognition would lead to 'harmonisation' which could eventually become nationally consistent, but not necessarily uniform.

Both mutual recognition and a national standard could be achievable under model D, or under existing cooperative arrangements through HWCA or the WRMC. The advantage of relying on the existing cooperative arrangements is that the implementation of elements of a national self-insurance framework could occur immediately, and not be delayed by the need to establish a new national body for workers' compensation. However, much depends on the willingness of jurisdictions to use existing cooperative arrangements to this end.

Overall, the Commission considers that mutual recognition and a single national scheme are inferior proposals to an alternative national self-insurance option for large firms.

Residual risks

A number of participants raised concerns that the prudential requirements were insufficient to reduce the risk which self-insurers would bring to a scheme. The most probable risk is that the company self-insuring collapses and the bank guarantee is not sufficient to cover all the claims liability. The Institute of Actuaries of Australia argued that:

> Let's say for instance Telstra falls over tomorrow, you'll get a huge swag of claims come out, and there won't necessarily be enough money in the bank to pay the compensation entitlement, and that's done normally through a bank guarantee, and all I'm saying there is the bank guarantees probably aren't the right level at this stage anywhere … (trans., p. 907)

The degree of risk the scheme is exposed to is more readily identifiable in some schemes. Under the Comcare scheme, the amount of the bank guarantee is set at 100 per cent of claims liability calculated to the 95th percentile.[2] This means that according to the actuarial assumptions, there is a 5 per cent probability that the bank guarantee will be insufficient if the self-insurer collapses, exposing Comcare to the difference between the bank guarantee amount and the actual claims liability. However, a number of jurisdictions require a multiple of the estimated claims liability. The Government Actuary, in the context of advice on the SRC Act, referred to this as a blunter approach which may be considered when the adequate regulatory resources are not available (appendix B). An example of this approach is New South Wales which requires 130 per cent of outstanding claims liability estimated to the 50th percentile.

Apart from the choice of percentile to which the claims liability is to be calculated and the required multiple of this, a bank guarantee may prove to be insufficient because of the inadequacy of the past data used to predict future claims liability. There is anecdotal evidence that, when firms fail, this brings forth additional workers' compensation claims. The CFMEU drew attention to the cost of claims which have been lodged in the NSW coal

[2] These are the current requirements, different bank guarantee requirements will apply from July 2004 (see table 12.1).

industry following retrenchments initiated by companies in that industry in the last five years (sub. 153, p. 2). If there are more claims than expected for a failing self-insurer, the predicted outstanding claims liability may be underestimated and the bank guarantee may be insufficient.

There is also the possibility of new claims liability arising from work-related fatality, injury or disease that have not been included in past data. For example, actuaries had not predicted the extent of claims arising from asbestos-related diseases when advising on levels of premiums some 30 or more years ago. If a similar event were to incur in the future, then the actual claims liability could be well above that provided for.

In addition, there is the outside possibility that the provider of the bank guarantee and the self-insurer could collapse simultaneously, exposing the scheme to all the claims liability of a self-insurer. Other risks include the possibility of a self-insurer experiencing a large claim and the reinsurer collapsing, or of there being an actuarial error. For example, the Safety Rehabilitation and Compensation Commission (2002) reported that an actuarial error was made in calculating the premiums for Commonwealth and ACT government agencies. There is also potential exposure to claims liability after a self-insurer has exited the scheme, or had their licence revoked, if the payment received on exit was insufficient to manage continuing claims.

Instruments to deal with residual risks

If the bank guarantee and reinsurance policy are insufficient to cover the claims liability of a collapsed self-insurer, then, in the absence of other prudential arrangements, injured workers would bear the burden of not having their claims met. To avoid this, all the State and Territory schemes explicitly guarantee to pay claims arising from a collapsed self-insurer. Although the Australian Government does not explicitly provide such a guarantee, it is very likely that there would be pressure for it to take responsibility if such an event occurred.

The available Australian and international evidence suggests that the probability of the Australian Government being exposed to the claims liability of a self-insurer under the Comcare scheme is relatively low. The most likely exposure would first require a self-insurer to collapse and then for the bank guarantee to be insufficient. Although such a combination of events is unlikely, it is important to recognise that it is still possible.

Collapse of self-insurer. Only two licensed self-insurers have failed in all the Australian schemes since self-insurance was offered (box 12.1). Similarly, in the United States of America, where self-insurance is also available, only a small number have collapsed. Moreover, the collapse of the Australian self-insurers occurred in schemes which, at the

time, had much weaker prudential requirements than those which apply currently (table 12.1).

Box 12.1 **Australian experience of self-insurer failure**

The Commission is aware of two self-insurers that have failed in Australia.

Blue Ribbon Meats collapsed in 2001 whilst self-insured under the Tasmanian scheme, leaving a claims liability of $575 379. The bank guarantee, which was 150 per cent of claims liability estimated at the 50th percentile was $438 248. The administrator has agreed to pay the outstanding liability.

T O'Connor & Sons Pty Ltd collapsed in 1991 whilst self-insured under the South Australian scheme, leaving a claims liability of $2.1 million. The required bank guarantee was specified at 150 per cent of claims liability estimated at the 50th percentile. However, only $797 000 of the specified $950 000 had been provided at the time of the collapse.

In response to the collapses, the schemes strengthened their prudential requirements to those outlined in table 12.1.

Sources: Tasmanian Nominal Insurer, SA WorkCover, National Council of Self Insurers.

Under Comcare, there has been no failure of a self-insurer since self-insurance was first permitted in 1992. However, all self-insurers are either current or former government owned agencies and could be considered to have been financially stronger than some of the corporations which may apply for self-insurance under the Commission's proposed reforms. As noted in chapter 5, the Safety Rehabilitation and Compensation (SRC) Commission has introduced more stringent prudential requirements. These are intended to alert the SRC Commission earlier to the possibility that a self-insurer could no longer be able to meet its future liability to its injured workers and allow for that liability to be covered in another manner before its collapse jeopardised its injured workers' entitlements.

Insufficiency of bank guarantee. The Australian Government Actuary noted several conceptual reasons why a bank guarantee may be insufficient, including that the self-insurer experiences an increased number of claims and that there are claims which are unforeseen. There is some evidence of bank guarantee insufficiency, as this occurred in the cases of both of the Australian self-insurers which collapsed (box 12.1).

Given that there are residual risks, the Commission considers it prudent for the Australian Government to consider additional risk management instruments. It is recognised that such instruments involve a transfer of risk from the Australian Government to the remaining self-insurers, at their cost, and that the efficacy and efficiency of the transfers are important considerations. The three instruments considered are: scheme reinsurance; a security fund; and a post-event levy.

Scheme reinsurance

The scheme (Comcare) as a whole could take out a reinsurance policy to cover any residual claims liability not met by the existing prudential requirements. Whilst this approach has the advantage of low administrative cost for the scheme, the reinsurance market is characterised by sharp cyclical swings in the availability and price of insurance. Advice to Commission is that such reinsurance could be difficult to obtain and expensive, the current reinsurance market being a case in point. A large part of the likely high price of reinsurance reflects the uncertainty involved in estimating the probability and consequences of the prudential arrangements failing.

Apart from high cost, the scheme is still relying on a third party and, as the Government Actuary has noted, insurers may not pay under some circumstances (appendix B). Further, there would also be the cost of reviewing the reinsurance arrangement whenever self-insurers enter or exit the scheme.

Security fund

As an alternative to taking out an insurance policy with a third party insurer, the government could act as the insurer. It would levy self-insuring employers so as to accumulate funds which could be drawn on if there was a need to pay unfunded liabilities. An example is the security fund operated by WorkCover South Australia for self-insurers.

In effect, the government is performing the same function as an insurance company providing scheme reinsurance. It is collecting premiums and earning a rate of return on the funds until called on to meet the claims liability arising from failed prudential arrangements. The government faces the same difficulties in forecasting the risk and promising to meet it as an insurance company.

Relevant issues include the size of the required fund, the method used to levy self-insurers, administrative costs and the opportunity cost of the capital tied up in the fund.

The size of the fund must strike a balance between fully covering the financial risk to the government and ensuring that self-insurers do not contribute more than necessary. This is the analogous problem of insurance companies determining the actuarially fair premium for scheme reinsurance, and it suffers the same limitations. As the probability and size of the risks are not quantifiable, it is not possible to accurately determine the size of the required fund. As the HIH Royal Commission noted:

> Because the funding for a pre-event scheme is necessarily calculated without reference to the known dimensions of a future event, the amount held in the fund will almost certainly be either too much or too little to cope with a specific failure. (2003, vol. 1, ch. 11, p. 296)

The contributions by self-insurers to the fund can be based on the risk that the self-insurer brings to the scheme. This has the advantage of allocating the cost of risk to the party that generates the risk. Whilst this has desirable incentive effects to manage risk efficiently, it is administratively costly. For example, the risk-based contributions of self-insurers to the Californian security fund requires significant actuarial input and a seven member board to run the fund.

To reduce administrative costs, the contributions could be based on more readily available information. For example, the South Australian security fund requires employers to contribute 1 per cent of the premium they would have paid had they not self-insured. This may not accurately allocate the cost of the risk to the party generating it. An alternative comprise between risk-based contributions and low administration cost would be to base the contribution on the proportion of payroll according to the credit rating of the self-insurer.

For a new fund (or a fund which has experienced a draw-down), the time taken to reach its prudent size still represents a risk of financial exposure to government.

There are also costs in managing the pool of funds and in dealing equitably with firms entering and exiting the scheme. For example, once the fund has reached a prudent size, what processes, if any, should there be to ensure equity between self-insurers that contributed to the fund's accumulation and more recent members.

For the above reasons, the efficacy and efficiency of security funds are questionable as a means of transferring the financial risk of prudential failure from governments to self-insurers.

Post-event levy

The cost of financing any liabilities arising from the failure of a self-insurer and their guarantees/reinsurance can be recouped by way of a levy on the remaining self-insurers. There is increased certainty as to the amount of funds required and the administration cost can be relatively low.

While it would add a cost to the remaining self-insurers, it internalises the cost of self-insurance failure to self-insurers as a category. If the prudential arrangements operate as intended, the costs are likely to be small and imposed infrequently. The internalisation of the costs would act to ensure individual and mutual support for prudential regulation among self-insurers.

The post-event levy does not require the ongoing administration of a pool of funds or the continual purchase of insurance scheme reinsurance. The administrative costs that would be incurred, however, would arise from the scheme administrator being empowered to

accept and pursue recovery of the self-insured's scheme liability; determining and enforcing collections of the levy; and accessing funds to enable timely settlement of the liability of the self-insured's injured workers while sufficient funds were being collected from other self-insurers to extinguish the debt and pay for the administration of the post-event levy. The funding could be dealt with in a variety of ways, such as by a Government loan or guarantee of loans (as occurred for Ansett employee entitlements).

Under post-event funding, the issue of potential avoidance would need to be addressed. In the event of a self-insurer failing, some remaining self-insurers could seek to avoid the payment of the levy by moving from the Australian Government scheme to State and/or Territory scheme(s) and vice versa. This could be dealt with by making a condition on voluntary exit that self-insurers pay the expected value of any levy owing at the time of exit.

In the Commission's view, a post-event levy is the most suitable approach.

A combination of instruments

The Australian Government could adopt one or more of these risk management instruments. By way of illustration, it is possible to combine limited pre-event funding with a condition that if the fund is insufficient, there will be a post-event levy. An example is the Australian Reinsurance Pool Corporation for terrorism cover.

Implementation

There is an issue about whether government-owned businesses self-insuring under the Comcare scheme should contribute to a post-event levy, security fund or scheme reinsurance. At one level, even if they are not explicitly guaranteed by the Australian Government, it is unlikely that the Government would let them fail (in effect, the risk of collapse has been transferred to the taxpayer). However, in terms of allocating resources through prices, and having regard to competitive neutrality policy, the cost base of government owned business should be comparable to an equivalent private sector firm.

The Commission recommends that the contribution of government owned businesses to additional risk management instruments should be based on the same criteria as would be private firms.

For a post event-levy, it would be a condition of the self-insurance licence that businesses would pay a levy to be determined by the SRC Commission (or new regulator), if there is outstanding claims liability that is not otherwise covered by the existing prudential arrangements. There could be an exit provision clause that the firm must contribute the net present value of its contributions to the post-event levy.

In implementing prudential requirements, some participants suggested that self-insurers should be subject to the same requirements as general insurers and be regulated by the Australian Prudential Regulation Authority (APRA). However, the Commission does not favour such an approach (box 12.2).

In conclusion, the Commission supports the adoption of stringent prudential requirements based on financial capability, supported by bank guarantees and reinsurance policies. Residual risks (however unlikely) could be further provided for by a post-event levy (such as for a national policyholders' support scheme) as recommended by the HIH Royal Commission.

12.2 Claims management requirements

The jurisdictions require self-insurers to have appropriate procedures for managing workers' compensation claims. Most jurisdictions allow for self-insurers to engage third parties to manage the claims. However, in Queensland, only local governments are allowed to contract out their claims management processes. Self-insurers are required to demonstrate that they employ suitable staff and engage service providers approved by the scheme. This is to ensure that employees of self-insuring employers have their claims managed in a professional manner in accordance with scheme benefit structures. The differing requirements generate compliance problems and costs for multi-state employers.

Box 12.2 **Comparison with general insurer prudential requirements**

The requirements of the Insurance Act and the Corporations Act, which currently apply to private insurance companies, could apply to workers' compensation self-insurers, with APRA and the Australian Securities and Investments Commission the relevant regulators. Insurance Australia Group argued that:

> self-insurers should be required to meet the same minimum standards as insurers, including prudential standards, to ensure a level playing field and to protect long term claimants from future insolvency. (sub. 89, p. 18)

The main prudential requirements regulating private insurance companies are: actuarial evaluation of claims liability; minimum capital adequacy; reinsurance policies; and a risk management plan. These requirements are based solely on managing the insurance risks they are exposed to and minimising the risk that they will collapse as a result of these insurance risks.

Whilst this is appropriate for private insurance companies who typically have more than 80 per cent of their balance sheet involving insurance risk, self-insuring employers typically have less than 10 per cent of their balance sheet involving insurance risk. The insolvency risk of a self-insurer is largely from their primary business activity and the current prudential requirements for private insurance companies do not address this risk. Although capital adequacy requirements may reduce the probability of self-insuring employers becoming insolvent, it is not appropriate to apply the capital adequacy requirement of insurance companies to other businesses, such as retail and mining operations.

The current reinsurance requirements for self-insurers are determined by the scheme, whereas private insurance companies require their reinsurance policy arrangements be approved by APRA. Whilst it may be appropriate for insurance companies exposed to different insurance risks to be required to have their reinsurance policy arrangements approved by APRA, it does not seem an efficient use of APRA's resources to approve the reinsurance polices of over 160 self-insuring employers who have a known form of insurance risk which is only a small proportion of their overall operations.

Moreover, whereas APRA requirements do not require the insurer to post any form of security deposit (eg bank guarantee) that the scheme could use to pay claims liability if the insurer collapses, this is a requirement of self-insurers.

Most jurisdictions require self-insurers to have claims managers located in that jurisdiction. A number of self-insurers noted that this prevents them from operating a national claims management centre, which would reduce claims management costs. For example, CSR estimated that it would save $150 000 per annum if it could have a single claims management centre (sub. 109, p. 7). The Western Australian Chamber of Commerce, on the other hand, expressed concern that claims outcomes could deteriorate if decision making is centralised, or claims and injury management are separate (sub. 55, p. 23).

Multi-state self-insurers are required to have detailed knowledge of up to eight different claims management processes and benefit structures, with the associated information technology (IT) costs. Coles Myer (CML) stated:

> The IT systems to manage different payment structures are expensive and time consuming given the complexities involved in the calculation processes and variations between jurisdictions. In addition there are constant legislative changes which impact on the payment of entitlements.
>
> CML businesses are currently moving to national, consistent payroll processes, however cannot easily achieve equivalent efficiencies in Workers Compensation payments because of the jurisdictional differences in benefit structure. Additional costs and resources are therefore involved to ensure payments are accurate. (sub. 155, p. 5)

The employer may also need a different claims manager in each jurisdiction (and perform its own claims management in Queensland). Telstra notes that 'there is a shortfall of national claims managers who are accredited in each State/Territory jurisdiction. As a result, a national company would be required to have different claims managers in various States' (sub. 136, p. 2).

Concerns about quality

Some Union participants raised concerns about the claims management practices of self-insured employers. For example, the Australian Manufacturing Workers Union (AMWU) argued:

> [I]n Victoria, a high return to work rate is ***not associated*** with self insurance and … processing of claims is no quicker with self insurers than under the legislative requirements. (IRsub. 188, p. 4) [emphasis in original]

Moreover, based on anecdotal evidence, the AMWU raised concerns that self-insurers did not fulfil their legislative claims management requirements, saying:

> The system is deficient in that it fails to adequately audit employers and establish limitations to ensure the employers cannot manipulate the system. (AMWU 2003, p. 22)

In part, this is seen as being a consequence of the strong incentive self-insured employers face to minimise the occurrence of workplace injury, fatality and illness and the subsequent cost of any accidents. Whilst the Commission has received other anecdotal evidence of self-insured employers inappropriately managing claims, there is no evidence of systematic failure. Robust administration of claims management practices, however, remains important.

12.3 OHS requirements

OHS regulations apply to all employers, irrespective of whether or not they self-insure. However, most jurisdictions place an added requirement on self-insurers to demonstrate, through an audit, that they have appropriate OHS management systems to prevent work-related injury and illness. These systems and audit processes differ between the schemes (table 12.2). They constitute an added cost for multi-state employers.

Table 12.2 **Additional OHS requirements for self-insurers**

State	*Additional OHS requirements for self-insurers*
NSW	NSW developed model and Audit based on Aus 4801. The self audit is annual, the Workcover audit is on a 3 year cycle.
Vic	Safety Map Audit.
Qld	Tri-Safe audit.
SA	SA performance standards based on Aus 4801.
WA	No additional OHS requirements for self-insurers.
Tas	Safety Map Audit.
NT	No additional OHS requirements for self-insurers.
ACT	OHS management system based on Aus 4801.
Comcare	No additional OHS requirements for self-insurers.

Source: Scheme sources.

In terms of justifying these additional requirements, the Institute of Actuaries of Australia argued:

> … it's just purely a risk from the scheme's view that if you're going to let go of someone, let's make sure they're running better than even we would expect them to be under our scheme. (trans., p. 902)

Expressing concerns about their appropriateness, CSR (sub. 109) argued that the additional OHS requirements are inefficient because they do not target employers with the greatest risk of work-related fatality, injury and illness (which is somewhat independent of whether they are self-insuring or paying premiums). The National Council of Self Insurers argued that OHS management systems should be determined on the risks of an organisation, rather than general OHS management systems applied to all employers:

> … it's really about assessing the risks and putting in place systems to address the risk for your organisation … we need to establish systems which apply to our particular organisations. (trans., pp. 70–1)

For multi-state employers, the problem of additional OHS requirements are exacerbated with the additional expense of multiple audits and the differences between audit requirements. This makes it difficult and costly for multi-state employers to develop uniform OHS management systems. For example, Woolworths has different OHS

management systems in each state because of the difficultly of developing a single OHS management process that meets the different requirements. Woolworths estimates they could save approximately $400 000 per annum if they could have a single national OHS management system (sub. 156, p. 3).

The Commission does not support OHS requirements for self-insurers that are additional to those applying to other employers.

12.4 The minimum employee requirement

In order to self-insure in some jurisdictions, employers are required to have a minimum number of employees in that jurisdiction (table 12.3). Where such a requirement is not specified, the number of employees of a self-insurance applicant may be taken into account when assessing eligibility for a licence.

Table 12.3 **Minimum employee requirement by jurisdiction**

State	*Minimum employee requirement*
NSW	500
Vic	not specified
Qld	2000
SA	200
WA	not specified
Tas	not specified
NT	not specified
ACT	not specified
Comcare	500

Source: Scheme sources.

Justifications for a minimum employee requirement include: that it helps gauge the financial strength of the employer; that a minimum number of employees is required for self-insurance to be cost effective; and that the quality of claims management will not be assured in firms with small numbers of employees.

A central concern with the requirement is that, if it is set too high, it can restrict otherwise eligible employers from obtaining the benefits of self-insurance. Employers who can obtain a self-insurance licence in one jurisdiction may not be able to obtain a licence in another jurisdiction because they do not meet the minimum employee requirement in that particular jurisdiction. The Australian Industry Group gave the example of an employer who can self-insure in New South Wales, Victoria and Western Australia but not in Queensland, Northern Territory, Australian Capital Territory or Tasmania, based solely on

the issue of employee numbers. It estimated that being denied self-insurance in those jurisdictions increased their costs by $500 000 per annum (sub. 104, p. 12).

The justifications for a minimum employee requirement are not strong given that:

- there is no direct link between the number of employees and the financial strength of an employer. There are financially strong employers who have only a small number of employees; and
- the cost effectiveness of self-insuring does not depend on employee numbers. Clearly the high fixed costs of self-insuring (such as arranging bank guarantees and reinsurance polices and capacity to manage claims) mean that it is only likely to be cost effective for large firms to self-insure. If prudential regulations focus on the ability of the employer to meet all future claims and manage them effectively, then the individual employer, not the regulator, should decide whether it is cost effective to self-insure.

Whilst a minimum number of employees may act as a guide for the scheme to assess the appropriateness of self-insurance for an organisation, on balance, the Commission concludes that setting a minimum number of employees as a requirement to self-insure is a poor proxy for the more fundamental requirements of effective prudential standards and claims management processes.

12.5 Other requirements

There is a range of other self-insurance licensing requirements which, although they may not be individually significant, can have a collective impact.

Self-insurers are required to pay an application fee and ongoing levies for each licence. These fees and charges include the recovery of self-insurance administration costs and contributions to OHS functions. For employers self-insuring in more than one state, there may be unnecessary replication in the payment of some components of these fees. There is also concern from self-insurers that the fees and levies are not based on the administration cost they bring to the scheme. As an example, the contribution fees Pacific National pays to the New South Wales and Comcare schemes are ‘very different’ despite there being almost the same number of employees covered by each licence.

Self-insurers are required to supply data to the regulator on an ongoing basis. Whilst the collection of data is appropriate, self-insurers feel that the schemes do not adequately use the data that is collected. The Self Insurers Association of Victoria argued:

> [T]hat while extensive data is provided to the VWA and on to NOHSC … little is provided back to self-insurers for use either in in-house safety and injury management initiatives; or in comparative form with other companies in the same industry. (sub. 163, p. 9)

The collection of data imposes costs on multi-state self-insurers because each scheme requires a different data set and software to supply the data, thus preventing self-insurers from operating an integrated computer system to satisfy the various scheme requirements. BHP stated that each State system costs $50 000 to purchase and is required to be tailored to each scheme's definitions, which themselves vary (sub. 110, p. 5).

12.6 National framework issues

For multi-state employers, the costs generated by the replication and differences in self-insurance requirements provide a justification for a regulatory framework that would allow them to obtain a single self-insurance licence to cover all of their workers.

In chapter 5, the Commission recommended that eligible employers be allowed to obtain a single self-insurance licence under the Comcare scheme, or under an alternative national self-insurance scheme, to cover all their workers throughout Australia. However, not all self-insurers or multi-state employers would apply to self-insure under an alternative national scheme. The recommended new national workers' compensation body could address the concerns of self-insurers remaining in the State and Territory schemes. The recommendations of how self-insurance should be regulated under a national self-insurance scheme are outlined below.

RECOMMENDATION

The Commission recommends the following principles be used for assessing self-insurance licence applications under the national self-insurance scheme:

- ***self-insurers to demonstrate appropriate prudential and claims management requirements, to ensure that they can adequately fund and manage claims;***
- ***prudential requirements to be based on financial capability (including actuarial evaluation of claims liability), bank guarantees and reinsurance policies;***
- ***remaining risks to be reduced further by making provision for a post-event levy;***
- ***occupational health and safety requirements to apply equally to all employers; and***
- ***there to be no explicit minimum employee requirement as it adds no prudential or operational value.***

Self-insurers under the national scheme should withdraw from, rather than be recognised under, any or all other schemes.

The Commission envisages that this recommendation would be incorporated into the national frameworks, as set out in chapter 5, in the following ways.

Model A. The existing self-insurance requirements of the SRC Act administered by Comcare would apply. The Commission, along with advice from the Australian

Government Actuary, has assessed the self-insurance requirements of the SRC Act and have found them to be sound. It is also noted that the prudential requirements have been strengthened in response to the advice from the Government Actuary.

Model B. As new legislation would be required to implement an alternative national self-insurance scheme, the Australian Government could use the current Comcare self-insurance requirements as a sound base and take the opportunity to refine certain of its requirements. Although the most important prudential and claims management requirements may not need to be changed, the minimum employee requirement should be dispensed with.

Model C. If the proposed alternative national insurance scheme is introduced, the self-insurance arrangements under model B would be incorporated in it.

Model D. Self-insurers have argued the benefits of common licensing and audit requirements. The above recommendations could form a basis for the States and Territories to develop consistent requirements across their schemes.

13 Dispute resolution in workers' compensation

This chapter is concerned with the term of reference which asks the Commission to identify and report on 'alternative mechanisms to manage and resolve disputes in workers' compensation matters'.

Dispute resolution systems are concerned with ensuring integrity in the provision of workers' compensation. Their objective is to resolve disputes about its provision in an equitable and cost-effective manner. As submitted by the Queensland Council of Unions, they should use processes that are 'transparent, consistent, equitable and low cost' (IRsub. 206, p. 5).

Cost effectiveness embraces scheme legal and administrative costs as well as costs borne by workers and employers. The major source of such costs is delay. Delays caused by disputes: create uncertainty and frustration; hinder early treatment and reduce the prospect of rehabilitation; and create financial costs for employers and workers.

The nature of workers' compensation schemes influences the type of disputes that arise. Being no-fault, determining negligence is not a major source of dispute. However, all but the South Australian and Northern Territory schemes have a common law option where the question of fault is relevant and where the resolution of the issue of negligence can incur high costs.

Disputes in no-fault schemes tend to arise from questions of the access to, or extent of, coverage. These include:

- the work-relatedness of the injury;
- the extent of injury, including threshold access to common law settlements; and
- access to entitlements.

As each workers' compensation scheme is unique, the significance of these causes of disputes vary among schemes. This is one of the factors leading to jurisdictions adopting differing approaches to dispute resolution.

Significant costs are involved in dispute resolution and the reform of dispute resolution procedures has been an important component of the more general changes to workers' compensation schemes over recent years.

13.1 Causes of disputes

Identifying the causes of disputes is a critical element in the design of dispute resolution systems. In work done for the Heads of Workers' Compensation Authorities, Transformation Management Systems Pty Ltd (TMS 1995a) suggested that disputes fall into two broad categories:

- artificial — those that are generated by the handling of claims, including mistakes and misunderstandings; and
- genuine — when the parties have shared all the information, but remain at odds and require the intervention of a third party.

Artificial disputes

Transformation Management Systems has suggested that the major cause of artificial disputes is the lack of information when decisions are made. Ideally, workers' compensation schemes should be structured so as to bring all the relevant information to the initial decision, to improve the quality of that decision and thereby prevent unnecessary disputes from entering the system.

Once a dispute is in the system, poor procedures and information management can make resolution more difficult and costly to achieve. There are two sources of information delay, in addition to discovery time, which the design of dispute resolution systems must overcome. These are:

- attempts to prevent cases being settled early in order to obtain larger pay-outs in court. Such behaviour is aimed at raising the stakes for the other party — settlements at the court door being an example; and
- inadequate or loose requirements which allow 'last minute' revisions of information (including premeditated intent).

Another source of artificial disputes is the management and culture of the system. People are less likely to reach agreement if they feel the system does not address their needs. Early and open communications are more likely to uncover those needs. An example of simple desires driving disputes was highlighted by the Australian Health and Medical Council Legal Process Reform Group. It reported on a survey of claimants initiating medical

litigation in the United Kingdom which found that, in addition to the quest for money, the action was being undertaken:

> … to stop the same thing happening to someone else (52%); the provision of an apology (44%); and opportunity to make the other side understand their concerns (40%); and to be told what had happened to them (38%). (AHMAC Legal Process Reform Group 2002, p. 27)

Genuine disputes

Employer disputes

The relationship between employers and workers' compensation scheme administrators/insurers is one source of genuine disputes. These disputes can arise when there is disagreement about whether employers are adequately meeting the requirements of the scheme, including whether:

- employers need to cover particular workers. This can arise from differing views as to whether the workers are employees, deemed employees or independent contractors;
- the correct basis was used for determining premium. This may involve disagreements about industry classification or definitions of salary and remuneration; and
- employers have made acceptable provisions for return to work.

Employer disputes, however, are not covered by the formal dispute resolution schemes, which are set up to deal with disputes about claims.

Disputes about claims

The majority of genuine claims disputes are generated by specific issues relating to claims assessment and management. These issues are highly dependent on the nature of the individual workers' compensation scheme. At the beginning of claims assessment process, areas of dispute can include:

- whether the injured party is an employee;
- whether the injury was work-related; and
- the extent of injury.

Other disputes arise where people are already receiving benefits — assessments of fitness for work being a common example. While all these factors may cause disputes, the nature of disputes of each scheme is also affected by its approach to the provision of benefits and injury management.

Over time, dispute systems also have to contend with causes of injury that emerge from new work-patterns or changing societal norms. For example, in Western Australia there was a 114 per cent increase in claims relating to stress between 1995-96 and 1999-2000 (Guthrie 2001, p. 73). Such a change may require the dispute resolution system to consider new approaches — for example, the use of psychologists/psychiatrists to assess stress claims.

13.2 Resolution of disputes

The many different elements employed in dispute resolution across the jurisdictions include internal review, early exchange of information, alternative dispute resolution (ADR), courts and legislated models.

Internal review

The purpose of internal reviews (or reconsideration) is to assess the initial claim decisions and determine whether the original officer made a correct judgment. This may prevent artificial disputes from entering the formal dispute resolution system, thereby avoiding a waste of time and money.

The requirement for firms to provide for, and for customers to first use, internal review procedures is an integral part of formal industry-based dispute resolution schemes elsewhere in the economy. It is a requirement in the financial services industry before the use of external complaints resolution under the Financial Industry Complaints Service, in the banking industry before use of the Banking Industry Ombudsman and in areas of general insurance before use the General Insurance Enquires and Complaints Service. The coverage and integrity of those industry-based internal complaints services is ensured by a requirement under the *Financial Services Reform Act 2001* for corporations to subscribe to them and by the Australian Securities and Investments Commission to approve and monitor them (ASIC 1999).

Early information exchange

Information exchange is an important part of any dispute resolution process, as the absence of full information can render attempts at resolution ineffective. Access to information can provide both sides with a clearer indication of where they stand on the matter — meaning that disputes are less likely to escalate through confusion. If parties know that they have all relevant information, it will give them confidence to make decisions during these first steps of dispute resolution.

Many systems that use ADR order a compulsory exchange of information before any resolution commences. Sometimes these exchanges are enforced by 'evidence caps', which impose time limits for the evidence to be presented, and after which no further admission is allowed. For example, section 84J of the WA *Workers' Compensation and Rehabilitation Act 1981* provides that a worker's statement in relation to their disability is not to be admitted in evidence or used by an employer or insurer unless supplied to the worker, or to a solicitor or agent acting on their behalf, at least 28 days before the dispute resolution proceedings.

Alternative dispute resolution

As its name suggests, ADR has been developed as a substitute forum to address problems identified with court-based resolution. In addition to workers' compensation, ADR processes have gained wide use in many specialised forums —such as for family and commercial disputes — as well as within the courts themselves to better utilise expensive legal resources.

There are two distinct motivations for the uptake of ADR. The first is that ADR is designed to provide a forum which is conciliatory. Parties are allowed and encouraged to speak for themselves, and explore solutions to their problems. It is hoped that this gives a feeling of empowerment which will result in greater acceptance of the process and, hence, outcome.

The other advantage of ADR is lower cost. The informality of the process means that it can commence quickly. As such, steps can be taken toward resolution before they would in a court system. This, coupled with a less-adversarial approach, can help maintain the relationship between the parties to a dispute. Failure to do so can create financial and social costs, and compromise rehabilitation and return to work.

While these objectives are common to ADR, the means to achieve them differ greatly. ADR can comprise a number of different steps, some of which differ only slightly. The following explains some of the more common features.

ADR processes

A wide number of dispute resolution options fall under the umbrella of ADR and there is some confusion about what terms can mean. The Australian National Alternative Dispute Resolution Advisory Council provides a categorisation which places elements of ADR into three broad groups (NADRAC 1997). Those that:

- assist the parties to come to their own agreement, where the third party merely aids the discussion between them. Many types of *mediation* fall into this category. Other examples include case-management meetings or negotiation;
- advise the parties toward an agreement, where the third party can propose solutions or provide advice on the facts. Most types of *conciliation* use this approach; and
- determine the agreement for the parties, where the third party makes a decision which settles the matter. *Arbitration* is the most common example.

Mediation, where a mediator attempts to guide the parties toward agreement, is widely used because it allows the parties a high degree of involvement in the process. To aid open discussion, most mediation is conducted in confidence. This means that information which is raised can not be used against the party in other forums or courts.

In the advisory step, the outside party can have a wide ranging role — providing advice, evaluating claims or proposing solutions. Conciliation is the most common example of this element, though some mediators also play such advisory roles. In the advisory step, the third party must tread a fine line between providing advice and issuing determinations. As highlighted by the Insurance Australia Group, 'in some situations in Victoria, the Accident Compensation Conciliation Service by default becomes an arbitration when the conciliator expresses a view' (sub. 89, p. 30).

The determinative step in the ADR process is most similar to a court. The arbitrator is charged with weighing the evidence presented to him/her and ruling on the dispute. The approaches taken within this step — for example, the ability to call or question witnesses — vary widely in practice.

Some systems place a heavy reliance on conciliation and then use courts for matters that need further determination. Others use what is known as a 'med/arb' model, where arbitration commences immediately after unsuccessful mediation and often the same third-party convenes both processes.

Courts

Courts have been the traditional mechanism for resolving disputes. However, court-based systems can run counter to the objectives of dispute resolution. Namely, they can be slow and costly, and many participants find the process adversarial.

Court-based systems can also generate incentives that hinder early resolution. Legal fees tend to accumulate with the length of the process, with court appearances being particularly costly. This fee structure can encourage delay by some parties. In addition, court processes can engender a victim mentality in the injured worker. This can stifle the desire to engage in rehabilitation. The generally adversarial nature of court-based

resolution can also jeopardise positive return-to-work relationships. The Australian Plaintiff Lawyers Association submitted to the Commission that the above criticisms could be overcome as demonstrated by '… well-run and well-funded common law schemes' (IRsub. 252, p. 7).

Assessing points of law is one area where the specialist expertise of courts is required. Failure to use courts on such issues would remove an important layer of public accountability from the schemes.

Legislative models

All workers' compensation schemes have legislated dispute resolution systems that comprise elements of both ADR and court-based resolution. However, there is wide variation in both the balance between these two approaches and the type of ADR that is used. A snapshot of this variation is depicted in table 13.1.

In addition, table 13.1 includes information on the use of medical panels and the availability of provisional liability. Typically, medical panels are used to provide determinative findings and avoid further disputation on medical matters. Provisional liability enables the treatment of injury and illness to be undertaken without delay, thereby increasing the likelihood of successful rehabilitation and reducing the overall cost (chapter 7).

It is also important to recognise that the majority of schemes have evolved, some considerably, since the early 1990s. Often these changes have stemmed from a recognition of the significant impost and unproductive nature of legal costs — the recent changes in New South Wales being an example. In broad terms, across the various jurisdictions, the power of the courts have been reduced (in many cases to the level of ruling only on points of law) and the role of ADR has been elevated. It is suggested that Australia has the highest involvement of any country of ADR in workers' compensation disputes (Jackson 2001, p. 264).

Data on current systems

The most comprehensive information publicly available on dispute resolution under the current workers' compensation schemes is that published by the Workplace Relations Ministers' Council (WRMC 2003). Figure 13.1 provides data on disputation rates (new disputes as a proportion of new claims) across the jurisdictions. For example, in Tasmania in recent years, there has been one new dispute for every three to four new claims. A similar high disputation rate applied under Comcare and Seacare in 2001-02. In contrast, in

Queensland it has been one dispute for every 20 claims. All jurisdictions, except Western Australian and Tasmania, experienced an increase in dispute rates in 2001-02.

Table 13.1 **Legislative dispute resolution processes**

	Comcare	*NSW*	*Vic*	*Qld*
Internal review	Yes	Informal	Yes	Yes
ADR: Assisted	Optional mediation.	Tele-conference. After this, WCC can make decision 'on the papers'.	None	None
ADR: Advisory	1 or more conciliation conferences.	Conciliation	Conciliation	Mediation and case appraisal.
ADR: Determinative	Administrative Appeals Tribunal	Arbitration immediately follows unsuccessful conciliation.	None. The County Court is used instead.	None
Court access	Appeals on points of law to federal Court.	Appeal to President of the WCC then, on questions of law only, to the Court of Appeal.	After County Court, points of law can be appealed to the Supreme Court.	After Q-Comp review, matters can be appealed to Magistrate of the Industrial Court.
Medical panels	No. Expert witnesses are used.	Approved medical specialists are used (whose decisions can be appealed to panels).	Yes. Final and binding.	Yes. Final and binding.
Legal access	Yes	Yes (except for during medical assessments).	No (unless all parties agree).	Yes, for all elements.
Provisional liability	No	Insurance company must begin provisional payments within 7 days and can continue to a max. of 12 weeks. WCC can order interim payments of up to $5000.	Conciliator can order payments after unsuccessful conciliation.	No
Legislated dispute resolution time limits	Advisory times which are lengthy (up to 10 weeks between steps).	Respondent reply within 21 days and WCC determined.	Only conciliation (60 days).	Internal review must occur within 35 days.
Initial decision time limits [second number from claim to decision]	No fixed time limit (advisory only).	21 days for insurer. [28 days]	28 days	3 months

(Continued next page)

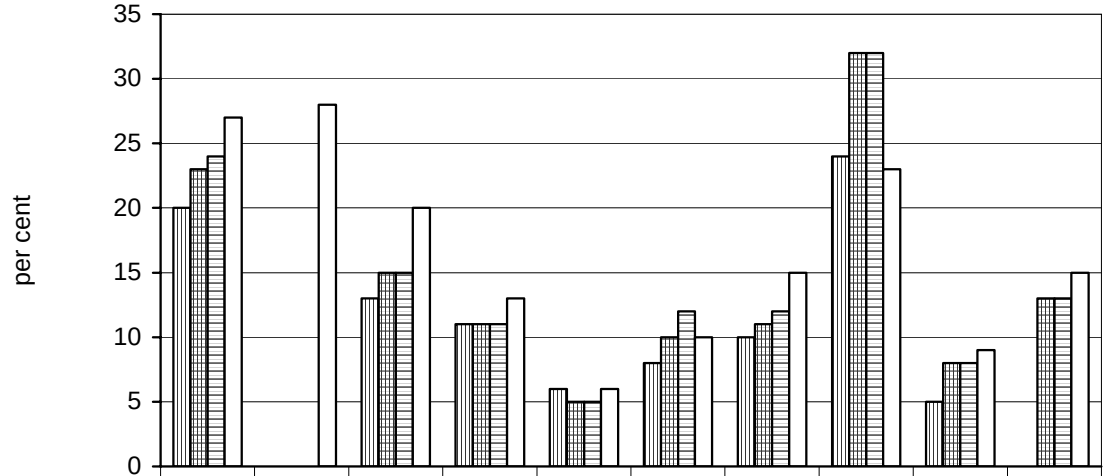
Table 13.1 (continued)

	WA	*SA*	*Tas*	*ACT*	*NT*
Internal review	Informal	Yes	Informal	Informal	Informal
ADR: Assisted	None	None	None	Case management meeting.	Mediation
ADR: Advisory	Conciliation conference	Conciliation	Up to two conferences.	For initial disputes conciliation is optional. For other disputes it is the first step.	Mediators can make recommend-ations to the parties.
ADR: Determinative	Provisional review (optional) and review hearing.	Arbitration	Arbitration	Arbitration	None
Court access	Points of law to Compensation Magistrates Court then Supreme Court.	Points of law first to Workers' compensation Tribunal, then to full bench and finally to the Supreme Court.	Points of law to the Supreme Court.	Magistrates Court on point of law.	The Work Health Court, then the Supreme Court on points of law.
Medical panels	Yes. Final and binding.	Yes, though not final (worker may not be assessed more than once every 2 months).	Yes. Final and binding.	Medical referee whose decision is final.	
Legal access	No (unless all parties agree or for points of law in review).	Yes, apart from medical assessments.	Non-legal for processes other than medical assessment. Legal only if otherwise would damage the worker's case.	Yes	
Provisional liability	Yes. Conciliator may order 10 weeks pay and medical expenses.	No	Yes. To start within 14 days of claim. Can be stopped by conciliator.	Yes, but income payments only (no medical).	Weekly payments commence within 3 weeks of application.
Legislated dispute resolution time limits	For all steps (conciliation, review and appeal to court).	For all steps including ADR and court.	For conciliation.	No	14 days for mediation.
Initial decision time limits [second number from claim to decision]	17 days (up to 27 days on extension).	Guidelines only (apart from 10 days for income maintenance). [15 days]	28 days [33 days]	28 days [35 days]	Decision can be deferred for up to 56 days.

Source: Information from individual schemes.

Figure 13.1 **Disputation rates**

per cent, new disputes as a proportion of new claims



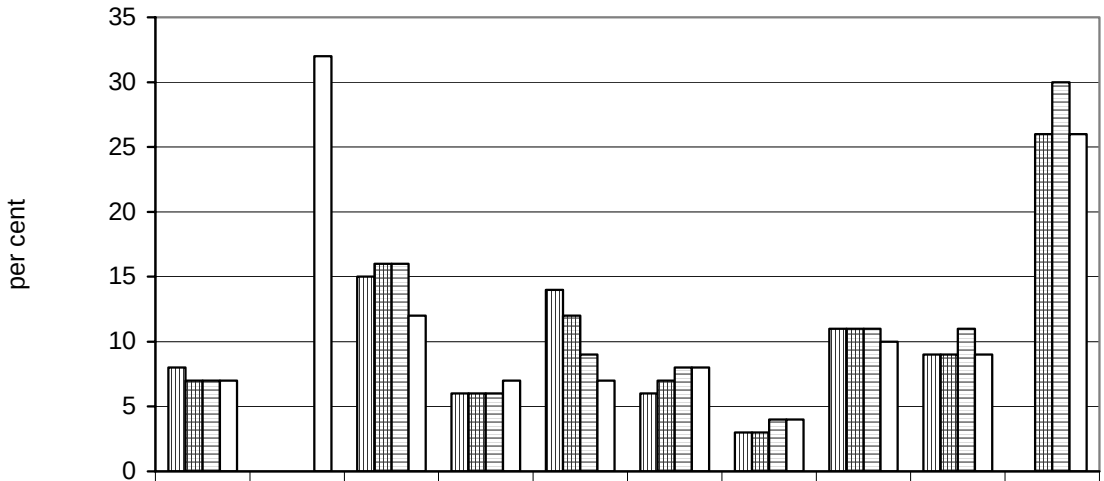
	C'care	S'care	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
1998-99	20	na	13	11	6	8	10	24	5	na
1999-00	23	na	15	11	5	10	11	32	8	13
2000-01	24	na	15	11	5	12	12	32	8	13
2001-02	27	28	20	13	6	10	15	23	9	15

Source: WRMC (2003, p. 55).

Care is required in making comparisons across jurisdictions as several states (New South Wales, South Australia and Tasmania) 'deem' claims to be disputes if a decision is not made on them within a specified time frame. This inflates the number of reported disputes as not all settlement offers made subsequently would be disputed. Also, the propensity to dispute claims is influenced by many factors, including satisfaction by the injured worker with the handling of the claim, expectations about the compensation available, excess provisions and the costs of lodging a dispute.

Available data on the costs of legal involvement in disputes (including those associated with common law claims) are depicted in figure 13.2, where legal expenses as a proportion of total claims costs, excluding costs of administration associated with dispute resolution, are given for each jurisdiction. The proportion of claims costs accounted for by legal expenses varies considerably among the jurisdictions. Under the Seacare scheme and in the Australian Capital Territory, the cost of legal expenses has exceeded 25 cents in the dollar of total claims costs in recent years. In contrast, in South Australia the cost has been as low as 3 cents in the dollar. In Queensland, there has been a significant decline in legal costs as a proportion of total claims costs over recent years. In 2001-02, statutory claim disputes accounted for some 56 per cent of disputes but only 4 per cent of the legal costs. The average legal cost of common law claims was $13 978.

Figure 13.2 **Legal costs as a proportion of total claims costs**
per cent, includes common law legal costs



	C'care	S'care	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
1998-99	8	na	15	6	14	6	3	11	9	na
1999-00	7	na	16	6	12	7	3	11	9	26
2000-01	7	na	16	6	9	8	4	11	11	30
2001-02	7	32	12	7	7	8	4	10	9	26

Source: WRMC (2003, p. 58).

New South Wales has recently reformed its disputes handling procedures (box 13.1) and initial information indicates that there had been significant reductions in both the number and legal cost of disputes. However, the Law Council of Australia cautioned against using it as an exemplar for dispute resolution. It reported that a recent review of the NSW Workers' Compensation Commission by John Hunter Management Services Pty Ltd had found that, with the closure of access to the NSW Compensation Court, the Commission was facing difficulty in meeting its legislative obligations as a result of concerns about a number of matters, including, '…communication and consultation, work structures, the IT system, staffing levels and the role of dispute assessment managers …' (IRsub. 250, p. 16).

The costs of legal involvement are variously managed and regulated among the jurisdictions. As mentioned above, legal costs are proportionately high for Seacare and in the Australian Capital Territory, both of which allow access to common law. Two other previously high-cost common law schemes, New South Wales and Queensland, have experienced recent reductions.

Box 13.1 **New South Wales dispute resolution**

From 1 January 2002 the New South Wales workers' compensation scheme introduced new procedures to prevent and resolve claims disputes. To prevent disputes, WorkCover established a claims assistance service whereby injured workers and their employers could obtain impartial advice about the scheme. It also involved a system of provisional liability under which insurance companies that handle claims for WorkCover are required to commence weekly compensation payments and injury management within seven days of initial injury notification. The early indications are that the prevention activities are acting as intended and achieving worthwhile improvements in the operation of the scheme.

To resolve disputed claims, a new independent Workers' Compensation Commission has been established. It provides a complete and integrated dispute resolution service that includes conciliation, arbitration and medical assessment. It has been progressively replacing the Workers' Compensation Resolution Service and New South Wales Compensation Court in settling disputes. The Resolution Service had been established in 1995-96 'to provide a fast and inexpensive method of resolving disputes' and replaced a voluntary conciliation service previously provided by WorkCover. Use of the Resolution Service was a requirement before matters were considered by the Compensation Court. In the event, the Resolution Service was able to settle only some 10 per cent of disputes and, in effect, became a 'stepping stone' on the way to the Court. Of the disputes lodged with the Courts, less than 10 per cent proceeded to judgment, with over 90 per cent being settled 'on the steps of Court'.

The new Commission encourages the parties directly involved to resolve their disputes and uses a five-step process to facilitate this, namely after acceptance:

1. Notice to parties explaining the processes to be followed, timelines, etc.
2. An 'on the papers' review undertaken by the assigned arbitrator.
3. Preliminary telephone conference with the parties establishing the facts and the prospects of settlement of the dispute 'on the papers'.
4. The conciliation conference where the arbitrators use their best endeavours to bring all parties to a settlement.
5. If the parties do not reach an agreement at the conciliation stage, on the same day and after a short break, the arbitration hearing and determination.

In the first year of operation, the Commission reported a marked decrease in the number of disputes filed and time taken to resolve them (to an average of 91 days after receipt). Some 41 per cent of cases were settled, 27 per cent were discontinued by the applicant or by agreement of the parties, 10 per cent were determined by the arbitrators, either 'on the papers' or at hearing, 12 per cent were closed by registration of a s66A agreement (an agreement between an insurer and a worker for the payment of lump sum compensation for permanent loss) and 3 per cent as a result of a workplace injury management recommendation by the Registrar of the Commission.

Sources: HWCA (2002b); Workers Compensation Commission (2003).

13.3 Directions of reform

There was general support amongst participants that dispute resolution systems can assist the objective of delivering equitable and cost-effective outcomes. Of particular importance to this objective has been the speedy resolution of points of difference. This can make the outcome more acceptable to the parties, lower the waiting costs and facilitate expeditious return to work.

With such objectives in mind, Transformation Management Systems outlined a number of what it considered to be 'best practice essentials' for the design of dispute resolution schemes (sub. 108, p. 12). These include:

- detailed information which explains to stakeholders their benefits and rights;
- informed initial claims decisions, including early information exchange (if not already done for the initial decision);
- internal review;
- assisted or advised ADR to resolve 80 per cent of disputes;
- determination; and
- legal review.

To provide both equity and cost effectiveness, this approach has two broad aims. These are to prevent disputes from arising and solve those that do arise using the least invasive methods first. Allied to these aims are the issues of legal access and use of medical panels.

Preventing disputes and the interaction with claims processing

In preventing disputes, the initial handling of claims is most important. The Heads of Workers' Compensation Authorities in their 1997 report, *Promoting Excellence*, said:

> The decision to accept or reject a claim for compensation is one of the most crucial trigger points within the workers' compensation system … failure to apply quality decision making practice at this stage can lead to anger and a process of antagonistic confrontation and disputation. A decision to deny a claim, made on proper information and communicated to the worker in an appropriate manner, does not have to lead to further disputation. (HWCA 1997, p. 150)

Or, as the Australian Rehabilitation Providers Association put it, sound claims management involves:

- Rapid claim determination (and payment of entitlements);
- Open, respectful communication including provision of information about rights and responsibilities; and

- Minimisation of dispute triggers. (IRsub. 228, p. 2)

Early claims determination reduces not only the likelihood of disputation arising, but also the success of rehabilitation and return to work, as discussed in chapter 7.

The role of information in claims assessment is paramount. Best practice claims management includes requirements on the parties to a claim to submit all relevant information as early as possible and includes incentives for this to occur.

Of course, delays in accessing relevant information can still occur — perhaps due to tardiness of the parties or the sheer volume of claims to be handled. In these circumstances, many claims managers will simply make the best decision they can. This can involve letting some claims go to dispute.

As Guthrie noted, in Western Australia:

> … at present there is no cost disincentive to deter insurers letting matters go to the Directorate. … in respect of a certain category of small claims, the Directorate operates as some form of quality control for some insurers, by providing a review service at no extra cost. (2001, p. 140)

In other jurisdictions (South Australia and Tasmania), missing a claim deadline results in the matter being deemed a dispute. As a consequence, avoidable cost is added to claims. It is borne by the parties and the scheme overall. In Tasmania in 1998-99, deemed disputes accounted for half of total disputes.

An alternative to using 'hard' time limits is to allow extension of the deadline coupled with the commencement of provisional payments. This approach, which is currently used in New South Wales and Western Australia, provides an incentive for assessors to determine claims expeditiously and allows extra time for claims to be assessed without passing an additional burden on to injured workers. In addition, provisional payments for medical expenses could assist faster rehabilitation. The use of limited provisional payments has been cited by several inquiry participants as removing an incentive for insurers to inappropriately deny claims.

Provisional payments can, however, result in overpayments and difficulties of recovery where subsequently the scheme is found not to have liability for the costs. It was on this basis that they were not supported by the Chamber of Minerals and Energy of Western Australia Inc. (IRsub. 237, p. 6). Similarly, the Australian Industry Group cautioned against recommending provisional liability. This was on the basis that it '… weakens the work relatedness nexus for claims' and, when combined with problems in notifying claims, '… the problems associated with provisional liability outweigh the benefits' (IRsub. 240, pp. 27, 28). Australian Business Limited reported that, while it was early days, the new provisional liability provisions in New South Wales were facilitating earlier interventions

and return to work. It considered, 'Effective use of provisional liability requires the application of appropriate systems and processes to manage potential abuse' (IRsub. 249, p. 12).

Transformation Management Systems suggested that out-sourced primary decision makers faced additional incentives to pass difficult decisions onto dispute resolution systems:

> … where insurers are seeking market share ... [they] ... quite often will not want to pass the bad news of the claims decision to their clients … they can allow the dispute resolution body to play that role. (trans., p. 942)

Contracting disputation rates into agreements with claims managers, as happens in South Australia, can help reduce the incentive to pass responsibility.

The communication of claims decisions can also influence disputation rates. Without a careful explanation of the reason for rejection, frustration may build-up which could result in a dispute. In the Comcare scheme, Wallace found that:

> … if a claims officer picked up the telephone and contacted a worker he or she would reduce the chances of that claim being disputed by 20%. In contrast, if a claim were referred to an expert doctor, without first contacting the worker, the chance of dispute would increase by 33%. (2001, p. 5)

Finally, internal reviews can provide an invaluable feedback for the claims assessment process. Reviews may aid identification of systematic flaws in claims processes, and may identify emerging issues or training needs for primary decision makers.

Solving disputes

ADR has been promoted as solving disputes in the most cost-effective and least invasive manner. Its informality allows people to express their own concerns and do so early in the process. Such features can produce enduring resolution with minimal damage to the relationships between the parties. Ballantyne and Mazingo, in their review of empirical literature that analysed the efficacy of ADR in American workers' compensation schemes, concluded that:

> Mediation is the most promising form of informal dispute resolution … Most studies show that mediation produces high levels of participant satisfaction and perceptions of fairness; it also resolves cases faster than formal hearings. (1999, p. 81)

These benefits arise where the parties trust the ADR process and take it seriously. Where it is compulsory, ADR may, on occasions, be regarded by some as a stepping stone that must be endured before 'having their day in court'. As the Insurance Australia Group suggested, the processes can become:

> … long and complicated, consisting of several non-binding stages that act as stepping stones to judicial determination. While there is ample opportunity to achieve a settlement, there is little incentive to do so. (sub. 89, p. 32)

In most schemes, where ADR is legislated, it is compulsory. To encourage its use and to provide an incentive for its use in settlements, some schemes empower conciliators to prevent the matter proceeding further if they believe a party is not making 'reasonable' attempts to reach a settlement. Cost penalties are a related incentive used in many schemes to discourage late settlement. They are awarded against appellants whose appeals achieve only marginal increases.

ADR will not be able to resolve all disputes. As a consequence, its efficacy can be enhanced if it includes suitable screening. For example, some cases, such as those which turn solely on complex medical matters or points of law, require special consideration. Through screening, it is possible to identify them at the outset. Sending them to a medical panel or for judicial determination immediately is likely to be the most efficient approach. The identification of such cases, however, is better made by the dispute resolution service, which has the experience to identify such issues, than by the parties themselves.

Finally, it needs to be recognised that ADR processes are an administrative system and like all such systems require regular monitoring in order to maintain their relevance and efficacy. This involves the training of staff, systems reviews that identify potential problems and appropriate funding.

Legal access

Several schemes have restricted access to legal representation. Motivating this is a view that lawyers can benefit financially from prolonging disputation. This increases costs and makes ADR confrontational, rather than conciliatory. The Law Society of New South Wales' guidelines provide that during mediation 'Legal advisors are not present at mediation as advocates, or for the purposes of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal advisor who does not understand and observe this is a direct impediment to the mediation process' (2003, p. 14). Nonetheless, McCarthy considered that, when lawyers attend mediations, while in the midst of litigation, it is hard for them 'to allow their clients to speak, let alone take part in the mediation in the independent manner the ADR theorists would idealise' (2001, p. 46).

While it may be ideal for parties to represent themselves, it is widely accepted that a power imbalance exists between workers and insurers or employers. In general, workers come to negotiations with limited experience, legal knowledge or financial capacity. This power

imbalance between 'one-shotters' and 'repeat players' has long been recognised to produce unbalanced outcomes between unrepresented parties (Galanter 1974).

In addition to interests of equal representation, the legal skills of lawyers can enable quick identification of relevant information, or when more is required. Without such professional assistance, the burden of information collection is passed onto the parties.

In assisted and advisory forms of ADR, the mediators or conciliators endeavour to have parties speak for themselves. The power asymmetry can be overcome where workers have recourse to sources of knowledge and advice available on an 'as needs' basis. In addition to lawyers, union representatives and other experienced advocates can play this role.

Several participants called for schemes to establish an advocate's office to provide an additional source of information (Henderson, trans., p. 287; QBE Insurance sub. 99, pp. 61–2). The Shop, Distributive & Allied Employees' Association Victorian Branch, which provides an advisory service to their members on workers compensation claims and support during disputation, considered Victoria has a good system of conciliation (IRsub. 239, p. 15). While it considered that there should be a greater understanding of the conciliation process, it pointed out that the Victorian Accident Compensation Commission directed claimants to free advisory services, such as those provided by WorkCover Assist (funded by the Victorian Government), Victoria Union Assist and by the Branch to its members. These providers operate throughout the State and support workers attending conciliations.

In Canada (where there is virtually no access to courts for settlements), all schemes except Quebec's have an advisory or counselling function to assist workers through the claims and disputes processes. Similar provisions apply for employers in some of the provinces (AWCBC 2003).

To provide legal representatives with a financial incentive for speedy outcomes, cost schedules have been advocated by several participants (Australian Industry Group sub. 104, p. 36; Insurance Australia Group sub. 89, p. 32; Guthrie, trans., p. 171). Guthrie, who has reviewed dispute resolution on a number of occasions, considered legal representation was fraught with problems. He said:

> … workers and employers and insurers are entitled to legal representation, but that there should be very strict guidelines on the time limits placed to actually achieve certain tasks … If those tasks are not completed within time there should be financial penalties which can be sheeted home to their legal practitioners and that any costs which are available to legal practitioners in the system should be subject to a very rigid scale and that legal practitioners shouldn't be able to exploit and contract out of a system. (trans., pp. 170–1)

An interesting example was provided by the NSW scheme which used a 'negative fee' scale whereby lawyers received proportionally higher fees for earlier settlements. This

approach encourages more intensive information gathering and analysis to occur at the beginning of the process.

Medical assessments

Many disputes rest on questions of medical opinion. Over the past decade, most jurisdictions have moved from relying on participant provision of expert testimony to using panels of medical experts to rule on medical matters. This has reduced expert testimony disputation and medical panels have become valued for their independence as well as the time and cost-savings they can deliver. The criticism of relying on expert testimony has been that when required to adjudicate on divergent opinion, judges have 'split the difference' (Boden 1992). This in turn encourages the use of ambit claims which can undermine confidence in the whole process.

Many stakeholders find the process of determining medical opinion adversarial. Worse, some view expert witnesses as partisan and their decisions as being 'up for sale'. Similar views are held by some judges. Freckelton, in reviewing Australian judicial perspectives on expert evidence, reported that:

- 70% regularly heard expert witnesses representing the same side; and
- 40% thought the partisanship in testimony was a significant problem for the quality of fact finding in court. (Freckelton 1999, p. 154)

It was suggested by Dr Niall, chief medical officer of the Compensation Court of New South Wales, that as an alternative to formal statutory mechanisms, there could be scope for joint medical consultations to provide a non-statutory method of resolving medical disputes. He noted that it had been used by self-insurers and by insurers. He considered that 'In the right circumstances … [it could form] … an excellent adjunct to formal medical panel assessments' (IRsub. 198, p. 7).

Typically, joint medical consultations involve two doctors consensually appointed by the parties to answer specific medical questions. Dr Niall considered that it was likely to be successful where adversarial feeling was not high and where the parties could negotiate arrangements for themselves. While not specifically excluded by existing formal dispute settlement arrangements, the issue remains as to whether there should be formal recognition of its role in dispute resolution legislation and the nature of its recognition, if any. The Commission also notes that a form of this has been trialled by the Administrative Appeals Tribunal (appendix F).

Transformation Management Systems (1995b, p. 5) has suggested that there are several 'best practice' principles which ought to be employed when designing medical panels, namely:

- appointments should be independent and by peer — to ensure that panels are trusted and treated as experts;
- cases should be screened so medical panels deal with only complex medical issues;
- medical panels should address medical fact only (away from fitness for work assessments — an example that blurs medical and legal issues) such that appeals can be limited without inhibiting the right to due process; and
- their decision on such matters should be final.

On the scope for medical panels, Dr Niall advised:

> … you really ought not to ask doctors other than what you might call pure medical questions. If you do — you want a medical slant on some issues which may not be entirely medical [for example, treatment disputes and causation disputes] — then you should be cautious about making the doctor's opinion in those circumstances conclusive. (trans., p. 1085)

It was because of such concerns that the Queensland Council of Unions advocated medical review panels '… must be used on questions of medical opinions only …' (IRsub. 241, p. 9). Concerns about using medical opinions conclusively on other than medical matters were also raised by BDS Recruit Pty Ltd (IRsub. 213) and by The Workers Compensation Support Network (IRsub. 212).

13.4 National framework issues

Dispute resolution schemes in the different jurisdictions share several common features. A form of conciliation is used in all jurisdictions and the use of arbitration is almost as wide spread. Despite these similarities, some participants advocated moves toward a more standardised dispute resolution system. Greater standardisation was sought by the Insurance Council of Australia so as to minimise compliance costs and to prevent the differences acting as 'a catalyst for increased disparities in outcomes between jurisdictions' (ICA, sub. 74, p. 29). Others, such as the Shop, Distributive & Allied Employees' Association Victorian Branch, saw strengths in State-based systems of dispute resolution which could not be replicated nationally (IRsub. 239, p. 15–17).

For inter-state firms that have their employees covered under a number of workers' compensation schemes, the associated dispute resolution procedures raise added compliance issues and costs. These derive from the need to:

- conform to the particular dispute resolution procedures specified in each jurisdiction;
- prepare the appropriate material in a timely manner; and
- engage a variety of legal resources who are expert in the various jurisdictions.

While the preparation costs would be incurred irrespective of the jurisdiction in which the dispute was heard, with a common dispute resolution system, the added costs from meeting the differing requirements of each existing system would be avoided.

However, as several participants have reinforced, dispute resolution must be designed with the details of each scheme in mind. Insurance Australia Group considered that it was:

> … difficult to compare the various approaches as the results may reflect broader scheme design and cultural issues … The success of the scheme is dependent on the ability to resolve disputes and the appropriate ADR mechanism is dependent on the type of scheme. (sub. 89, p. 30)

Another factor that mitigates against rapidly moving to a simple national system is that, in order to work effectively, a well designed scheme has to be understood and respected by the people that use it. As BDS Recruit Pty Ltd added, 'Each participant should also understand the role others have in the system' (IRsub. 213, p. 6).

Dispute resolution schemes have gone through considerable change in the past ten years, often in response to unintended consequences of previous reforms. Thus when determining if further changes are warranted, the cost of added confusion should not be ignored.

Queensland reports the lowest rate of disputation (figure 13.1). Transformation Management Services suggested that :

> … [the reason] we think it's so successful in keeping its disputes down … is that they have had longstanding entitlements and there is a strong cultural understanding of what their rights are and how the system works. Everybody knows what to do. (trans., p. 937)

Some features of the Queensland system which contribute to its success in achieving equitable outcomes that the Queensland WorkCover drew attention to were: its non adversarial nature; reasonable timeframes for review of decisions; independent review of decisions by the regulator; and independent assessment of medical decisions by medical assessment tribunals (IRsub. 225, p. 39).

Differences between jurisdiction can also provide scope for innovation and development. Recognising successful new approaches elsewhere could result in schemes iterating toward best practice. For example, the Insurance Australia Group saw merit in combining the mediation/conciliation step of the WA scheme and the determinative aspects of the Workers Compensation Commission in New South Wales (trans., pp. 609–10).

The following recommendation, prefaced in the interim report, was generally supported by a range of participants (Australian Business Limited, IRsub. 249, p. 18; Australian Chamber of Commerce and Industry, IRsub. 196, p. 26; Australian Meat Industry Council, IRsub. 234, p. 7; Housing Industry Association, IRsub. 193, p. 8; Queensland Council of Unions, IRsub. 241, p. 9). Those that sought maintenance of a substantial role for common

law in the operation of workers' compensation schemes also saw the use of the courts as the last resort and were supportive of mandatory pre-litigation procedures (K M Splatt & Associates, IRsub. 197, p. 2).

Willis considered that, while the recommendations were excellent in theory, they could be improved if there was 'A formal system of feedback and evaluation by claimants …' (IRsub. 244, p. 4). There was general recognition that to operate effectively, any dispute resolution system needed to be adequately resourced with appropriately qualified and experienced people.

RECOMMENDATION

The Commission recommends the following features of mechanisms to manage and resolve disputes about claims in an equitable and effective manner:

- ***be tailored to deal with the disputes arising from the specific workers' compensation scheme that it supports and the broader dispute resolution culture of the jurisdiction within which it operates;***
- ***be supported by claims handling methods that minimise the likelihood of disputes arising in the first place. These include:***
  - ***the provision of information about the scheme to stakeholders which explain their benefits and rights;***
  - ***informed initial claims decisions based on an early exchange of all available information; and***
  - ***use of provisional liability/payments for a limited period; and***
- ***applications to be screened, using the least invasive methods first. These include:***
  - ***a requirement for claims managers to provide for, and injured workers to first use, internal review procedures;***
  - ***use of alternative dispute resolution procedures involving mediation/ conciliation and arbitration, with incentives for the use of the least invasive;***
  - ***identification and, as appropriate, rectification of informational and power imbalances;***
  - ***appeals allowable to a suitable court on points of law; and***
  - ***use of independent medical panels to provide final and binding determinations on questions of medical opinion.***

Under the national framework model D as outlined in chapter 5, there would be no change initially in current disputes settlements arrangements. Over time, if the recommendation was adopted by the individual jurisdictions and the national body achieved more formal information sharing and cooperative policy formulation in workers' compensation among

the jurisdictions, then there could be a greater consistency of disputes settlements among the existing schemes.

Under model A (self-insurance under Comcare), dispute resolution would be as currently applies under the Comcare scheme. It involves an independent review within Comcare, followed, if needed, by Administrative Appeals Tribunal case conferences, mediation, conciliation and a Tribunal hearing. The Tribunal's determinations are conclusive, except on points of law where appeals to the Federal Court are permitted. Details of the dispute resolution system are given in appendix F.

In terms of Comcare's existing dispute resolution procedures, the existing mechanisms which do not already reflect those recommended are the use of provisional liability/payments and determinations on questions of medical opinion. Model B (an alternative national self-insurance scheme) and model C (an alternative national premium-paying insurance scheme) both require new legislation to be implemented. This provides an opportunity to review Comcare's dispute resolution procedures and adopt procedures that more closely implement the mechanisms recommended above.

APPENDICES

A Conduct of the inquiry

A.1 Introduction

The Commission received a total of 262 submissions during the inquiry — 177 were received prior to the release of the interim report in December 2003 and a further 85 following its release. All submissions are listed in section A.2. In addition, those who provided comment on the interim report at public hearings are shown in section A.4.

Following receipt of the terms of reference, the Commission placed advertisements in national and metropolitan newspapers and appropriate publications inviting public participation in the inquiry. Information about the inquiry was circulated to people and organisations likely to have an interest in it. The Commission also released an issues paper to assist parties in preparing their submissions. Subsequent information about the progress of the inquiry has been sent to those who have expressed an interest. All of this information has been made available on the Commission's website (http://www.pc.gov.au).

A.2 List of submissions

The following table lists submissions received. Submissions containing commercial-in-confidence information have been denoted with an asterisk (*).

Participant	*Submission no.*
ACROD Limited	IR 242
ACT Government	IR 243
ACTU	133, IR 186
AMP	121
Aon	73
ARIMA Ltd, Victoria	25
Association of Rehabilitation Providers in the Private Sector, ACT	139

| *Participant* | *Submission no.* |

Australasian Meat Industry Employees Union	117
Australian Business Limited	106, IR 249
Australia Meat Holdings Pty Ltd	96, 170, IR 247
Australian Bankers' Association	101*
Australian Chamber of Commerce and Industry	81, 116, 138, IR 196
Australian Clinical Psychologists	34
Australian Dental Association, Victoria	46
Australian Industry Group	104, IR 240
Australian Manufacturing Workers' Union	119, IR 188, IR 231
Australian Meat Industry Council (formerly The National Meat Association of Australia)	IR 234
Australian Medical Association	54
Australian Nursing Federation	70
Australian Physiotherapy Association	20
Australian Plaintiff Lawyers' Association	69, IR 252
Australian Rehabilitation Providers Association	160, 175, IR 183, IR 228
Australian Services Union, South Australia and Northern Territory	33
Ausworks	161
Bates, Ms Julie Marie	IR 179
BDS Pty Ltd	36
BDS Recruit Pty Ltd	IR 213
Belle Design and Manufacturing	2*
BHP Billiton Ltd	110
Boyer, Ms Ros	50
Burnie City Council	18
Business Council of Australia	143
Business SA	53, IR 187
Buys, Associate Professor Nicholas	92
Bywater, Mr Kevin	56*
Carnegy, Mr Ivan	115
Centennial Coal Company Ltd	145
CFMEU (Mining and Energy Division)	153, IR 257
Chamber of Commerce and Industry, Western Australia	55
Chiropractors' Association of Australia (National) Limited	IR 230

Participant	*Submission no.*
Clark, P S	127, IR 254
Coal Services Pty Limited	IR 232

Coles Myer Ltd	155
Commonwealth Safety Management Forum	IR 258
Community & Public Sector Union/State Public Services Federation Group	52, IR 246
Congress of Occupational Safety and Health Association Presidents	45
Council of Small Business Organisations of Australia Ltd	7
CSR Ltd	109
Defence Personnel	6
Dept of Consumer and Employment Protection, Western Australia	58, IR 219
Dept of Employment and Workplace Relations	166
Dept of Family and Community Services	167
Dial-An-Angel Pty Ltd	149
Direct Selling Association of Australia Inc	100, IR 209
Employment Advocacy Solutions Pty Ltd	41
Field, Ms Evelyn	1
Flint Forensics Pty Ltd	150
Geoff McDonald & Associates Pty Ltd	IR 192, IR 226
GlaxoSmithKline Australia Pty Ltd	158
Green Triangle Injured Persons Support Group Inc	21
Group Training Australia Ltd	65
Henderson, Ms Terri	4
H.R. Nicholls Society	140
HMV Australia Pty Ltd	30
Hollis-Watts, Mr Phillip	173
Housing Industry Association Ltd	35, IR 193
Injuries Australia	43, 125, IR 200, IR 221, IR 248
Institute of Actuaries of Australia	88, 171, IR 182
Insurance Australia Group	89, 146
Insurance Council of Australia	74, 162, 174, IR 260
Insured Persons Action & Support Association	90
Jim Pearson Transport	IR 224
Kamalaharan, Dr & Associates	118
K M Splatt & Associates	IR 197, IR 210, IR 214, IR 216
Labour Force Australia Pty Ltd	26
Labor Council of New South Wales	147
Law Council of Australia	62, IR 194, IR 250

LMR Roofing Pty Ltd	87, IR 199
Lucire, Dr Yolande	102
Mak, Mr Hing Kwok	44
Manpower Services (Australia) Pty Ltd	IR 178
Master Builders Australia Inc	79, IR 217
Master Cleaners Guild of Western Australia Inc	24
May, Mr John and Burl, Ms Margo	60
Media Entertainment and Arts Alliance	86, 122*
Merse, FitzGerald & Nichols Pty Ltd	5
Millen, Mr Jed	61
Minerals Council of Australia	63, 141
MS Australia, Victoria	77
National Australia Bank Ltd	42
National Council of Self Insurers	72, 168, IR 223, IR 261
National Farmers' Federation	94
National Insurance Brokers Association	59, 129, IR 204
National Research Centre for OH&S Regulation, Regulatory Institutions Network	22
National Tertiary Education Industry Union	68
NatRoad Limited	IR 236
Niall, Dr Paul	IR 198
Northern Territory Association of Rehabilitation Providers	152
Northern Territory Government	144
NSW Minerals Council	172, IR 235
O'Donnell, Ms Carol	10, 13, IR 184
Objective Claims Solutions	17
OccCorp	49, IR 195
Oddy, Mr Trevor	95
OT Australia, Queensland	159
OT Australia, Victoria	16, 131

Participant	*Submission no.*
Pacific National	169
Pacific Terminals (Australia) Pty Ltd	85
Peak Conditioning Pty Ltd	142
Plastics and Chemicals Industries Association	114, IR 222
QBE Insurance	99
Queensland Council of Unions	91, IR 206, IR 241

Queensland Government – Dept of Industrial Relations	154
Queensland Law Society	97, IR 207, IR 245
Queensland Workers' Compensation Self Insurers' Association	IR 253
Quinlan, Professor Michael	93
Recovre	157
Recruitment and Consulting Services Association Ltd	47, 177
Rehab One Physiotherapy	IR 218
RSI & Overuse Injury Association of the ACT	113
Safety Institute of Australia	48
Sandilands, Mr P A	23, 176, 181, IR 191, IR 211, IR 259
Self Insurers Association of Victoria	107, 163
Self Insurers of South Australia	71
Sherryl Catchpole Medical Pty Ltd	128
Shop, Distributive & Allied Employees' Association, Victorian Branch	IR 239
Sing Tel Optus Pty Ltd	57*, 134, IR 189
Skilled Engineering	IR 202, IR 208
SoftLaw Corporation Ltd	132
South Australian Rehabilitation Providers' Association	67
Specpipe Group	IR 215
Spencer, Ms Geraldine	3, 9, 11, 12, 148, IR 180, IR 185, IR 201
Spooner, Mr Michael	103
Statewide Group Training South Australia	80
Tasmanian Government	135
Taylor, Mr Robert Richard	126, IR 203
Taylor, Ms Charmaine	78*
Telstra Corporation Limited	136
Territory Insurance Office	27

Participant	*Submission no.*
The Association for Payroll Specialists	15, IR 227
The Australasian Faculty of Occupational Medicine	29
The Australian Psychological Society Ltd	38, 165
The Australian Workers Union, Greater South Australian Branch	112
The Chamber of Minerals and Energy of Western Australia Inc	IR 237
The Ergonomics Society of Australia Inc	123, 86
The National Meat Association of Australia	82
The National Meat Association of Australia, New South Wales	84

The National Meat Association of Australia, Queensland	83
The New South Wales Bar Association	64, IR 190
The RiskNet Group	120
Transformation Management Services	108
United Group Limited	31, IR 238
Valued Independent People Inc	14
Victorian Automobile Chamber of Commerce	105
Victorian Employers' Chamber of Commerce and Industry	66
Victorian Government	164, IR 256
Westpac Banking Corporation	75, 130, IR 229
Wigglesworth, Dr Eric	8
Willis, Ms Judith S	124*, IR 244
Winsen, Dr J K	76
Winzer, Mr Neil	39, IR 220
Woolworths Ltd	98, 156
WorkCover New South Wales	151, IR 255
WorkCover Queensland	IR 205, IR 225
Workers'Compensation and Rehabilitation Commission of Western Australia	111, 137, IR 262
Workers Compensation Support Network	19, IR 212
Working Amour	28, IR 251
Workplace Injury Management Services Pty Ltd	37
Worksafe Western Australia Commission	51
Wright MP, The Hon Michael	IR 233
Xstrata Coal Australia Pty Ltd	32, 40*

A.3 Visits

During the course of the inquiry, 120 meetings were conducted covering each state and territory.

Australian Capital Territory

Australian Chamber of Commerce and Industry
Australian Prudential Regulation Authority
Australian Rehabilitation Providers Association
Australian Taxation Office
Chief Minister's Department

Coal Services Pty Limited
Comcare Australia
Council of Small Business Organisations of Australia Ltd
Defence Personnel
Department of Employment and Workplace Relations
Department of Family and Community Services
Department of Finance and Administration
Department of Health and Aged Care
Department of the Treasury
Master Builders' Australia Inc
National Farmers' Federation
National Occupational Health and Safety Commission
National Safety Council of Australia
Seacare Authority
Standing Committee on Employment and Workplace Relations
The Australian Psychological Society Ltd
The Government Actuary
WorkCover Authority

New South Wales

Australian Employers Federation
Australian Industry Group
ANZ
Australian Prudential Regulation Authority
Australian Rehabilitation Providers Association
BHP Billiton Ltd
GIO
Injuries Australia
Insurance Australia Group
Insurance Council of Australia
New South Wales Minerals Council
Pacific National
Professor Michael Quinlan
Self Insurers Association
Sing Tel Optus Pty Ltd
University of NSW, Centre for Tax Studies
Westpac Banking Corporation
WorkCover New South Wales
Workers' Compensation Commission

Northern Territory

Australian Medical Association
Australian Nursing Federation
Commonwealth Public Sector Union
Department of Corporate and Information Services
Department of Employment, Education and Training
Department of Workplace Relations
Department of the Chief Minister
Northern Territory Chamber of Commerce and Industry
Northern Territory Law Society
Northern Territory Treasury
Northern Territory University, Law School
Office of the Commissioner for Public Employment
Territory Insurance Office
United Trades and Labor Council

Queensland

Australian Plaintiff Lawyers Association
Brisbane City Council
Council of Unions
Department of Industrial Relations
Department of Premier and Cabinet
Inergise Australia
Nevin, Mr Bill
Q-Comp
Queensland Council of Unions
Queensland Mining Council
Self Insurers Association
Shine Roche McGowan
Woolworths Ltd
WorkCover
Workers Medical Centre
Work Health Safety

South Australia

Business SA
Department of Administrative and Information Services
Department of Business, Manufacturing and Trade
Department of Premier and Cabinet
Department of Treasury and Finance

Office for the Commissioner for Public Employment
Origin Energy
Peakcare
Self Insurers Association
United Trades and Labor Council
WorkCover Corporation
Workplace Services

Tasmania

Chamber of Commerce and Industry
Department of Infrastructure, Energy and Resources
Department of Premier and Cabinet
Kirwan & Associates
Self Insurers Association
Workplace Standards Australia

Victoria

Australian Chamber of Commerce and Industry
Australian Council of Trade Unions
Bracton Consulting Services
Carter Holt Harvey Aust
Coles Myer Ltd
Department of Premier and Cabinet
Department of Treasury and Finance
GIO
National Road Transport Commission
Self-Insurers Association
The Australian Psychological Society Ltd
Transformation Management Services
Unilever Australasia
Victorian Government
WorkCover Authority

Western Australia

Chamber of Commerce and Industry
Coles Myer Ltd
Department of the Treasury
Insurance Australia Group
Insurance Commission

Self Insurers Association
Unions of Western Australia
Wesfarmers
WorkCover
WorkSafe

A.4 Public hearings

Public hearings were held during June 2003 in all States and the Australian Capital Territory, Darwin's hearing was held via video link. Interim Report hearings were held in December 2003 in Victoria, New South Wales and the Australian Capital Territory.

Table A.1 **Public hearings**

Participant	*Transcript page no.*
Hobart Hearing – 10 June 2003	
Safety Institute of Australia	2 – 19
Merse Fitzgerald and Nichols Pty Ltd	20 – 30
Mr Robert Pearce	31 – 40
Ms Sharon Hyland	41 – 48
Adelaide Hearing – 12 June 2003	
Congress of Occupational Safety and Health Association Presidents	50 – 63
Self Insurers Association	64 – 88
Rehabilitation Providers Association of SA	89 – 109
Mr Kevin Purse	110 – 137
Perth Hearing – 13 June 2003	
Mr Neil Robert Winzer	139 – 147
Mr Robert Guthrie	148 – 172
Mining and Resources Contractors Safety and Training Association	173 – 183
Mr David Massey	184 – 187
Mr Les Reid	188 – 191
Group Training Australia	192 – 193
Chamber of Commerce and Industry Western Australia	194 – 210

Darwin Hearing – 16 June 2003

Canberra Hearing – 18 June 2003

Participant	*Transcript page no.*

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Canberra Hearing – 8 December 2003

B Australian Government Actuary

As part of its inquiry process, the Commission requested advice from the Australian Government Actuary as to the financial impact on the Australian Government if private sector employers were encouraged to seek self-insurance under the *Safety, Rehabilitation and Compensation Act 1988*. This appendix provides a copy of the Actuary's advice.

The appendix is structured as follows:

B.1 Introduction

1.1 We have been asked by the Productivity Commission to provide advice in relation to its 'Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks'.

1.2 Specifically, we have been asked to consider the impacts on the Commonwealth which might arise if private sector employers were encouraged to seek self-insurance licences under the *Safely Rehabilitation and Compensation Act 1988* ('the Act'). In particular:

- The nature of financial risks to the Commonwealth were applications to be approved;
- The adequacy of existing prudential arrangements under the Act;
- How existing prudential arrangements could be changed to reduce to an acceptable level the financial risks to the Commonwealth.

1.3 We provided related advice on this matter to the Department of Employment and Workplace Relations in 2002. We understand that the Productivity Commission has a copy of that paper.

1.4 This current report only considers the specific issues above. A number of other issues fall outside the scope of this report. However, they are important and would also require careful consideration. Some of these issues are:

- OHS performance assessment, audit, and management
- Workplace relations issues associated with self-insurance
- Scheme design under the Act
- Possible downstream impacts on State schemes

1.5 The findings in this report are based on our:

- Examination of the Act and of the prudential conditions in some other jurisdictions
- Discussions with the Commission and examination of a number of documents provided by them
- Discussions with APRA about the operation of bank guarantees.

B.2 Background

2.1 Under the Act, the Safety, Rehabilitation and Compensation Commission ('the Commission') can grant 'licences to enable Commonwealth authorities and certain corporations to accept liability for, and/or manage, claims'.

2.2 There are at least three reasons why a large employer may want to self-insure under a single licence:

- Administration and compliance cost savings
- Workplace relations
- Anticipated claims cost savings

Administration and compliance

2.3 Large firms which operate nationally may have to comply with up to eight different workers' compensation regimes. Depending on their employee distribution, they may self-insure in some jurisdictions and pay premiums in others. If these firms were able to operate under a single workers' compensation licence and a single set of workers' compensation benefit provisions, then they would probably benefit from some administration and compliance savings.

Workplace relations

2.4 A further motivation to self-insure (and the reason most often put by employers) is the desire to have full control over the whole workplace safety process — from injury prevention, to rehabilitation, to return-to-work, and to compensating genuinely injured employees. 'Serious' firms will argue that worker well-being is a fundamental aspect of running the business properly. They would say, for example, that they have a stronger interest in return-to-work than an insurer or a scheme and this is in the interests of the worker. Bottom line benefits arise consequentially through increased productivity, better staff morale, as well as reduced claim costs.

Claims cost savings

2.5 Claims cost savings could arise if the Commonwealth Scheme provides lesser benefits than the aggregate of the benefits provided under the State Schemes. Based on our knowledge of the arrangements, it would seem unlikely that there would be significant cost savings because of this.

2.6 There may be a financial incentive for employers who are premium payers to a State Scheme which is in deficit to look for a national option. How strong an incentive this is will depend on transitional arrangements.

2.7 There can also be a perception, which may or may not turn out to be real, that there will be other claims cost savings if an employer does not participate in a pool. A variation on this is that employers may tend to think that they have better than average workplace practices. Accordingly, if they self-insure and have control of their destiny, they will not be dragged down by the bad practices of other employers.

B.3 The nature of financial risk to the Commonwealth

3.1 This section considers direct financial risk to the Commonwealth which may arise if self-insurance licenses are granted to employers. It does not consider indirect financial risk (for example, associated with possible flow-on effects to State Schemes). Nor does it consider non-financial risk (for example, perception risk which may arise if employers with inadequate workplace safety systems are granted licences).

Background

3.2 Self-insurers have to meet the full cost of their own workers' compensation claims from within their own balance sheet.

3.3 Reinsurance can help to smooth the costs somewhat over time, and is a particularly important risk management tool in respect of very big claims. Under the Act, claimants may be entitled to fortnightly income replacement benefit up to age 65, reimbursement of out-of-pocket expenses for medical treatment, attendant care, etc and lump sums for permanent impairment. A very large claim (say for quadriplegia or brain injury) could run well into the millions of dollars over the lifetime of the claimant.

3.4 Some benefits under the Act (eg medical) are payable for life. Therefore, a self-insurer's outstanding claims liability may have a very long tail. For a newly-licensed self-insurer, the liability will take some time to mature, but for some employers could conceivably grow to around 50% of their payroll. This could happen especially if there is poorer than expected claims experience. Balance sheet movements in the workers' compensation liability may have a material impact on the employer's overall bottom-line performance.

3.5 So long as a self-insurer is able to meet its accrued workers' compensation obligations from within its balance sheet, there is no direct financial exposure to the Commonwealth.

Problem areas

3.6 Should things go wrong, there may be a financial risk to the Comonwealth. Things are most likely to go wrong if a self-insurer goes out of business, particularly because of insolvency. The extent of the risk to the Commonwealth (associated with self-insurer insolvency) depends on the security systems (ie prudential arrangements) that are in place.

3.7 Related to this, it is instructive to consider the case where the Commission decides to revoke a self-insurer's licence. This might happen for any one of a number of reasons, for example:

- Failure to meet a licence condition, eg renewal of bank guarantee. (This may in turn be associated with worsening financial health of the self-insurer or ballooning compensation costs.)
- Inadequate OHS performance

3.8 It is fair to assume that the revocation of a licence may be inked to financial pressure on the licensee, even though the financial pressure may be less than in the event of insolvency (at least it the short term). Thus, to understand the nature of the financial risks to the Commonwealth associated with expanding the group of self-insurers, it is instructive to consider what might happen if a licence is revoked.

3.9 If a self-insurance licence is revoked, we understand that the 'legal liability' remains with the self-insurer. The liability in this case refers to the cost of claims arising

during the period of the self-insurance licence. This seems appropriate. However, there is likely to be an expectation, at least amongst claimants, that the Commonwealth will take steps to ensure that the liability is satisfactorily discharged. Certainly it would be expected that the Commission would have an active role in managing the orderly exit of a self-insurer whose licence had been revoked.

3.10 Therefore, it is necessary to see what prudential arrangements are in place to secure the liability,

3.11 The cornerstones of the arrangements are requirements to:

- obtain regular actuarial evaluation of the claims liability
- maintain a bank guarantee of a specified amount
- obtain reinsurance protection as directed by the Commission.

3.12 The Commonwealth will be most directly exposed if these arrangements fail.

3.13 Of particular relevance is the adequacy of the bank guarantee.

3.14 The Commission has advised us that the bank guarantee is:

- in favour of the Commission;
- up to a specified amount; and
- irrevocable.

3.15 All of this provides comfort. Other jurisdictions have broadly similar bank guarantee requirements for self-insurers. APRA has confirmed that when these sorts of bank guarantee are offered, they would normally be fully collateralised.

3.16 The Commission requires bank guarantees to be renewed at a higher amount if liabilities increase. The effective requirement for full collateral means that it will more difficult for a firm which is in financial trouble to obtain a renewal. This is another example of a circumstance where a licence may be revoked.

3.17 It seems likely that if a licence were revoked because of assessed financial difficulties, the Commission would call the bank guarantee (however the Act does not specify what the sequence of events is). It is worth noting that this would occur even though the licensee would retain the legal liability as described in paragraph 3.9.

3.18 This would provide an amount of funds (presumably held in trust by the Commission for the benefit of relevant injured workers). These funds could be drawn on by the licensee. If the application of the funds were limited to the discharge of workers' compensation entitlements (which we understand would be intended), then this provides an additional layer of comfort. In effect, it quarantines the funds so that they can only be

applied to the claims of injured workers and not to the claims of other creditors. This would be particularly relevant in the case of wind-up of the company.

3.19 On balance, as suggested above, it is not unreasonable to assume that if a licence is revoked, the firm may be in some financial trouble and the main source of funds to meet the relevant claims liability will be the bank guarantee. The Commonwealth will be exposed if the bank guarantee is inadequate. This may happen for a number of reasons, primarily:

- Expected inadequacy

  The bank guarantee is set at the intended 95th percentile. So, it is to be 'expected' that occasionally it will be inadequate, even if it has been properly calculated.

- Large event risk

  Large events with low probabilities will result in substantial increases to the liability. Fortunately this increase in liability is usually passed onto the reinsurer. However this will not always be the case. For example, terrorism related claims would typically be excluded from the reinsurance contract. This sort of event could lead to the true liability being well in excess of the amount of the bank guarantee. It is also likely that this type of event would place the employer in financial stress for other reasons.

- Estimation error

  This type of claims distribution is not always well understood. In particular, the tail of this type of distribution is not well understood. Reliable evaluation at the 95th percentile requires a sound understanding of the distribution, particularly the tail. The notion that the distribution has been evaluated at the 95th percentile may appear to provide more comfort than it actually does.

- Inadequate allowance for latent exposures

  In some cases, large latent exposures may exist which have not been identified or reserved for. There is a good chance that such exposures will also fall outside of the reinsurance contract. A historical example is asbestos-related claims. Australia-wide, outstanding asbestos-related liabilities are probably several billion dollars. A future example might be claims relating to sun-cancer.

- Insolvency ‘creates’ claims

  In the event of insolvency leading to unemployment of the licensee’s workforce extra claims are likely to be reported. Workers with reduced employment prospects can ‘find reasons’ to make compensation claims.

- Reinsurance failure

  The bank guarantee relates to the liability, net of reinsurance. If this has been misjudged (for example, if certain recoveries are wrongly assumed, the reinsurer disputes claims, premiums have not been paid, or simply if the reinsurer fails) then the true net liability may be understated.

- Non-compliance with the prudential rules

For example, the bank guarantee is not kept up to date. Employers in financial trouble are likely to have poor record keeping or even keep deliberately wrong records, which lead, for example, to an inadequate bank guarantee.

- Value of money erodes over time

  The bank guarantee is related to a discounted present value of the liabilities. Unless properly invested by the Commission, the value may erode over time and ultimately prove unable to keep pace with benefit inflation.

3.20 The Commonwealth would also be exposed in the very unlikely event of bank failure, but it is more likely to be exposed as a result of fraud, eg falsifying bank guarantee documents.

3.21 The list above describes the various risks. The purpose was to identtfy them rather than to conclude that they are unreasonable or unacceptably high. The next chapter looks at the prudential arrangements, which are, of course, designed to address the financial risks.

3.22 Finally, a side issue. If a licence is revoked, it is not totally clear what the fall-back position would be for employees. For the period that the licence is in place, employee compensation benefits are governed by the provisions of the Act. However, once a licence is revoked, it seems likely that the fall-back position would be to the relevant State scheme provisions. This is likely to create administrative and workplace relations headaches. We suspect that there may be pressure on the Commission to maintain licences for longer then they would like in some circumstances. If this is the case, then any financial risk to the Commonwealth would be increased.

3.23 As mentioned in Chapter 1 we have not considered possible indirect financial risk to the Commonwealth, which may arise if this measure were (argued) to lead to financial pressure on the State schemes. For example, State schemes may complain that the costs of their schemes have increased as a result and the Commonwealth should compensate them. This may be particularly so for a State Scheme with a deficit which is being funded over time.

B.4 Existing prudential arrangements

4.1 The current Commonwealth prudential arrangements are built around the following:

- Licensing process. This is intended to ensure that only firms with adequate financial capacity and OHS systems are granted a licence.
- Active and regular actuarial evaluation of the outstanding claims liability and the expected accruing liability.

- A requirement to effect reinsurance for large claims with a licensed insurer and a requirement to obtain certain actuarial advice on the reinsurance arrangements.
- A requirement to maintain a bank guarantee of an amount equal to the 95th percentile of the claims liability distribution, with a reputable bank.
- A requirement to demonstrate the financial capacity to withstand one catastrophe and a requirement for the actuary to express an opinion on this capacity.
- Some reporting requirements.

4.2 The context within which these rules are applied is currently limited to firms with a strong Commonwealth connection. This contextual feature is a relevant consideration when assessing the current prudential framework. A different set of relationships would apply if licenses were granted to a wider group of employers.

4.3 The prudential framework has some structural similarities to the frameworks in other jurisdictions, but some significant differences in detail.

4.4 All jurisdictions have some or all of:

- Licensing requirements, including financial capacity requirements
- Requirements for actuarial valuation of the liabilities
- Reinsurace requirements
- Bank guarantee requirements
- Reporting requirements

4.5 The Table below tries to compare the Commonwealth's framework with the frameworks in place in other jurisdictions.

Item	*Commonwealth*	*Other*
Bank Guarantees	Based on 95th pecentile of the claims distribution	Typically 130% to 150% of the central estimate of the claims distribution
Reinsurance	Per event excess-of-loss attaching at a level determined by the Commission (typically $750 000)	Various attachment points
	Actuary required to recommend an attachment point	
Financial capacity	Withstand one large 'event'	Various — minimum level of Net Tangible Assets, minimum number of employees
	Actuary to give opinion on capacity to withstand one large event	
	Customised case-by-case assessment by the Commission	
Actuarial valuation of liabilities	Central estimate and 95th percentile	Most require actuarial valuation of the central estimate
	Qualified and experienced actuary	At least one jurisdiction requires actury to be approved by the regulator
Reporting requirements	Minimal explicit requirements, more possibly included in licence conditions	In some cases very detailed requirements, designed to support a comprehensive level of data capture
Counterparty risk	Standards for bank and insurer counter-parties	
Revocation of licence	Not explicit	In one jurisdiction a very explicit statement of subsequent process

4.6 It is instructive to look at some of these items. Firstly, the Commission requires the amount of the bank guarantee to be based on the 95th percentile of the claims distribution. Other jurisdictions require the amount of the bank guarantee to be based an the central estimate of the claims distribution plus a fixed percentage (between 30% and 50%).

In concept, the Commission's requirements are better tailored to the individual claims distribution and provide a more easily understood level of comfort than the fixed percentage approach.

In practice, however, workers' compensation claims distribution are poorly understood, particularly in the tail. Therefore, evaluation at the 95th percentile may not be reliable. The level of comfort provided by this approach may be more illusory than real.

The alternative approach (fixed percentage added to the central estimate) may be regarded as blunt, but objective.

On balance, we regard the 95th percentile approach as appealing providing the regulator has some way of 'validating' the actuarial calculations.

4.7 The Commission's requirement that the actuary recommend an attachment point for the excess-of-loss reinsurance is sensible. I would extend this requirement — see next chapter.

4.8 In relation to demonstration of financial capacity, the SRCA requires that the Commission be satisfied that the applicant has sufficient resources. However, no guidance is provided to assist the Commission in making its judgements.

In some jurisdictions, certain requirements are explicit. In Queensland, for example, net tangible assets have to be at least $100m. Another approach is to set a minimum number of employees (perhaps as well as a minimum net tangible asset requirement). Again, in some jurisdictions there is an explicit minimum. This would limit the risk that a single large claim would cause a lot of problems. It would also mean that only substantial firms would need to be regulated.

We understand that the Commission makes assessment of the financial capacity of licence applicants on a case by case basis using a range of measures and hurdles. It may, in fact, require a minimum number of employees (500), although this requirement does not appear in the SRCA nor the prudential licence conditions.

Interestingly, in relation to demonstration of ongoing financial capacity, the Commission requires the actuary to give an opinion on the company's capacity in this regard, although it is not clear precisely what form that opinion has to take. Nor is it clear that the actuary would have access to all of the necessary information. An alternative approach would be to add the catastrophe retention (the amount that the self-insurer would be exposed to in the event of a catastrophe before reinsurance cover kicked in) to the bank guarantee and to have a different 'financial capacity' hurdle.

4.9 All jurisdictions have a requirement for actuarial evaluation of liabilities. This is an important piece of the prudential framework. One jurisdiction has a requirement that the actuary be approved by the regulator. This is similar to the approach taken by APRA for general insurers. This has some appeal, provided that the regulator has the resources to properly carry out the approval process.

4.10 It will be very important to ensure that there is a sufficient volume of high quality data provided by self-insurers under the Act. The current reporting requirements appear to be fairly minimal, although there may be further requirements set out as licence conditions.

4.11 Counterparty risk is addressed by the requirement to deal with banks and insurers which meet certain conditions. Bank counterparties must be at least AA-rated and insurer counterparties must be licensed by APRA. The standard for insurers is lower than for banks, but probably the best approach in practice. Having a AA requirement for insurers would greatly restrict the range of available market participants.

4.12 Finally, it is important that the processes that would be undertaken in the event of a licence being revoked are understood by all relevant parties. It would be very worthwhile having this documented, so that both sides 'knew where they stood'. Perhaps, such a process could be incorporated into the governing legislation to add certainty, although it would be important to give the Commission enough flexibility to be able to 'stand where it needs to' in any particular situation.

B.5 Possible changes to the prudential framework

5.1 This section considers possible changes to the prudential framework. should the level of self-insurance under the Act be increased.

5.2 Firstly, it is important to note that a prudential system consists of:

- a set of rules or standards;
- a regulator responsible for administering the rules; and
- a set of firms who are regulated.

5.3 The rules and the regulator have to be appropriate for the regulated. Currently, the firms who are regulated all have a strong Commonwealth connection. Opening the system up to private firms with no Commonwealth connection may mean that the rules need to be reviewed, or at least reassessed in light of the new target employers.

5.4 The regulation process involves monitoring and ensuring compliance, collecting data and reporting on Scheme performance, and also, importantly, managing problems when they arise. It is clear that the level of regulatory resources would have to be properly aligned with the number of self-insurers. This section of the report assumes that the level of regulatory resources will be adequate for the purpose.

5.5 We have considered the main elements of the framework as described in chapter 4. The table below comments on the existing provisions, including some possible changes. These suggestions fall short of recommendations, rather they should be taken as suggestions for consideration.

5.6 There is a dear connection between the level of sophistication and complexity in the prudential arrangements and the level of regulatory resources to administer the Scheme. A

sophisticated set of rules in theory should be economically efficient. However, it requires a particular level of regulatory resource to administer it properly.

5.7 Initial conditions may need consideration. For example, an explicit requirement for some combination of a minimum level of net tangible assets and a minimum number of employees seems worth thinking about. It is important to get the right balance between objectivity and flexibility. However, there may be merit in considering some blunt, explicit minima, below which a licence will not be granted under any circumstances and above which consideration may be given to granting a licence.

In particular, it would be important to ensure that only substantial and soundly motivated employers were eligible to be granted a licence. Financial motivation may not be soundly based for some smaller employers who do not have a proper appreciation of all of the risks associated with self-insurance.

5.8 The current framework relies heavily on the role of the external expert (the actuary). This is a good thing, and I think the role could be extended in respect of reinsurance. A requirement for the actuary to include a section in the liability valuation report which discusses the reinsurance arrangements in some detail (contract terms, premium basis etc) would provide a useful piece of information for the regulator.

Item	*Comment*
Bank Guarantee based on 95th percentile of claims distribution	Conceptually sound, provided that adequate regulatory resources to validate the adequate calculations.
	Might consider a floor requirement, eg at least $5m.
	Might consider adding the catastrophe reinsurance retention.
	Without adequate regulatory resources, might consider a blunter approach — eg central estimate plus 40%.
Reinsurance	Might consider extending the role of the actuary to advise on the whole arrangement and to include a section in the liability valuation report which covers the reinsurance arrangements in some detail (including a discussion of the nature of the arrangements).
Financial capacity	Might consider a different/additional hurdle — eg a minimum level of Net Tangible Assets, minimum wage roll, or some combination of these.
	Might consider the need to publish existing tests and any specific hurdles used by the Commission.
Actuarial valuation of liabilities	Might consider an approved actuary model. Again relies on adequate regulatory resources.
Reporting requirements	There seems to be room for considerably enhanced reporting requirements, particularly to support Scheme performance reporting efforts.
	Again, need adequate regulatory resources to compile and present statistical information.
Revocation of licence	Might consider making the process explicit. Eg, upon revocation, the Commission will exercise the bank guarantee, and place the funds in trust until it is satisfied that the liability has been adequately discharged or separately funded.

In order to be able to rely on the actuary's work, it is important for the regulator to be able to 'validate' the actuary's advice. That is, the regulator will need to understand the limitations and uncertainties that will inevitably be involved.

We are not convinced of the merits of the actuary opining on the company's financial capacity to withstand one 'major' event. The form of the opinion required is not clear. It requires the actuary to look at a lot of other aspects of the company's financials apart from the workers' compensation liabilities. It is not clear that the actuary is well placed to do this. For example, Telstra's actuary would not necessarily be well placed to comment on the realisability of Telstra's fixed infrastructure assets (which make up a large part of Telstra's balance sheet).

5.9 A more detailed set of reporting requirements would facilitate both Scheme performance reporting and internal benchmarking, to enable the regulator to monitor individual self-insurer performance.

5.10 There may be merit in making explicit the process that the Commission must undertake in the event of a licence being revoked. This could be incorporated into the governing rules. Such an approach is likely to be beneficial to both sides (Commission and self-insurer) as both will better understand where they stand. Care would be needed, however, to ensure that the Commission had enough flexibility to stand where it needed to in any given case. The Commonwealth is potentially most exposed at the point where a licence is revoked. An explicitly stated case management process would help in understanding the extent of the exposure.

5.11 Finally, with respect to the whole package of rules, consisting of:

- The SRCA;
- The prudential conditions of licence; and
- Internal guidelines and interpretations for applying the rules

the Commission is responsible for the last two components. Should the number of self insurers be expanded beyond the current small number of employers with a close Commonwealth connection, some consideration could usefully be given to ensuring the right balance between:

- objectivity and flexibility in the governing rules and their application; and also between
- transparency and confidentiality of any particular conditions of licence.

For example, the SRCA requires that the Commission be satisfied that the licensee has the financial capacity to fulfil its obligations under licence but does not incorporate any explicit minima. Whilst the Commission is developing its own internal tests of financial capacity, which can in theory be tailored to particular circumstances, there may be merit in considering certain explicit and objective minima, below which a licence will not be granted under any circumstances.

Peter Martin
Australian Government Actuary

24 September 2003

C Australian Government Solicitor

As part of its inquiry process, the Commission requested legal advice from the Australian Government Solicitor as to the powers available to the Australian Government to operate an alternative national workers' compensation scheme and occupational health and safety regime. This appendix provides a copy of the Australian Government Solicitor's response.

15 September 2003

Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Productivity Commission inquiry into national workers' compensation and occupational health and safety frameworks

1. We refer to your request for advice dated 6 August 2003.

Background

2. The Productivity Commission is inquiring into occupational health and safety and workers' compensation national frameworks. It is considering the following two options.

Option 1

3. The Commonwealth would establish a new national self-insurance scheme for which all eligible employers could apply for a licence. (Self-insurance means that employers, rather than insurers, bear the direct responsibility for managing their workers' compensation claims liabilities.) The Commonwealth would, in effect, be providing an alternative to the existing State and Territory worker's compensation schemes. It would have provisions on self-insurance licensing criteria (such as prudential matters and claims management); definitions of 'employee', 'work-related injury or illness' and 'employer'; statutory benefits; access to common law damages; injury management (claims

management, return to work and rehabilitation); and dispute resolution. These provisions could be modelled on the existing Comcare scheme with modifications as appropriate (for example, as to dispute resolution and statutory benefits). To administer the scheme, an independent regulator would be established (alternatively, the existing regulator for Commonwealth self-insurance, the Safety, Rehabilitation and Compensation Commission, could be utilised).

Option 2

4. The Commonwealth would establish a new national workers' compensation scheme for all employers. It would provide an alternative to the State and Territory schemes. It would have provisions for self-insurance (identical to those canvassed for option 1 above), as well as for premium-based insurance. Private underwriting would be a necessary element of the scheme. Thus, scheme provisions would govern insurer licensing arrangements (including prudential criteria), as well as premium supervision. An independent regulator would also be established to administer the scheme.

5. You seek our advice on the Commonwealth's constitutional power to implement either of these two options.

6. You understand that were the Commonwealth to establish a new national self-insurance or worker's compensation scheme, or even to issue self-insurance licences to private sector employers under the existing *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act), employers would continue to be subject to existing State and Territory occupational health and safety legislation. (We mention that this would appear to be correct in relation to private sector employers under Part VIII of the SRC Act: see paragraph 108D(1)(e).) You seek our advice on whether it would be possible for the Commonwealth to permit employers who join its national scheme (or are self-insured under the existing SRC Act) to elect to opt out of State/Territory jurisdictional occupational health and safety coverage and, instead, be covered by the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the OHSCE Act) or, if necessary, new Commonwealth occupational health and safety legislation.

7. As employers will not be compelled to enter into the schemes under options 1 and 2 and the schemes are intended to operate as alternatives to existing State and Territory schemes, we assume for the purposes of this advice that options 1 and 2 will not apply to State and Territory government employers and employees (for example, State Departments and their officials).

Short advice

8. The corporations power in paragraph 51(xx) of the Constitution would, in our view, provide scope for Commonwealth legislation implementing either options 1 or 2, as well as providing for Commonwealth occupational health and safety laws, to extend to trading or financial corporations. The insurance power would also support key aspects of option 2 (other than State insurance not extending beyond the limits of the State concerned). Whether the related scheme for occupational health and safety should be implemented by extending the OHSCE Act or by new legislation is essentially a policy and drafting matter. To the extent particular corporations were made subject to Commonwealth law, inconsistent State laws would not apply to them.

9. Although other constitutional powers (such as the interstate and overseas trade and commerce power) could be relied upon (in combination with the corporations power and the insurance power) to further extend the scope of options 1 or 2 and the related scheme for occupational health and safety, it is likely that, even with a combination of powers, legislation implementing the options could not be comprehensive in scope (that is, in terms of the categories of employers and employees to whom the options would apply). For example, the legislation could not extend to all individual (that is, non-corporate) employers or partnerships that carry on businesses only within States. A reference by the States under paragraph 51(xxxvii) of the Constitution would probably be necessary for this purpose.

Reasons

General

10. The Commonwealth does not have specific constitutional power over workers' compensation or occupational health and safety generally. There are, however, a number of constitutional powers over other subject matters that could be relied upon to support Commonwealth legislation to implement option 1 or 2, particularly in relation to large corporate employers, and the related scheme for occupational heath and safety. Although the Commonwealth legislation could not, in the absence of a reference from all States under paragraph 51(xxxvii) of the Constitution, cover all employers and employees, it could achieve a high level of coverage in practice.

11. For options 1 and 2 and the related scheme for occupational health and safety, the chief constitutional powers would be the corporations power and, in relation to option 2, also the insurance power. The interstate and overseas trade and commerce power and the territories power would also offer significant support. The external affairs power may possibly also be available but any legislation based on that power would be significantly

constrained by the need to be consistent with relevant treaty obligations. These constitutional powers are discussed in more detail below.

Corporations power

12. Under paragraph 51(xx) of the Constitution, the Commonwealth has power to make laws for the peace, order and good government of the Commonwealth with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' ('constitutional corporations'). Most large non-government employers are likely to be trading or financial corporations.

13. For the purpose of paragraph 51(xx), 'foreign corporations' are legal entities formed under the law of a foreign country and accorded a corporate legal personality either by that law or by Australian law. A corporation will be a 'trading corporation', within the meaning of paragraph 51(xx), if its trading activities form a significant or substantial part of its overall activities. It is not necessary to establish that trading is the corporation's predominant or characteristic activity; even if the corporation carries out its trading activities so that it may carry on some other primary or dominant undertaking (which is not trading), it may nevertheless be a trading corporation. 'Trading' is not limited to buying or selling at a profit; it extends to business activities carried on with a view to earning revenue. Certain incorporated associations and certain State statutory corporations (including a public utility and a university) have been held to be 'trading corporations' within the meaning of paragraph 51(xx) (see *Commonwealth v Tasmania (1983)* 158 CLR 1 and *Quickenden v O'Connor (2001)* 184 ALR 260).

14. A corporation will be a 'financial corporation' within the meaning of paragraph 51(xx), if it engages in financial activities or is intended to do so. Financial activities need not be the predominant or characteristic activity of the corporation; a corporation which engages in financial activities in the course of carrying on its primary or dominant undertaking will be classified as a financial corporation. 'Financial' activities include transactions the subject of which is finance (such as borrowing or lending money).

15. The power in paragraph 51(xx) extends to the regulation of a wide range of matters relating to constitutional corporations, after their formation, including their trading or financial activities. It is irrelevant, for the purposes of this power, whether a constitutional corporation carries out activities such as trade within or between States (contrast the interstate and overseas trade and commerce power discussed in paragraphs 27 and 28 below). In order to be within the scope of the corporations power, a law must have a sufficient connection with the subject-matter of the power (*Re Dingian; Ex parte Wagner (1995)* 183 CLR 232 *(Re Dingian)*). The judgments in *Re Dingian* (the most recent High Court decision in which the scope of paragraph 51(xx) was considered in detail) contain a range of different approaches on the appropriate test to determine whether a law reveals a

sufficient connection with the subject-matter of constitutional corporations as to be a law with respect to that subject-matter. In addition, the composition of the High Court has changed almost entirely since *Re Dingian* was decided. However, we think it is probable that a majority of the current High Court would hold that the Commonwealth can make a law, in reliance on paragraph 51(xx), conferring rights or imposing obligations on a constitutional corporation, including their officers and employees in their capacity as officers and employees of constitutional corporations.

16. The corporations power would support key elements of options 1 and 2 and the related scheme for occupational health and safety. Under option 1, for example, Commonwealth legislation could give constitutional corporations the right to apply for a self-insurance licence and could impose obligations and liabilities on licence-holders in respect of their employees. It could provide for statutory benefits and limit access to common law damages, injury management and dispute resolution. There would, in our view, be a sufficient connection between such legislation and the subject matter of constitutional corporations. To the extent Commonwealth law applied, this would displace inconsistent State requirements (Constitution, section 109).

17. In so far as the dispute resolution arrangements involved the exercise of the judicial power of the Commonwealth, that judicial power could only be conferred and exercised consistently with Chapter III of the Constitution. However, this would not preclude use of administrative tribunals or other dispute settlement mechanisms (as in the case of the existing SRC Act scheme) provided there was provision for judicial review of their decisions.

18. In addition, the variation of existing rights (arising from work-related injury or illness occurring prior to the commencement of legislation implementing the options) would raise issues in relation to the constitutional guarantee in paragraph 51(xxxi) of the Constitution against acquisition of property otherwise than on just terms. For this reason, the legislation may need to be limited to apply in relation only to claims based on work-related injury occurring in the future and not claims arising from past events.

19. In relation to option 2, the corporations power would also support provision for dispute resolution arrangements between constitutional corporations and workers' compensation insurers (other than State insurers in so far as they were not conducting insurance business beyond the limits of the State: see paragraph 23 below). The corporations power would support the imposition of requirements directly on insurers (other than State insurers not carrying on insurance beyond the limits of a State) in relation to insurance they made available, such as in relation to insurance coverage and premium setting in relation to constitutional corporations.

20. The functions and powers of the independent regulator needed to regulate either of the schemes would be supported by the corporations power or, possibly, by the express

incidental power in paragraph 51(xxxix) of the Constitution. Options 1 and 2 could be implemented by amendments to the SRC Act or by a new Act applicable to constitutional corporations.

21. Recent examples of Commonwealth legislation enacted an the basis of the corporations power include the *Therapeutic Goods Act 1989* (section 6), the *Environmental Protection and Biodiversity Conservation Act 1999* (see, for example, subsection 21(1)), the *Gene Technology Act 2000* (paragraph 13(1)(a)) and the *Research Involving Human Embryos Act 2002* (paragraph 4(1)(a)). The *Workplace Relations Act 1996* also relies on the corporations power for certain of its provisions, eg, for Australian workplace agreements (section 17OVC(a)). This reliance on the corporations power reflects the expanded scope given to that power in recent years by decisions of the High Court like *Re Dingian*. The recent references by the States under paragraph 51(xxxvii) of the Constitution of power to enact the *Corporations Act 2001* (Cth) to the extent not otherwise supported by Commonwealth power were necessary, in part, to overcome constitutional problems arising from use of Commonwealth bodies to carry out functions under substantive State corporations laws under the previous co-operative scheme. There is no reason to doubt the wide potential of the corporations power to regulate activities of established constitutional corporations, including benefits provided to employees. It is not necessary, as a matter of constitutional law, for the consent of the States to be obtained in order for Commonwealth law to apply to constitutional corporations. There is a political agreement requiring consent to be obtained from a majority of States for any amendment to the *Corporations Act 2001*. The requirement in that area does not, however, apply to reliance in other Commonwealth laws on the corporations power.

Insurance power

22. Under paragraph 51(xiv) of the Constitution the Commonwealth has power to make laws with respect to 'insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned'. Leaving aside the scope of the exclusion in relation to State insurance, this power extends to the activity of 'insurance', the essential characteristic of which is a relationship of indemnity between an insured and an insurer. While this relationship may be created by statute rather than by contract, not all statutory compensation schemes may amount to insurance (for example, a statutory scheme which confers a no-fault benefit unrelated to insurance). Whether a statutory scheme or indeed any other kind of scheme, albeit described as insurance, is insurance for constitutional purposes will depend on the details of the scheme. Self-insurance is not 'insurance' for the purpose of paragraph 51(xiv) (see paragraphs 3 and 4 above).

23. Again leaving aside the scope of the exclusion in relation to State insurance, and assuming that arrangements amount to 'insurance' for constitutional purposes, the

insurance power extends to the regulation of all aspects of the relationship between an insurer and the insured, in particular:

- regulating the conduct of insurance business in Australia, including the premiums charged by insurance companies;
- controlling the nature and content of insurance products that insurers offer (although altering rights under existing policies could raise issues in relation to the constitutional guarantee in paragraph 51(xxxi) against acquisition of property otherwise than on just terms);
- regulating the conduct of insurance intermediaries;
- establishing the Commonwealth's own insurance business;
- prohibiting the provision of insurance by any particular persons either specifically or generally, for example, the Commonwealth could prohibit the provision of insurance subject to a broad range of conditions which do not need to be directly related to insurance;
- controlling the acquisition of shares in insurance companies or purchasing assets from insurers, and possibly even dealing with the management and staffing of insurers;
- regulating the non-insurance activities of insurers, in so far as such regulation is necessary in order to ensure the effective prudential regulation of insurers.

24. The insurance power does not extend to 'State insurance', other than State insurance extending beyond the limits of the State concerned. By analogy with the banking power in paragraph 51(xiii) of the Constitution, which is similarly limited, State insurance is insurance carried on by a State as insurer and not as customer. A law with respect to insurance cannot legally encroach on State insurance, except to the extent that any interference with State insurance is so incidental as not to affect the character of the law as one with respect to insurance other than State insurance (Bourke v State Bank of New South Wales (1990) 170 CLR 276). If the interference is significant, the legislation will be invalid. Over the last decade or so the States have mostly gone through a process of corporatising and then privatising their State insurance offices. It is not clear to what extent the States currently carry on insurance. It is possible, therefore, that this restriction on Commonwealth legislative power may have only limited practical effect.

25. In our recent discussions you asked whether, in relation to the scheme in option 2, the insurance power would support legislation requiring payments to be made by the Commonwealth (or the independent regulator) to a relevant employee for work-related injuries or illness in circumstances where an insurer was unable to meet the relevant employer liabilities under the scheme (for example, by reason of the insurer's insolvency). Although such payments by the Commonwealth may not involve insurance in the constitutional sense, they may be supported by the 'incidental' aspect of the insurance power (namely, the implied power to make laws governing or affecting many matters incidental or ancillary to insurance; see Grannall v Marrickville Margarine Pty Ltd (1955)

93 CLR 55 at 77). In any event, we think it would be possible to rely on the appropriations power in section 81 of the Constitution to support the payments in these circumstances. The corporations power may also be relevant, given that the employees would be employed by constitutional corporations and that the relevant liabilities were liabilities incurred by constitutional corporations. Other heads of power may also be available (for example, the benefits and pensions powers in paragraphs 51(xxiii) and (xxiiiA) of the Constitution).

26. The insurance power would provide considerable support for those aspects of option 2 involving premium-based insurance, whether involving the Commonwealth or private insurers as providers of coverage. Legislation to implement the option could, under the insurance power, govern insurer licensing arrangements (including prudential criteria), as well as premium supervision. The insurance power (and the corporations power to the extent corporations were involved) would support the imposition of requirements directly on insurers (other than State insurers not carrying on insurance beyond the limits of a State) in relation to insurance they made available, such as in relation to insurance coverage and premium setting.

Interstate and overseas trade and commerce

27. Paragraph 51(i) of the Constitution provides that the Commonwealth Parliament may make laws with respect to 'trade and commerce with other countries, and among the States'.

28. To the extent that the options and the related scheme for occupational health and safety did not involve constitutional corporations or insurance, a Commonwealth legislative framework could be made available to employers and employees in inter-State or overseas trade and commerce (see, for example, *Australian Steamships Ltd v Malcolm (1914)* 19 CLR 298, which upheld the validity of seaman's compensation legislation).

Territories power

29. Under section 122 of the Constitution the Commonwealth Parliament 'may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth ...'. This includes the Australian Capital Territory and the Northern Territory. Under this head of power, the Commonwealth has a general power of legislating for a Territory. This would support legislation implementing the options in relation to all employers and employees in the Territories. In relation to the self-governing Territories, policy considerations may dictate that they be treated similarly to States. This may limit reliance on the Territories power.

External affairs

30. The Parliament's power in paragraph 51(xxix) of the Constitution to make laws with respect to 'external affairs' will support Commonwealth legislation which discharges an obligation imposed on Australia by an international treaty or instrument, whatever the subject matter of that obligation (see, for example, *Victoria v Commonwealth (1996)* 187 CLR 416 (*Industrial Relations Act Case*) at 486-488). In such a case, the legislation must be reasonably capable of being considered appropriate and adapted to implementing the treaty or instrument.

31. Our examination suggests that the 1981 International Labour Organisation (ILO) Convention 155 (the Occupational Safety and Health Convention) could, if Australia became a party, support a reasonably comprehensive Commonwealth legislative scheme concerning occupational health and safety. Similarly, the 1964 ILO Convention 121 (Employment Injury Benefits Convention) could, if Australia became a party, support Commonwealth workers' compensation legislation prescribing particular entitlements. However, the Convention is fairly prescriptive and also envisages either public administration of the scheme or ultimately public responsibility. Any scheme which relied constitutionally on Australia's treaty obligations, would need to conform relatively rigidly to the Convention requirements. The Conventions appear unlikely to provide any particular constitutional assistance in relation to Options 1 or 2 beyond that already provided by the corporations or insurance powers, unless some more comprehensive coverage was desired (such as sole traders and partnerships). Further advice on the external affairs power can be provided, as necessary. In particular, we would be willing to consider any particular treaties or instruments in greater detail.

32. Please contact either of us if you would like to discuss this advice or require any further assistance.

Yours sincerely

Henry Burmester QC
Chief General Counsel

Damian Page
Counsel

D Consultant actuaries' reports of impacts on State and Territory schemes

During the conduct of the inquiry, the Commission requested advice from consulting actuaries as to the possible impacts of its proposals for national frameworks on State and Territory workers' compensation schemes. Following selection by tendering, Taylor Fry provided initial advice as to the potential impact on State and Territory workers' compensation schemes of providing access to self-insurance on a national basis. The advice was published in the Interim Report and the Law Council of Australia commissioned professional comment on that advice from Bateup Actuarial + Consulting Services (IRsub. 250). Responses to the Bateup comment was sought from am actuaries, who were also asked to report on the sensitivity of scheme average premiums rates to varying levels of loss of premium revenue from State schemes and levels of cross subsidies provided by exiting premium-paying employers. Finally, the Victorian WorkCover Authority made data available about their scheme and analysis of that data was commissioned from am actuaries to more accurately assess the impact which alternative national self-insurance could have on the Victorian scheme. This provided a cross check of the previous Taylor Fry results.

The appendix is structured as follows:

D.1 Taylor Fry advice;

D.2 am actuaries' report on the impact on scheme average premium rates from large employers exiting;

D.3 am actuaries' response to the comment of Bateup Actuarial + Consulting Services; and

D.4 results from the analysis of Victorian WorkCover Authority data.

D.1 Taylor Fry advice

8 October 2003

Productivity Commission
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Impact of national self-insurance on State schemes

You have requested that we estimate the potential impact on the State workers compensation schemes of widening access to self-insurance on a national basis. This letter details the investigation undertaken to determine the potential loss of premium revenue to State workers' compensation schemes from large employers becoming self-insurers under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

Scope

The focus in this investigation has been to consider the potential premium losses to State and Territory schemes of granting insurance licences to private sector companies under the existing access provisions of the SRC Act. We have considered two factors in determining which employers may potentially become national self-insurers.

Firstly, Section 100 of the SRC Act defines which corporations may be eligible for national self-insurance. The key for private sector corporations lies in sub-section (c) which provides discretion for the Minister to declare a corporation eligible to be granted a licence if it '*is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority*'.

Secondly, we understand that Comcare[1], the statutory authority charged with managing SRC Act self-insurers, uses (as an internal guide) 500 employees as the lower limit on the size of organisation that could be considered for eligibility.

Our investigation has adopted these criteria to quantify the potential reduction in the overall premium pool from premium paying employers becoming national self-insurers. Our estimates rely on these criteria, however, it should be noted that the final impact of any national self-insurance system will depend on the actual criteria adopted, as well as other factors addressed in this letter. We also consider the impact on employers remaining in the State schemes.

[1] Comcare is a Commonwealth statutory authority covered by the *Commonwealth Authorities and Companies Act 1997* and established under the SRC Act. Comcare administers the Commonwealth's workers' compensation scheme under the SRC Act and also administers the *Occupational Health and Safety (Commonwealth Employment) Act 1991* OHS(CE) Act.

Information sources

As you are aware, information was requested of three State schemes; Victoria (a large centrally managed no fault and common law scheme), Queensland (a large centrally managed scheme that predominantly compensates injured workers through common law) and Tasmania (a smaller scheme that is underwritten by commercial insurers). Information was sought from these three schemes as they were considered a representative selection from which the nation-wide impact of national self-insurance could be extrapolated and time constraints made wider data collection impracticable.

At the time of writing only Tasmania was able to provide all the requested information. Queensland provided the scheme statistics requested and information on current self-insurers but no information on organisations that may have the potential to self-insure under the SRC Act. Victoria is still seeking legal advice on their ability to release the information.

Due to the lack of access to scheme data we had to seek other sources of data. We have therefore extracted information from the Australian Bureau of Statistics (ABS) (refer D.1 Appendix B) and Dunn and Bradstreet (D&B)[2]. The information extracted was:

- average weekly earnings subdivided by industry and jurisdiction; and
- numbers of employees employed for large corporations.

We estimated remuneration for each employer by multiplying employee numbers by average weekly earnings. We then estimated premiums by multiplying remuneration by industry premium rates.

It is important to note that this information is not directly related to workers' compensation and so a number of inferences had to be made. For example, the D&B information only permitted us to allocate each company to the jurisdiction in which its head office is registered. As it does not reflect the dispersal of the workforce across the country, the estimated wage roll and premium derived for each jurisdiction does not correspond exactly to each scheme. The numbers of employees may include casual workers or part-time staff. The premium rates apply to an industry and may not be representative for an employer.

Key assumptions

In order to quantify the potential reduction in the overall premium pool we first needed to identify those employers that may be eligible to access the existing national self-insurance

[2] D&B List of organisation, ANZSIC industry code, number of employees, ABN and post code (employers with more than 200 employees).

arrangements and then estimate the wage roll of those employers so that their workers compensation premium could be estimated.

The key assumptions required to achieve this are:

- Industries likely to satisfy the 'competition' criteria for self-insurance under the SRC Act;
- Employee numbers in each State and Territory;
- Average weekly earnings per employee; and
- Premium rates applicable to each employer.

Each assumption is described in the appendices to this letter together with the source and use of each assumption. Over 3500 companies were included in the D&B list and so we have not reproduced the list and calculations. Further details can be provided on request.

Comments on assumptions

The most difficult assumption is which employers are likely to satisfy the competition criteria. We have classified each industry as likely, unlikely or potentially able to satisfy this criterion. Details are shown in D.1 Appendix A.

The second assumption is that employees recorded in the D&B statistics are employed (for the purpose of workers' compensation premiums) in the State shown. We know that the D&B statistics relate to the State in which the head office is registered. The assumption implicit in our analysis is that, taken across all employers, the numbers outside each State will offset each other. The preponderance of NSW registered head offices means this potentially introduces significant error.

The third assumption regarding average wages may lead to under- or over-statement of remuneration and hence premium for each employer.

The further assumption regarding premiums is dependent on average industry premium rates being applicable to large employers.

We have tested the effects of the assumptions by:

- Comparing remuneration for large employers estimate for each State with details extracted from the 4th CPM report[3]; and
- Comparing remuneration for a sample of employers with available information on remuneration.

[3] Comparative Performance Monitoring Fourth Report, Workplace Relations Ministers' Council, August 2002.

The results of these comparisons were mixed. For some individual employers, the estimates produced very close agreement with available information. At the State level, the estimates produced higher remuneration for large employers than would have been expected for insured employers in the State. The discrepancy has not been sufficiently explained and suggests that our estimates may overstate actual remuneration and premiums for these large employers.

Impact assessment

Once we had estimated the premiums payable by large employers, and had allocated the proportion anticipated as eligible to be granted a national self-insurance licence, we compared the results with total premium income of each jurisdiction. The following section outlines the estimated premiums that could potentially transfer. It then discusses the impact on premium payers and comments on the likely impact on existing self-insurers. Comment is also made on funding scheme deficits, tail management and funding, cross subsidies and the impact on remaining employers.

Premium payers

Table D.1 summarises the results of our investigation. The figures have been distilled from a list 3561 employers with 200 or more employees. The list covers 5.4 million employees with an estimated wage roll of $237 billion.

Table D.1 **Summary of potential transfer to national self-insurance**

Jurisdiction	*Wage roll ABS estimate[1] (all employers)*	*Wage roll (premium payers >500 employees)*	*All possible exits (industry based selection)*	*Premium (all possible exits)*
	$m	$m	$m	$m
ACT	8 901	6 509	629	15
NSW	127 880	77 701	24 562	377
NT	4 268	183	40	2
QLD	58 448	13 608	3 755	45
SA	22 777	7 325	759	11
TAS	6 159	1 484	118	3
VIC	89 668	38 777	14 165	288
WA	33 953	9 670	1 814	30
Total	**352 055**	**155 256**	**45 841**	**771**

1 ABS Cat 5220.0 Australian National Accounts - State Accounts 2001-02 Index by 4%.

The wage roll of existing premium payers with more than 500 employees (a threshold for eligibility to self-insurance under the SRC Act) has been estimated to be $155 billion. This represents 44 per cent of the total wage roll for Australia of $352 billion.

For private sector corporations, access to national self-insurance is restricted to those employers that carry on business in competition with a Commonwealth authority. In table D.3 we list those industries that may be considered eligible. Typically, they represent the banks, transport and logistics companies, telecommunications and utilities.

In the event that all such employers apply for a national self-insurance licence, then we have estimated that 30 per cent of remuneration of current premium payers with more than 500 employees or $46 billion may be deemed eligible to be granted. Multiplying this remuneration by average industry premium rates produces an estimate of the **maximum** possible reduction in premium for the schemes Australia-wide of $771 million.

Propensity to self-insure

As evidenced by the operations of existing State and Territory schemes, all eligible employers do not seek to become a self-insurer.

Statutory benefits under the SRC Act are generally considered to be more generous than those under the State and Territory schemes due to payment of weekly entitlements at 100 per cent of pre-injury earnings. In addition, employers have very limited recourse to settle weekly compensation claims through restricted access to common law. The cost of self-insuring under the SRC Act is likely to be more costly than other schemes, which may act to reduce the numbers of employers seeking to self-insure under the current national framework.

The potentially higher cost of the benefit structure could be reduced by those firms with a strong commitment to workplace safety and claims management. In addition, larger employers usually have a greater ability to provide injured workers with alternative duties and hence greater return to work potential.

No firm statistics exist upon which to base rates of application or approval to self-insure. Accordingly, we have illustrated the effect of a different level of approval to self-insure. If only one in five eligible employers apply and are successful, then the potential reduction in rateable remuneration for the workers' compensation schemes would be $9.2 billion and around $154 million in premium revenue.

Table D.2 summarises the **maximum** reduction in premium revenue of $771 million and the reduction in premium revenue of $154 million in the event that one in five of those considered eligible actually elect to transfer. The table also shows scheme premium revenue for 2000-01.

Table D.2 **Maximum and illustrative premium reduction compared to scheme premium review**

Jurisdiction	*Premium reduction (all possible exits)*	*Premium reduction (1 in 5 potentially eligible to transfer)*	*Scheme premium revenue*
	$000	$000	$000
ACT	14 847	2 969	187 000
NSW	377 276	75 455	2 269 000
NT	1 894	379	58 000
QLD	44 601	8 920	506 000
SA	11 228	2 246	341 000
TAS	3 091	618	117 000
VIC	287 512	57 502	1 591 000
WA	30 374	6 075	636 000
Total	**770 823**	**154 165**	**5 705 000**

1 Comparative Performance Monitoring Fourth Report, Workplace Relations Ministers' Council, August 2002. CPM statistics relate to the 2000-01 financial year.

The estimated premium reduction is concentrated in New South Wales and Victoria due to the limitations of the data which allocated all employees to the jurisdiction in which the head office was registered. However, the total premium reductions and total scheme premium revenues are comparable. This indicates that the maximum premium reduction that can be expected is 13.5 per cent and, in the event that one in five of those employers considered eligible actually elect to transfer to national self-insurance, then the premium reduction would be 2.7 per cent. These percentages will be lower if scheme revenue has increased since 2000-01.

Deficit funding

For those schemes currently in deficit (a funding ratio of less than 100 per cent), removal of a part of the remuneration base could mean that any increased funding to reduce the deficit would be spread over a smaller group of remaining employers.

In the event that employers are able to self-insure under national arrangement, then it would be advisable for any scheme currently in deficit to investigate options for obtaining deficit funding contributions from transferring employers.

This is only an issue for the centrally managed schemes as, by their nature, privately underwritten schemes are fully funded.

Tail management and funding

The question of employers exiting from the centrally managed schemes (South Australia, Victoria, New South Wales and Queensland) raises issues of how claims incurred up to the date of transfer ('tail' claims) are managed and, if the scheme is unfunded, how the deficit should be funded.

Possible management options and a brief description of deficit funding considerations are:

1. **State schemes retain and manage the 'tail'** — Benefits are preserved and accrued entitlements are not altered. The critical issue will be how any existing deficit in the scheme is funded. This issue is discussed above under the heading *Deficit funding*.
2. **'Tail' is transferred to the self-insuring employer** — This approach is similar to how most schemes currently treat employers who change to self-insurance within their jurisdiction. Transferring the 'tail' acts to crystallise any deficit in the scheme which only transfers assets equal to the funded proportion of the assessed liability being transferred. Provided the liability assessment is accurate, the scheme would suffer no financial loss and the self-insurer becomes responsible for managing and paying claims
3. **Entitlements remain as per State scheme** — Accrued entitlements for injured workers would not be affected. However, the self-insurer would become responsible for managing benefits under the SRC Act for new claims as well as the benefit structures of the South Australia, Victoria, New South Wales and Queensland schemes for those transferring 'tail' claims which remain active. It is anticipated that the 'tail' would take many years to runoff and form a strong disincentive to self-insure under a national framework. We understand that only NSW has the legislative ability to transfer the tail in such circumstances.
4. **Entitlements convert to the design of national scheme** — Although a common benefit structure would reduce the administrative burden for national self-insurers, it raises questions as to accrued entitlements and possibly 'jurisdiction' shopping, both of which would require extensive legal investigation.

Insurance companies in the privately underwritten jurisdictions would continue to be responsible for all claims arising up to the date the employer transfers to national self-insurance.

Cross-subsidies

By its nature, insurance means that every employer will be either paying more or less than their associated cost of claims and expenses. Ideally, these ups and downs will average out. However, sometimes the premium basis may result in an employer (or group of employers) paying more than their share of claims and expense and others less. The existence or extent

of cross subsidies in the various premium systems in Australia is not known and so it is not possible to quantify the impact on the schemes.

Cross sub-subsidies are not expected to affect the States and Territories in the privately underwritten schemes (Tasmania, Western Australia, Northern Territory and the Australian Capital Territory). Rather, it may be an issue for insurance companies if they have cross subsidies within their workers' compensation book.

For the centrally managed funds, large employers exiting a scheme would have a negative financial impact if large employers as a group cross subsidise smaller employers. Although the claims costs of the large employer would also transfer out of the scheme, premiums would reduce by an even large amount. This would mean that the premium rates for remaining employers would need to increase or, if unchanged, the funding position of the scheme would deteriorate over time.

Larger employers tend to have 'experience' rated premiums. This means that the premium is based on the employers own claims experience and the larger the employer the closer the premium is to the 'true' cost of claims and expenses. In this event, the exit of these large employers should be relatively neutral to the scheme.

Current self-insurers

A large number of employers across Australia currently self-insure in more than one jurisdiction. For example, ANZ, CBA, CSR, NAB, Qantas, and Westpac may be eligible to self-insure under the SRC Act and already self-insure in two or more jurisdictions. This suggests a commitment to self-insurance that is likely to lead to each at least examining their options under a national self-insurance system.

Current self-insurers with more than 500 employees nation-wide have been estimated to have a wage roll of $57.4 million. Details are shown in table D.7. A significant proportion of these companies are likely to transfer to a national self-insurance arrangement in the event they consider it to be in their financial interest.

These self-insurers contribute to the overall costs of workers' compensation in many States via a levy. The impact of their transfer to national self-insurance on the State and Territory schemes would be to significantly reduce this contribution or to increase the levy rate on the remaining self-insurers. It would also significantly reduce, although not remove, the obligation to regulate, monitor and report on self-insurers under their legislation.

As an example, we have been provided with data on current self-insurers in Tasmania. Recent contributions from 15 self-insurers in Tasmania totalled $285 127. Access to national self-insurance could potentially result in the number of State self-insurers reducing to four. If self-insurers fully fund the regulatory function then a consequence of

maintaining the same level of services to the remaining State self-insurers would be to significantly increase the licence fee to a level that covers the fixed costs of regulation and oversight.

The impact on the larger schemes would not be as great as that indicated for Tasmania. Provided sufficient State-based self-insurers remain, they are likely to cover the fixed costs of regulation while the service requirements (and hence scheme costs) are likely to reduce in a similar proportion to the number of self-insurers.

Limitations

No checks have been performed on the data as to its completeness or accuracy. It is possible that some employers with over 500 employees are excluded, which may lead to an understatement of the potential movement to national self-insurance. Incorrect industry codes could result in significantly different estimates of wage roll and hence premiums.

The calculations are approximations. Average wages have been applied to average industry premiums to estimate wage roll and premiums for large employers. While the calculations for individual employers may differ significantly to their actual wage roll and workers' compensation premium, the aggregate results are still expected to provide a reasonable estimate of these statistics.

Assessment of eligibility for national self-insurance is based on broad industry grouping. Actual granting of licences will be assessed on a case-by-case basis that may result in some corporations being granted a licence not envisaged in our assessment and some being denied that satisfied the criteria used in our investigation.

The actual reduction in wages and premiums due to corporations being granted a licence will differ to that estimated. This is normal and to be expected.

Please do not hesitate to contact either of the writers should any aspect of this advice require clarification.

Yours sincerely

Clive Amery

Martin Fry

Fellows of the Institute of Actuaries of Australia

D.1 Appendix A Eligibility for national self-insurance

Our investigation was restricted to organisations with more than 500 employees as we understand that this is a guide used by Comcare when assessing access to self-insurance.

Potential for organisations to compete with a Commonwealth body was examined at the 2-digit industry code level. This assessment, necessarily, was qualitative and primarily based on our experience of existing self-insurers under the SRC Act and knowledge of those seeking to self-insure. We classified each industry code as one of:

- **False** Competition unlikely
- **Maybe** Potential may exist for organisations to build a case that competition exists
- **True** Competition highly likely

The results of this assessment are shown in table D.3. In our analysis weightings of 0 per cent (False), 50 per cent (Maybe) and 100 per cent (True) were applied to our estimates of wage roll and premiums.

Table D.3 **Competition with Commonwealth bodies**

Industry		*Competition?*	*Example*
1		FALSE	
2		FALSE	
3		FALSE	
4		FALSE	
11	Coal mining	FALSE	
12	Oil and gas extraction	FALSE	
13	Metal ore mining	FALSE	
14	Other mining	FALSE	
15	Services to mining	FALSE	
21	Food, beverage and tobacco manufacturing	FALSE	
22	Textile, clothing, footwear and leather manufacturing	FALSE	
23	Wood and paper product manufacturing	FALSE	
24	Printing, publishing and recorded media	FALSE	
25	Petroleum, coal, chemical and associated product	TRUE	ADI/CSL
26	Non-metallic mineral product manufacturing	FALSE	
27	Metal product manufacturing	FALSE	
28	Machinery and equipment manufacturing	FALSE	
29	Other manufacturing	FALSE	
36	Electricity and gas supply	TRUE	ACTEW
37	Water supply, sewerage and drainage services	TRUE	AGL

(Continued next page)

Table D.3 (continued)

Industry		*Competition?*	*Example*
41	General construction	FALSE	
42	Construction trade services	FALSE	
45	Basic material wholesaling	FALSE	
46	Machinery and motor vehicle wholesaling	FALSE	
47	Personal and household good wholesaling	FALSE	
51	Food retailing	FALSE	
52	Personal and household good retailing	FALSE	
53	Motor vehicle retailing and services	FALSE	
57	Accommodation, cafes and restaurants	FALSE	
61	Road transport	TRUE	
62	Rail transport	TRUE	Pacific National
63	Water transport	FALSE	
64	Air and space transport	Maybe	Qantas
65	Other transport	Maybe	
66	Services and transport	TRUE	Aae
67	Storage	TRUE	Australia Post
71	Communication services	TRUE	Visionstream
72		FALSE	
73	Finance	TRUE	CBA/RBA
74	Insurance	Maybe	CBA
75	Services to finance and insurance	Maybe	
77	Property services	FALSE	
78	Business services	TRUE	Telstra
81	Government administration	FALSE	
82	Defence	TRUE	ADI
84	Education	FALSE	
86	Health services	FALSE	
87	Community services	FALSE	
91	Motion pictures, radio and television services	FALSE	
92	Libraries, museums and the arts	Maybe	Australia Post
93	Sport and recreation	FALSE	
95	Personal services	FALSE	
96	Other services	FALSE	

D.1 Appendix B Average weekly earnings

Average weekly earnings (AWE) for each industry and jurisdiction were sourced from the Australian Bureau of Statistics (ABS). Initial figures related to Full Time Adult Earnings[4] subdivided by industry and jurisdiction but these were considered likely to significantly overstate the calculated wage roll. Subsequently, we obtained All Employees Total Earnings by Industry[5] which were apportioned across the jurisdictions according to the statistics available for Full Time Adult Earnings. The results of this adjustment are shown in table D.4.

AWE statistics were also provided by the ABS at the 2-digit ANZSIC industry code level; however, these figures are subject to considerable statistical variation when divided across jurisdictions.

Remuneration was determined as the product of average weekly ordinary time earnings and the number of employees from the D&B statistics. The treatment of casual and part-time workers has not been fully investigated and the results may require some revision.

ABS statistics are not available for industry code A (Agriculture, Forestry and Fishing). Therefore, were assumed the average weekly earnings for this industry to be the jurisdictional average.

The resultant wage rolls are considered to provide a reasonable indication of actual wage roll. Several individual employers were checked against known wage rolls and agreed within 5 per cent. Although AWE were revised from Full Time Adult to All Employee Earnings, the aggregate remuneration from large employers for State schemes still appeared large relative to total scheme remuneration.

4 ABS May 2003 Individual request for AWE by Industry and Jurisdiction.

5 Source: ABS May 2003 AWE by Industry Cat 6302.0.

Table D.4 **Average weekly earnings by jurisdiction and industry**

Code	*Industry*	*NSW*	*VIC*	*QLD*	*SA*	*WA*	*TAS*	*NT*	*ACT*
B	Mining	1 605.34	1 458.54	1 717.84	1 647.24	1 828.46	1 429.61	1 569.52	887.45
C	Manufacturing	952.92	891.40	767.47	807.01	893.11	817.55	880.27	880.67
D	Electricity, gas and water supply	1 205.22	1 207.11	1 179.98	1 151.18	1 200.20	1 184.49	1 100.38	1 165.84
E	Construction	998.22	908.00	910.82	684.97	868.64	731.96	986.21	876.78
F	Wholesale trade	883.69	747.30	745.92	682.42	753.28	648.46	704.69	1 143.04
G	Retail trade	478.71	425.58	407.99	410.81	432.93	389.90	444.05	447.63
H	Accommodation, cafes and restaurants	383.78	380.38	407.41	364.68	384.69	362.07	448.05	352.94
I	Transport and storage	919.76	801.61	868.29	858.54	835.54	895.78	786.70	1 028.17
J	Communication services	1 002.40	997.84	796.50	815.66	953.95	874.90	982.40	937.95
K	Finance and insurance	1 227.88	1 146.98	878.89	944.32	1 035.22	672.71	915.33	956.27
L	Property and business services	770.66	843.74	675.18	814.59	759.62	667.64	656.20	1 000.38
M	Government administration and defence	843.92	874.32	744.96	832.21	810.40	787.69	861.35	1 015.56
N	Education	801.68	779.23	717.86	761.32	732.60	719.83	723.38	757.69
O	Health and Community services	656.06	781.41	652.73	671.53	658.80	657.54	644.00	633.94
P	Cultural and recreational services	668.57	626.59	537.16	637.04	526.78	520.92	561.62	546.91
Q	Personal and other services	648.20	591.22	613.24	576.27	617.26	668.49	676.38	752.95

Source: ABS May 2003 AWE by Industry Cat. 6300.0.

D.1 Appendix C Workers compensation premium rates

Premiums rates for each jurisdiction and industry group were derived from the last published Comparative Performance Monitoring (CPM) report published by the Department of Workplace Relations.

The premium for each potential national self-insurer was determined as the total wage roll (refer above) multiplied by the adopted premium rate.

Table D.5 **Adopted premium rates by jurisdiction and industry**

Code	*Industry*	*NSW*	*VIC*	*QLD*	*WA*	*SA*	*TAS*	*NT*	*ACT*
		%	%	%	%	%	%	%	%
A	Agriculture, forestry and fishing	5.5	4.2	3.0	5.5	4.0	7.3	9.4	8.7
B	Mining	3.2	2.9	2.7	2.9	3.7	6.5	2.6	6.1
C	Manufacturing	4.0	4.3	2.5	4.7	4.3	3.7	3.3	4.2
D	Electricity, gas and water supply	1.7	1.1	0.8	1.9	1.6	1.7	1.8	4.7
E	Construction	4.9	4.1	2.7	4.4	4.5	4.2	4.2	6.6
F	Wholesale trade	1.9	1.8	1.0	2.6	1.9	2.4	3.1	3.2
G	Retail trade	2.4	1.9	1.0	2.2	2.2	2.1	2.5	2.7
H	Accommodation, cafes and restaurants	2.8	2.5	1.4	3.0	2.8	2.0	2.6	3.5
I	Transport and storage	3.7	3.8	2.5	3.5	4.4	4.2	4.1	5.1
J	Communication services	0.9	0.9	0.6	1.4	1.5	2.4	3.1	2.3
K	Finance and insurance	0.5	0.4	0.3	0.5	0.4	1.2	1.4	1.3
L	Property and business services	1.0	0.9	0.6	1.1	1.7	2.0	2.2	1.4
M	Government administration and defence	1.5	1.3	1.1	2.5	0.5	3.2	2.1	1.7
N	Education	1.0	1.0	0.4	1.2	1.0	1.2	2.3	1.8
O	Health and community services	2.4	2.2	1.4	3.0	2.6	3.8	3.1	3.1
P	Cultural and Recreational services	1.7	1.9	1.3	1.9	1.6	1.3	2.5	2.2
Q	Personal and other services	3.1	4.1	1.3	3.6	2.5	3.6	3.5	2.3

D.1 Appendix D Licence types, licensees and expiry dates (as at 1 July 2003)

Table D.6 SRC Act self-insurance licensees

Licence type	*Features*	*Licensee* *1. licence commencement date* *2. licence expiry data*	*Claims management arrangements*
Part VIII Corporations	Self-insurance Self-claims management (with capacity to arrange for a 3rd party claims manager)	ADI Limited 1. 7/02/1196 2. 31/12/2005	In license, with claims Review function by Comcare
		Australian Air Express Pty Ltd 1. 1/07/1999 2. 31/12/2005	GIO General Ltd
		Pacific National (ACT Limited) 1. 1/07/2001 2. 31/12/2005	In house, with claims Review function by Australia Post
		Telstra Corporation Limited 1. 30/06/1992 2. 30/06/2006	GIO General Ltd
		Visionstream Pty Ltd 1. 1/07/1999 2. 30/06/2004	GIO General Ltd
Part VIII Commonwealth Authority	Self-insurance Self-claims management	Australian Postal Corporation 1. 30/06/1992 2. 30/06/2006	In house
Part VIIIB Corporation (Class B)	Self-insurance Self-claims management (with capacity to arrange for a 3rd party claims manager)	Network Design and Construction Limited 1. 15/04/1999 2. 31/12/2004	GIO General Ltd
Corporations (Class A)	Self-insurance Claims management by Comcare subsidiary	CSL Limited 1. 1/06/1994 2. 30/06/2004	Comcare subsidiary (QWL Corporation Pty Ltd)
		JRH Biosciences Pty Ltd 1. 1/06/1994 2. 30/06/2004	Comcare subsidiary (QWL Corporation Pty Ltd)
Part VIIIA Commonwealth Authority (Class III)	Self-insurance Self-claims management	Reserve Bank of Australia 1. 1/07/1996 2. 30/06/2004	In house

D.1 Appendix E Remuneration for current self-insurers (> 500 employees)

Wage roll for self-insurers with more than 500 employees was estimated based on the number of employees listed in the D&B statistics multiplied by the average weekly earnings detailed in table D.4.

Table D.7 **Estimated remuneration of large self-insurers**

Jurisdiction	*Wage roll (self-insurers >500 employees)*
	$m
Australian Capital Territory	0
New South Wales	19 808
Northern Territory	0
Queensland	2 386
South Australia	1 978
Tasmania	95
Victoria	30 218
Western Australia	2 963
Total	**57 449**

D.2 am actuaries' report on the impact on scheme average premium rates from large employers exiting

16 February 2004

Productivity Commission
PO Box 80
Belconnen ACT 2616

Re: Impact on scheme average premium rates from large employers exiting

You requested advice from *am actuaries* as to the possible impacts to a workers' compensation scheme's average premium rate caused by large employers exiting by self-insuring under Comcare. This letter sets out the range of possible impacts on average premium rates.

Influencing factors

The impact on the average premium rate will be influenced by:

- The level of exiting employers as a proportion of premium income to the existing scheme.
- The level of cross subsidisation that the exiting employers currently provide to the scheme.

These factors are examined below.

Proportion of Premium Income Relating to Exiting Employers

The types of employers that could join the Comcare scheme are limited to those in competition with a present or former Commonwealth authority and who meet the minimum employee requirement of 500. Taylor Fry estimated that across all states there are around 500 employers paying $771 million in premiums which meet the requirements, of which it was assumed that 100 ($154 million in premiums) may self-insure under Comcare. Table D.8 summarises the maximum and expected level of exiting employers by State and Territory.

Table D.8 **Projected level of exiting employers by State and Territory**

State	*Scheme revenue*	*Projected maximum exiting Premium*		*Expected level of exiting Premium*	
	$'000	$'000	%	$'000	%
ACT	187	15	7.9	3	1.6
NSW	2 269	377	16.6	75	3.3
NT	58	2	3.3	0	0.7
QLD	506	45	8.8	9	1.8
SA	341	11	3.3	2	0.7
TAS	117	3	2.6	1	0.5
VIC	1 591	288	18.1	58	3.6
WA	636	30	4.8	6	1.0
Total	**5 705**	**771**	**13.5**	**154**	**2.7**

Table D.8 shows large percentages of exiting premium for Victoria and NSW. This is influenced by the data due to the use of head office addresses for the larger employers although many would have employees across other states. Hence, we consider that it is more appropriate to apply the overall percentages.

From this table we conclude that the percentage of exiting employers would represent less than 10 per cent to scheme revenues and probably less than 5 per cent.

Extent of cross subsidy from exiting employers

To determine the impact on average scheme premiums for remaining employers requires the extent to which their premiums are subject to cross subsidisation. However, the information to determine the cross subsidisation of these employers is not readily available, mainly because of the difficultly in determining the "true" or expected cost for each employer.

Centrally managed schemes use experience rated formula to apply to large employers which generally take the form of:

Assessed Premium = E x Z + IP x (1-Z)

where:

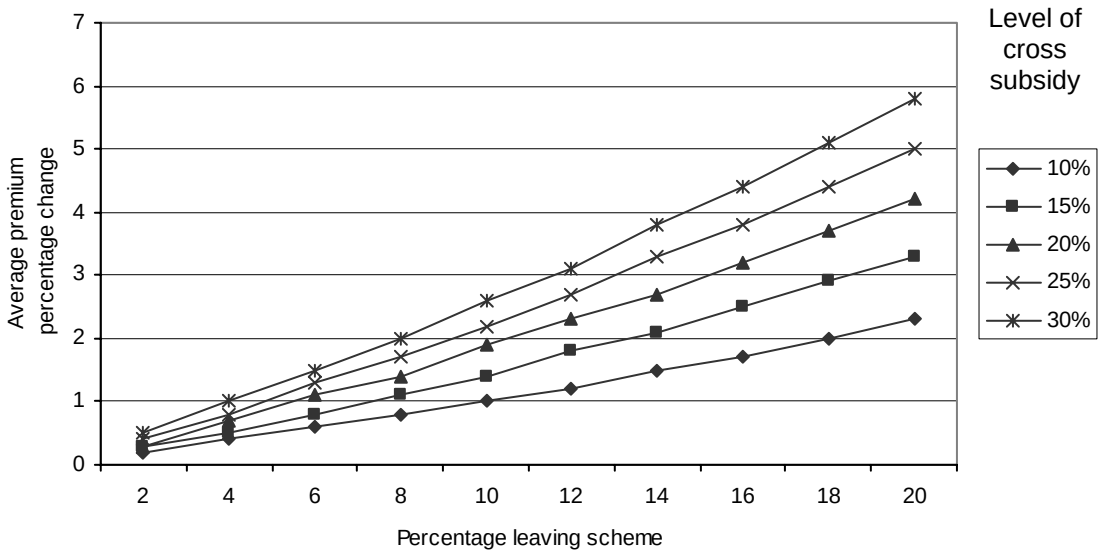
- E is the experience rate of the large employer based on their own claims costs;
- Z is a credibility factor, probably at least 80 per cent for the larger employers; and
- IP is either an industry premium or the rate applied the prior year for the large employer.

Based on our experience of these formulae, the underlying claims ratio (present value of claims divided by premium) for large employers are often around 50 per cent to 60 per cent. Premiums and claims are all net of GST impacts. Hence, with expense rates in the order of 25 per cent the level of cross subsidisation by large employers could be in the range of 15 per cent to 25 per cent.

Influencing factors

We have calculated the impact on remaining employers' average premium rate on different scenarios. Given that the extent to which employer will self-insure under Comcare is not known and the exact level of cross subsidy is also not known, we have illustrated the impact under a range of assumptions. The results are shown in figure D.1 which illustrates the impact on the scheme premium rates for various levels of cross subsidisation and exits.

Figure D.1 **Impact on scheme average premium for various level of cross subsidy**



Each line in figure D.1 represents a level of cross subsidisation ranging from 10 per cent to 30 per cent. For example, with 10 per cent of premium income exiting the scheme, with cross subsidisation of 20 per cent means that the average premium for remaining employers would increase by less than 2 per cent. This represents the percentage *increase* in premium rate and is not an addition to the existing average premium rate.

The results show that using plausible values for cross subsidisation, the impact on the premium levels of remaining employers is small. Even assuming that all eligible employers exit (representing 13.5 per cent of premium revenue as shown in table D.9) and cross

subsidise the scheme at the rate of 30 per cent of their premiums, the average premium increase is 3.6 per cent. It is expected that the number of employers exiting and the actual level of cross subsidy would be considerably less resulting in an increase in average premiums for remaining employers of perhaps 0.5 per cent to 1.5 per cent.

The percentages shown in figure D.1 are detailed in table D.9.

Table D.9 **Impact on scheme average premium for remaining employers**

Assumed level of cross subsidy	*Level of premium exiting scheme*									
	2	4	6	8	10	12	14	16	18	20
	%	%	%	%	%	%	%	%	%	%
10%	0.2	0.4	0.6	0.8	1.0	1.2	1.5	1.7	2.0	2.3
15%	0.3	0.5	0.8	1.1	1.4	1.8	2.1	2.5	2.9	3.3
20%	0.3	0.7	1.1	1.4	1.9	2.3	2.7	3.2	3.7	4.2
25%	0.4	0.8	1.3	1.7	2.2	2.7	3.3	3.8	4.4	5.0
30%	0.5	1.0	1.5	2.0	2.6	3.1	3.8	4.4	5.1	5.8

Reliances and limitations

The change in average premium rate for remaining employers is based on maintaining the current funding ratio of the schemes. It is noted that run-off claims for employers exiting a scheme require further funding for those schemes in deficit. However, no future revenue would be available from those employers. In our calculations we have assumed that any unfunded liability would be recovered from the exiting employer. This could be achieved by transferring the 'tail' to the exiting employer (provisions currently exist under NSW WorkCover legislation).

It is not possible to predict the number of employers that will seek to self-insure under the SRC Act. Although our estimates have been prepared on a conservative basis (more likely to overstate the extent of employers exiting than understating) it is still possible that more employers may exit than illustrated in the scenarios illustrated.

The scenarios presented were designed to encompass the possible range of cross subsidies that may exist. We note, however, that the actual level of cross subsidies is not known and could be higher than that illustrated.

The impact is shown on the average premium rate for remaining employers. The impact on individual employers will differ from the average. Some can expect considerably higher

increase and some may experience reductions. The range of increases would depend on the various policies and strategies implanted by each scheme.

Yours sincerely

Clive Amery Greg Moran

Fellows of the Institute of Actuaries of Australia

D.3 am actuaries' response to the comment of Bateup Actuarial + Consulting Services

26 February 2004

Productivity Commission
PO Box 80
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Bateup review of Taylor Fry report

This letter responds to Robyn Bateup's review of the Taylor Fry report contained in Appendix D of the Productivity Commission's Interim Report on 'National Workers' Compensation and Occupational Health and Safety Frameworks'. am actuaries was requested by the Productivity Commission to undertake this work as Clive Amery was the principal author of the Taylor Fry report. No comment is made in relation to her review of the Australian Government Actuary's report.

The main comments and issues raised are addressed below.

Further investigation

Bateup suggested that several areas may benefit from further investigation. Each is considered below.

While more detailed analysis may provide greater insight into the impact of self-insurance on various schemes, we consider that it is unlikely to significantly alter the results of the assessment already conducted.

Cross subsidies

Large employers are mainly experience rated and so their premium is expected to reflect their cost of claims and contribution to administration and claims management. Even if exiting large employers were subsidising the cost of claims of smaller employers it was not expected to have a material impact on the average premium rate for remaining employers.

That view was confirmed in separate advice recently provided to the Productivity Commission in our letter dated 16 February 2004. Further analysis is unlikely to result in a more accurate assessment of the impact on the average premium rate for remaining employers as it is not possible (except in hindsight) to determine the actual level of cross subsidy.

Propensity for large employers to self-insure

Further analysis is unlikely to provide a better estimate of the ultimate number that will be successful in applying for national self-insurance. Although, as suggested by Bateup, a survey of identified employers could be undertaken, in the absence of a feasibility study, it is unlikely that employers would be in a position to indicate if they would apply to self-insure under a national licence. Even if employers could respond, at this stage, the ultimate number seeking to self-insure under a national framework can only be a matter of conjecture.

In the original impact assessment of self-insurance, the premium pool of all potential exiting employers, as well as a more likely one in five, was illustrated. This clearly provides the possible range of outcomes.

Impacts other than premium revenue

Bateup suggests that an assessment of the loss of subsidies and economies of scale on small to medium sized employers be undertaken by industry and jurisdiction.

The key difficulty with undertaking the original assessment relates to knowing which employers are likely to exit the scheme. The original assessment based this on the 2-digit ANZSIC industry code (refer table A.1 (table D.3 above) of the Taylor Fry report). Although not directly referred to in the report, it was assumed that each company with more than 500 employees in the industry with 'TRUE' shown under the 'Competition?' heading would self-insure. Fifty percent of those shown as 'Maybe' were also assumed to self-insure. This provides an indication of the industries likely to be affected by national self-insurance arrangements.

The level of examination suggested by Bateup could only be performed with detailed scheme data. Although requested, only limited information was made available for the original review. This issue is discussed further below.

Access to scheme data

It was originally intended that the impact on jurisdictions would be assessed by considering Tasmania (impact on a smaller and privately underwritten scheme), Victoria (impact on a large centrally funded scheme) and Queensland (due to the different characteristics of that scheme). However, only limited information was made available.

Although scheme data was not available, the alternate source of information was considered useful. Checks were performed on the data that provided the necessary confidence that it was adequate for the purpose of the investigation.

The lack of scheme specific data does not invalidate the analysis undertaken. The results of the analysis on the alternate data sources are soundly based and provide a reasonable indicator as to the impact on the various workers compensation schemes.

Since the original report, the Victorian WorkCover Authority has made information available. This is currently being analysed and will be the subject of a separate report.

Comments on assumptions

When undertaking the analysis, as observed by Bateup, it was necessary to make several subjective assumptions. These assumptions were carefully chosen to clearly illustrate the range of likely outcomes and inform the reader of their significance. For each assumption we adopted a cautious approach that was aimed at not understating the impact on the workers' compensation schemes. As such, the results are considered to more likely to over-state than under-state the impact on the schemes.

It is true to say that considerably uncertainty exists in the assessment; this point is clearly acknowledged and largely quantified in the original report. However, it is not correct to say that the use of the assumptions 'significantly increases the uncertainty in the results produced'. As indicated in the sections above concerning the suggested areas of further investigation, we do not consider further investigation would yield more accurate assumptions.

Conclusion

Our opinion is that the overall assessment undertaken in the original report remains valid. Bateup has reiterated the limitations of the analysis undertaken. However, we do not consider that the further investigations suggested would produce better assumptions or result in a material change to the original assessment.

We do consider that analysis on scheme specific data would provide more insight into the impact on each scheme.

Yours sincerely

Clive Amery Greg Moran

Fellows of the Institute of Actuaries of Australia

D.4 Analysis of Victorian WorkCover Authority data

1 March 2004

Productivity Commission
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Impact of national self-insurance on State schemes (Victoria)

The Victorian WorkCover Authority (VWA) recently provided information that had been requested by the Productivity Commission to assist in the assessment of the impact of national self-insurance under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) on the State schemes.

This letter examines the information provided by VWA and quantifies the impact that national self-insurance may have on VWA's remuneration base and premium pool. Other issues such as accrued unfunded liabilities and cross subsidies are not discussed as they have been considered in separate advices.

Approach

Our investigation follows along similar lines to that conducted in the initial Taylor Fry report that examined this issue and formed part of the interim report by the Productivity Commission. The potential to self-insure under the national framework was considered for each industry and each company was then categorised according to their industry group. A list of the industries considered having some ability to meet the competition criteria is listed in Appendix A of the Taylor Fry report.

The main difference from the initial assessment is that VWA provided the ANZSIC classification for each *workplace* rather than the overall corporation. In this assessment we have assumed that a corporation will be eligible to transfer to national self-insurance if any workplace[6] satisfies the competition criteria. This approach has been adopted to minimise the potential for understating the impact on VWA.

In this assessment we have assumed that State government departments and agencies, authorities, councils and health service providers will remain premium payers under VWA.

6 Workplaces with ANZSIC codes 78 – Business Service and 67 – Storage were excluded from this adjustment where they provided a relatively minor part of an organisation's operations.

These organisations represent 21 per cent of remuneration and 16 per cent of premium revenue of the companies listed by VWA[7].

Impact of national self-insurance on VWA

In 2002-03, 1173 'large' employers (employers with remuneration exceeding $7.5 million) represented 42 per cent ($32 468 million / $76 681 million) of total remuneration and 40 per cent ($723 million / $1799 million) of premium for the Victorian scheme.

The same criteria for assessing a company's potential to self-insure under the SRC Act was used in this assessment to that employed in the initial investigation (refer Appendix A of the Taylor Fry report). Using these criteria, 179 or 15 per cent of the 1173 'large' companies, were considered to have potential to self-insure under the SRC Act. Aggregated remuneration and premium information is shown in table D.10.

Table D.10 **Potential for national self-insurance**

	Number of companies	*Remuneration 2002-03*	*Premium 2002-03*
	No	$m	$m
Potential for national self-insurance	179	7 643	146
Total 'large' employers	1 173	32 468	723
Scheme total 2002-03		**76 681**	**1 799**

The figures in table D.10 indicate that VWA's remuneration base would reduce by 10.0 per cent ($7643 million / $76 681 million) and premium revenue by 8.1 per cent ($146 million / $1799 million) if all companies with the potential to self-insure actually transfer to the national scheme. These percentages represent the **maximum** reduction in scheme remuneration and premium as it is considered unlikely that all eligible employers will pursue self-insurance.

The initial report illustrated the impact on remuneration and premiums in the event that only one in five eligible employers transferred to national self-insurance. Utilising this same assumption suggests that VWA's remuneration pool could reduce by around 2.0 per cent and the premium pool by around 1.6 per cent.

In the initial Taylor Fry report, the maximum reduction in premium was estimated to be 13.5 per cent (compared to the current estimate for VWA of 8.1 per cent) and, assuming one in five actual transfer to national self-insurance, the premium reduction was estimated

7 VWA provided a list of 2938 workplaces in respect of 1173 companies whose aggregate remuneration each exceeded $7.5 million. This remuneration floor equates to around 200 employees.

to be 2.7 per cent (compared to the current estimate for VWA of 1.6 per cent). The current assessment is considered to provide more reliable estimates of the impact on the VWA as the analysis is based on actual scheme data.

The reduction in premium pool resulting from exiting employers is not expected to result in a material change in premiums for remaining employers. This issue has been addressed in separate advice to the Productivity Commission in our letter dated 16 February 2004.

Removal of competition criteria

The impact of broadening access to national self-insurance by removing the 'competition' criteria has been assessed by assuming that all companies in the list provided by VWA with at least 500 employees would be eligible to self-insure under the SRC Act, except for State government departments and agencies, authorities, councils and health service providers.

If all organisations (apart from the identified exclusions) transfer to national self-insurance, then the VWA could expected scheme remuneration and premiums to reduce by 23 per cent. However, as discussed in the initial review, it is unlikely that every eligible company will seek to self-insure on a national basis. Assuming that one in five companies will transfer to national self-insurance, then it is expected that both scheme remuneration and premiums would reduce by around 4 per cent to 5 per cent.

Current self-insurers

As noted in the initial Taylor Fry report, current self-insurers in Tasmania are mostly large national employers that would be likely to consider transferring to a national self-insurance arrangement. It was expected that access to national self-insurance could potentially result in the number of Tasmanian self-insurers reducing from 15 to 4, which could act to increase the licence fee for remaining self-insurers. This fee is charged by the state authority to meet the costs of regulation and oversight of self-insurers.

VWA reported that there were 35 licensed self-insurers in 2002-03. Based on existing eligibility conditions, we consider that most could self-insure under the national framework. If all eligible organisations elect to transfers to national self-insurance only seven would remain under Victorian self-insurance arrangements. This proportion (20% = 7/35) is a similar order of magnitude to that previously assessed for Tasmania (27% = 4/15). It is expected that the cost of supervising self-insurers will decrease in proportion to the number of remaining self-insurers and is unlikely to affect the finances of the scheme.

Limitations

The impact on the Victorian scheme will differ to the estimates contained in this letter and will depend on the actual number of companies that seek national self-insurance.

The assessment of eligibility for national self-insurance is based on broad industry groupings. It is possible that many companies deemed eligible may in fact not be eligible. In addition, many companies not considered eligible may be eligible. The figures presented in this advice have been prepared to minimise the risk of understating the reduction in remuneration and premiums.

Yours sincerely

Clive Amery Greg Moran

Fellows of the Institute of Actuaries of Australia

E Institutional arrangements for national workers' compensation frameworks

In the Interim Report, the Commission proposed a number of national framework models to overcome the compliance burdens and costs faced by multi-state employers and mobile workers arising from multiple workers' compensation schemes and OHS regimes.

The proposed models take an incremental approach to changing the existing arrangements. As an initial step, they would allow employers meeting specific criteria to self-insure under the Australian Government's Comcare scheme, followed by making the alternative self-insurance arrangements more widely available. Should the Government be so disposed it could then implement an alternative premium paying national workers' compensation scheme. Employers opting into such workers' compensation arrangements could also seek coverage under the Australian Government's OHS legislation.

This raises the issue of whether existing institutional arrangements governing the Comcare scheme and OHS legislation are appropriate and, if not, what changes are required to deal with an expanded national scheme.

This appendix, after briefly describing the existing arrangements, looks at a continuum of appropriate changes to the institutional arrangements to reflect the incremental approach of the national framework models proposed by the Commission.

E.1 Current arrangements

The legislative framework for the Comcare scheme is provided by the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), while the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS (CE) Act) provides the legislative basis for the Australian Government's OHS regime. Details of the Comcare scheme are provided below.

In broad terms, the administration and regulation of workers' compensation and OHS is undertaken by two agencies, the Safety Rehabilitation and Compensation Commission (SRCC) and Comcare.

The SRCC

The SRCC, established under the SRC Act, is broadly responsible for providing the regulatory framework for the Australian Government's workers' compensation scheme and OHS regulatory regime. The eleven members of the SRCC are primarily stakeholder representatives. The Chair is the CEO of Comcare and other members represent Australian Government employers, Australian Government employees, licensed self-insurers, the Australian Defence Force and the ACT Government. The CEO of NOHSC is a member of the SRCC and two other members are appointed on the basis of relevant qualifications and experience.

The SRCC's functions include advising the Minister, issuing licences for self-insurance and claims management, and issuing guidelines for the determination of premiums and regulatory contributions. The SRCC also has regulatory functions under the OHS(CE) Act.

The SRCC does not have its own staff and relies on Comcare staff to carry out its functions. Also, it does not have a separate budget and relies on Comcare for its expenditures. Because of these arrangements, the SRCC is more of a stakeholder body embedded in Comcare than a stand alone regulator.

Comcare

Comcare, a statutory authority also established under the SRC Act, administers the Australian Government's workers' compensation scheme and administers the OHS (CE) Act. Comcare's governance structure consists of a Chief Executive Officer, Deputy Chief Executive Officer and a number of general managers responsible for various divisions within the organisation. The Chief Executive Officer reports to the Minister for Employment and Workplace Relations.

Comcare's functions include determining and collecting premiums and regulatory contributions, determining claims from employees of premium paying agencies, applying premiums to meet claims, common law liabilities and the cost of managing claims, promoting strategies for the rehabilitation of injured employees by employers (who are responsible for occupational rehabilitation), and providing administrative support to the SRCC. It also enforces the OHS (CE) Act, initiating investigations and prosecutions, and appointing investigators who may also initiate prosecutions.

The Australian Government effectively acts as self-insurer and ultimately the underwriter for premium paying agencies under the scheme.

Employee coverage. The scheme covers all Australian Government employees, including members of the Defence Force, as well as employees of certain corporations and ACT Government employees.

Journeys etc. The scheme covers journeys (for example, between place of residence and place of work) and 'ordinary recesses' (for example, meal breaks).

Statutory benefit structure. Weekly benefit rates are payable for the first 45 weeks at 100 per cent of normal weekly earnings, and after 45 weeks at 75 per cent of normal weekly earnings. All reasonable medical and hospital costs are paid. Lump sums are paid for permanent impairment (assessed as at least 10 per cent of the whole person). Redemptions are paid only where the weekly benefit is below a statutory threshold and when the employee's incapacity is unlikely to change.

Access to common law damages. Common law damages are limited under the scheme (for example, they are only available where there is permanent impairment and for non-economic loss only, and they are capped). There is no ceiling on third party actions or those made by dependants.

Premium setting. Premiums are set so as to 'fully fund' the scheme. Comcare determines and applies premiums for each Australian Government agency on an experience-rated basis. There are no employer excesses.

Licences for self-insurance and claims management. Licensing arrangements were first enacted in 1992 and were 'streamlined' in 2001. The SRC Act provides scope for Australian Government authorities and for eligible corporations to be granted a licence to self-insure and/or manage claims. The Minister may declare certain corporations as eligible to apply to the SRCC for such a licence. Before granting a licence, the SRCC must be satisfied that: the applicant has sufficient resources to fulfil the responsibilities imposed on it under the licence; the applicant has the capacity to ensure that claims will be managed in accordance with standards set by the SRCC; the grant of the licence will not be contrary to the interests of the employees; and the applicant has the capacity to meet the OHS and rehabilitation standards set by the SRCC. The SRCC applies conditions to the licence that may include prudential requirements, and conditions whereby the management of claims may be performed by another body.

Dispute resolution. Applications for a review of claims management decisions involve a two-tier process. The first is an internal reconsideration, which may then be followed by an application for review by the Administrative Appeals Tribunal (appendix F). A decision of the Tribunal may be appealed to the Federal Court on questions of law only.

E.2 Institutional arrangements for step 1

The initial step in the proposed development of a national scheme would involve using the Ministerial discretion powers under the SRC Act to enable employers carrying on a business in competition with Australian Government authorities, or with corporations that were previously Australian Government authorities, to apply for a licence to self-insure under the Australian Government scheme.

As with the current licensing arrangements, the SRCC would be responsible for granting the licence to self-insure, subject to certain prudential and other requirements being met, as set out above. One concern with the current arrangements is that the SRCC is essentially a stakeholder body. As such, the applicants for self-insurance would not be scrutinised by an independent regulator. This may not be a major issue for step 1, provided that those employers wanting to self-insure are not being scrutinised by a competitor who is also a member of the SRCC.

Given the use of existing legislation and the limited number of employers that would be eligible to self-insure under this initial step, the current regulatory regime appears to be appropriate. Moreover, as indicated by Comcare in discussions with the Commission, additional resources would not be required to administer such minor changes to the current arrangements.

The Australian Government may wish to draft legislation to enable this wider group of self-insurers to be covered under its OHS arrangements.

E.3 Institutional arrangements for step 2

The second step is more substantial, involving legislative, rather than administrative, changes to the current workers' compensation scheme.

The establishment of such a broadly based self-insurance scheme, and the increased regulatory task it entails, raises a number of issues regarding the structure and functions of the SRCC. These include:

- the lack of clear separation of the regulatory functions from the service functions;
- the 'stakeholder' composition of the Commission; and
- the SRCC's reliance on Comcare's resources.

Stakeholder involvement in the SRCC

At present, the stakeholder nature of the SRCC results in a lack of independence, leading to a possible conflict of interest from having those being regulated sitting on the regulator's board.

The requirement for legislative change to implement step 2 provides an opportune time to review the governance structure of the SRCC. Given its expanded regulatory role, it would be appropriate to establish its independence by establishing an independent board of directors appointed on the basis of their skill and expertise.

The use of Ministerial discretion, as required for step 1, should be reviewed with a view to its removal under the proposed step 2 legislation, given that licences for self-insurance would be issued by an independent board based on specific prudential and other eligibility criteria being met.

Separation of the regulatory and service functions

The separation of regulatory and service functions is a fundamental tenet of good governance. At present, however, the regulator, the SRCC, is dependent on Comcare for its staffing and financial resources and the chief executive officer of Comcare is the Chair of the SRCC. Separation would ensure that there is no conflict of interest between setting the appropriate service standards and providing the service. There are a number of options to separate these functions.

'Ring fencing' the SRCC

The minimalist option would be to provide the existing SRCC with dedicated resources and separate its operations administratively from Comcare through a 'ring fencing' arrangement. The current representation on the SRCC would remain.

Establishing the SRCC as statutory authority

A second option would be to remove the SRCC from Comcare and create it as a separate regulatory authority. This would present the opportunity to ensure that its governance structure and functions complied with the *Commonwealth Authorities and Companies Act 1997* and that its executive board possessed relevant skills and experience.

At present there is some ambiguity as to whether or not those current SRCC members representing self-insures, employers and employees are directors for the purpose of the *Commonwealth Authorities and Companies Act 1997* and whether they are charged with

the responsibilities attached to directors under the legislation. These responsibilities cover conflicts of interests, acting honestly, exercising care and diligence and using insider information and are in accordance with the duties of directors under Corporations Law. Establishing the SRCC as a separate regulatory authority would leave Comcare predominantly in a service provider role.

The separation of the regulatory functions from the service provision functions in relation to workers' compensation has been undertaken in some other jurisdictions. For example, following a National Competition Policy review, the Queensland Government introduced legislation in early 2003 which established Q-COMP as a stand-alone regulator separate from Workcover Queensland, the monopoly provider of workers' compensation insurance in Queensland. Details of the State and Territory institutional arrangements relating to workers' compensation and OHS are provided in box E.1.

A 'greenfields' regulator

A further option, rather than revamp the SRCC into a separate statutory authority, would be to establish a 'greenfields' regulator for the alternative national self-insurance scheme and leave the SRCC in its current role of regulating and licensing Australian Government agencies. The need to establish a 'greenfields' regulator is likely to depend on the number of employers accepted to join the national self-insurance scheme.

The roles and functions of a 'greenfields' regulator is discussed in further detail in relation to the step 3 arrangements.

As with the step 1 proposal, employers opting to self-insure could be covered by an extension of the Australian Government's OHS legislation. This raises the issue of whether the SRCC's regulatory functions in relation to the Australian Government's OHS legislation should be with the body responsible for workers' compensation, such as a revamped SRCC or 'greenfields' regulator, or be separated.

Box E.1 **State and Territory institutional arrangements**

The institutional arrangements surrounding workers' compensation and OHS vary across jurisdictions. They range from OHS and publicly underwritten workers' compensation being provided under the control of a single statutory authority, such as in Victoria, to having separate agencies responsible for OHS and the administration of a privately underwritten workers' compensation scheme such as in Western Australia.

Regulation and provision of workers' compensation

In the case of the publicly underwritten schemes, Queensland is the only jurisdiction which has separated the regulatory functions from the provision and administration of workers' compensation. Also, the use of private insurers to provide services under these schemes varies across jurisdictions. In New South Wales and Victoria private insurers are used extensively to collect premiums, deliver benefits and rehabilitation, while in South Australia the role of private insurers is limited to claims management.

OHS consultation and enforcement

Consultative bodies representing the government, employers, employees and OHS experts provide policy advice and set OHS standards in most jurisdictions. The enforcement of OHS is often undertaken by separate bodies, often by a separate division within the Department which has overarching responsibility for OHS policy. While some jurisdictions operate all OHS functions from a single body, such as in New South Wales and Victoria, the responsibility for OHS is fragmented in others, such as in South Australia.

Source: various.

Regulatory arrangements for workers' compensation and OHS

There are different views and practices as to whether the regulation of workers' compensation and OHS should be separate. From the discussion in chapter 4, the use of a single regulator is seen to provide benefits through greater coordination and feedback between workers' compensation and OHS matters. Conversely, the different aims and issues of workers' compensation and OHS were seen as reasons as to why they should be separated, but with strong informational links.

Across the States and Territories, the use of single or separate bodies to regulate workers' compensation and OHS varies (table E.1). New South Wales, Victoria, the Australian Capital Territory and the Northern Territory use a single body. For example, in New South Wales the Workcover Authority is responsible for both administering and regulating workers' compensation and OHS, while the Victorian Workcover Authority undertakes a similar role in Victoria. Single regulator models are used in both publicly and privately underwritten workers' compensation schemes. Those jurisdictions with separate workers' compensation and OHS regulators, Queensland, Western Australia, South Australia and

Tasmania also include both publicly and privately underwritten schemes. For example, in Queensland Q-Comp is responsible for regulating workers' compensation and WorkCover Queensland for its administration, while the Division of Workplace Health and Safety in the Department of Industrial Relations administers and regulates OHS.

Table E.1 **Institutional arrangements in OHS and workers' compensation by State and Territory**

	Publicly underwritten schemes				*Privately underwritten schemes*			
	NSW[a]	*Vic*	*Qld*	*SA*	*WA*	*Tas*	*ACT*	*NT*
Single body responsible for administering workers' compensation and OHS	yes	yes	no	no	no	yes	yes	yes
Single body responsible for regulating workers' compensation and OHS	yes	yes	no	no	no	no	yes	yes
Single body responsible for OHS policy advice and regulation	yes	yes	no	no	no	no	yes	no

[a] Workcover NSW does not have the statutory responsibility for underwriting the New South Wales scheme.

Source: Various.

Initially, a new self-insurance scheme is unlikely to attract the number of employers to warrant the creation of separate workers' compensation and OHS regulators on administrative cost grounds. Further, as is currently the arrangement, some of the OHS enforcement and inspection tasks could continue to be undertaken by State agencies or other agencies on behalf of the Australian Government. The principal requirement is that the regulatory and service functions are separated.

E.4 Institutional arrangements for step 3

The establishment of a broad-based alternative premium paying national insurance scheme (the Commission's step 3) would require fundamental changes to the existing institutional arrangements. The regulatory task would be significantly greater than that proposed under steps 1 and 2. An alternative national insurance scheme would require the regulation of self-insurers and those private insurers who would provide workers' compensation

insurance. However, the additional regulatory burden of regulating private insurers may not be that great, given that there would be no additional prudential scrutiny of private insurers to that undertaken by the Australian Prudential Regulation Authority.

In addition, there would be the need for regulation and administration of the accompanying national OHS scheme.

Such a move raises the question of what a new regulatory body would look like and what roles it would undertake. It also raises the issue of the role of Comcare and the regulation of its activities in an alternative national insurance scheme.

A greenfields regulator

There are several key roles in regard to regulatory frameworks. They include:

- the development of policy;
- the regulatory role; and
- enforcement.

The development of policy is the preserve of the Government. As to the regulatory role and function, there is a number of broad best-practice principles relating to the structure and operation of regulatory bodies. The following governance structure draws on a number of recommendations from the HIH Royal Commission relating to the structure of the regulatory body responsible for general insurers. Most importantly, such a body should be independent, with its overarching role being to make decisions in accordance with the relevant legislation. To this end it should:

- be established by an Act of Parliament;
- be required to report to Parliament through the relevant Minister;
- have a control body based on at least one full-time commissioner;
- have commissioners appointed on fixed terms;
- have its own budget voted by Parliament;
- employ its own staff as opposed to using a secretariat provided by another agency;
- use transparent processes and permit public scrutiny, including publishing details of the processes and the basis for the decisions it reaches; and
- undertake public consultation dealing with matters of public importance.

More specifically, but in keeping with the broad principles outlined above, a new regulator for an alternative national workers' compensation scheme and OHS regulatory regime should be established as a separate Commonwealth statutory authority and operate in

accordance with the *Commonwealth Authorities and Companies Act 1997*. Such a body should be administered by a board comprised of a chair and a small number of Commissioners appointed by the Governor-General. The chair would report to the relevant Minister and be accountable to the Government for the performance of the regulator. Commissioners would be appointed based on their relevant experience and expertise. The chair would also have the power to form an advisory body, which could include stakeholders and other relevant parties.

The role of the regulator

Broadly, the role of the regulator would be to:

- license private insurers providing workers' compensation based on the appropriate prudential (Australian Prudential Regulation Authority) standards and administrative requirements;
- license self-insurers based on the appropriate prudential and administrative requirements (such as under 'file and write');
- act as a review body for premium settings;
- collect relevant data; and
- provide advice to the Minister as required.

In keeping the regulation of OHS and workers' compensation within the one agency, the new agency would also be responsible for the regulation of the Australian Government's OHS legislation. Jurisdictions such as New South Wales and Victoria, which have relatively large schemes, use a single regulatory agency for both workers' compensation and OHS. As it is proposed that any new national scheme would be privately underwritten, there is also a parallel with the Australian Capital Territory and Northern Territory arrangements where a single body regulates a privately underwritten workers' compensation scheme and the relevant OHS arrangements.

Policy formulation would continue to reside with the Department of Employment and Workplace Relations.

Should it undertake the enforcement of OHS?

There is some degree of judgment as to how separate the regulatory and enforcement functions of OHS should be. Given that Comcare is already in existence and has experience in undertaking the enforcement and prosecution of functions in relation to Australian Government OHS legislation, these functions could remain with Comcare while the regulatory functions of the OHS legislation are moved to the specialist regulator. This

would ensure that those responsible for setting the regulatory standards are independent of those enforcing the standards and undertaking prosecutions.

Previous work by the Commission in relation to other areas, such as gambling, suggests that there are benefits in having the enforcement and regulatory function undertaken by separate agencies (PC 1999).

The role of Comcare in a national scheme

Various roles for Comcare have been discussed above in relation to the proposed step 1 and step 2 schemes. While an alternative national premium paying scheme is a longer term possibility, it also raises the issue of the role of Comcare under such a scheme.

Workers' compensation

The Australian Government may consider that its agencies, rather than being part of any national scheme, retain separate arrangements and continue using Comcare (and the smaller Seacare scheme administered by Comcare) to provide the workers' compensation arrangements for its agencies and the maritime industry. This is the case in Western Australia where the Risk Cover Division of the Government Insurance Commission provides the workers' compensation arrangements for government agencies in that jurisdictions.

If there were to be separate arrangements for Australian Government agencies and the maritime industry, the most appropriate regulatory agency for their workers' compensation and OHS would be a 'separate' SRCC as discussed for step 2.

OHS

In regard to OHS, irrespective of whether Australian Government agencies were part of a national workers' compensation scheme, Comcare could continue its role in administering the Australian Government's OHS legislation and its enforcement as under steps 1 and 2.

Under any of the proposed steps, if it was considered that the Australian Government's OHS legislation did not warrant a specialist OHS administrative and enforcement body, the functions could be incorporated into the Department of Employment and Workplace Relations. In a number of states, such as Queensland, Western Australia and Tasmania, OHS administration and enforcement is undertaken by the relevant industrial relations department. As is the current practice, investigations and prosecutions could continue to be undertaken both by the Australian Government and on its behalf by State government agencies and other agents.

As discussed in chapter 4, were an Australian Government inspectorate to be established which reported directly to the SRCC, this body could undertake the enforcement and administration of the Australian Government's OHS legislation.

Summing up

The institutional arrangements, discussed above, are part of a continuum of change and as such are not 'welded on' to each of the steps of the national framework. Indeed, there may be arguments for such institutional changes to be undertaken as part of earlier steps in the national framework. In particular, while opening up the existing self-insurance arrangements to specific employers only involves minor administrative change, given the potential conflict of interest in the management of the SRCC it may be worthwhile to amend legislation to change its structure in conjunction with the administrative changes. This would allow the SRCC time to 'bed down' any new administration arrangements before additional demands were placed on its services by steps 2 and 3.

F Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) was established by the *Administrative Appeals Tribunal Act 1975*. Its powers, functions and procedures are governed by that Act and the associated regulations (Administrative Appeals Tribunal Regulations 1976).

The AAT is an independent body that was set up to review, on the merits, a broad range of administrative decisions by Australian Government ministers and officials, authorities and other tribunals. The Tribunal also reviews administrative decisions made by some non-government bodies, including about seafarers' compensation and mutual recognition.

An 'on the merits' review involves the Tribunal deciding, on the facts before it, whether the correct — or in a discretionary area, preferable — decision has been made in accordance with the applicable law. It will affirm, vary or set aside the original decision.

The AAT is not always the first avenue of review of an administrative decision. In some cases, such as in the decisions made by Comcare that are subject to review, it may not review the decision until there has been an internal review by the agency. (Comcare's internal review procedures are outlined in box F.1.) In other cases, review by the Tribunal is only available after an intermediate review by a specialist tribunal, such as in the area of social security where matters must first be considered by the Social Security Appeals Tribunal.

The AAT can only review decisions over which it has specifically been given jurisdiction. Typically, this is contained in the legislation authorising the original decision. In total, however, its jurisdictional coverage is contained in some 400 separate acts, and also arises from decisions made by other authorities under the *Safety, Rehabilitation and Compensation Act 1988* and statutory instruments. In addition to review of Comcare's decisions, its coverage includes taxation, social security, veterans' affairs, Australian government employees' superannuation, civil aviation, customs, freedom of information, bankruptcy, security assessments undertaken by the Australian Security Intelligence Organisation, corporations and export market development grants.

Box F.1 **Comcare's internal review procedures**

Comcare's internal review procedures are set up to provide reconsideration of original Comcare decisions on workers' compensation claims by review officers who have had no previous involvement in those decisions. Review officers can confirm or amend the original decision and must issue a written decision.

To invoke the review procedures, complainants must request the reviews within 30 days of the original decision. The requests must be in writing, identify the date of the original decision, explain the grounds for disagreeing with the decision and provide any new information that supports the request, such as medical reports not previously considered by Comcare. Extensions of time may be considered and complainants can, at their own expense and irrespective of the outcome, seek the help of solicitors to aid them with the review process.

Employers have the same rights to request reviews of Comcare decisions as do employees. Employers are provided with a copy of employee requests for reviews and may provide comments on those requests. Likewise, employees are notified if their employer requests a review of an original decision on their claim.

If complainants are not satisfied with the decision of the review officer, they can apply for the decision to be reviewed by the Administrative Appeals Tribunal.

Source: Comcare (nd), *What do I do if I do not agree with a decision made by Comcare?* (available at www.comcare.gov.au).

At 31 July 2003, the Tribunal had a membership of 75, staff of 130 and a budget of $28 million. Members of the Tribunal come from a wide variety of backgrounds including lawyers, medical practitioners, aviators, accountants and other professions. Approximately 30 per cent of applications lodged with the AAT involve compensation matters, with one-third of these involving decisions made by Comcare (table F.1).

Table F.1 **Administrative Appeals Tribunal, compensation applications lodged and finalised, 2002-03**

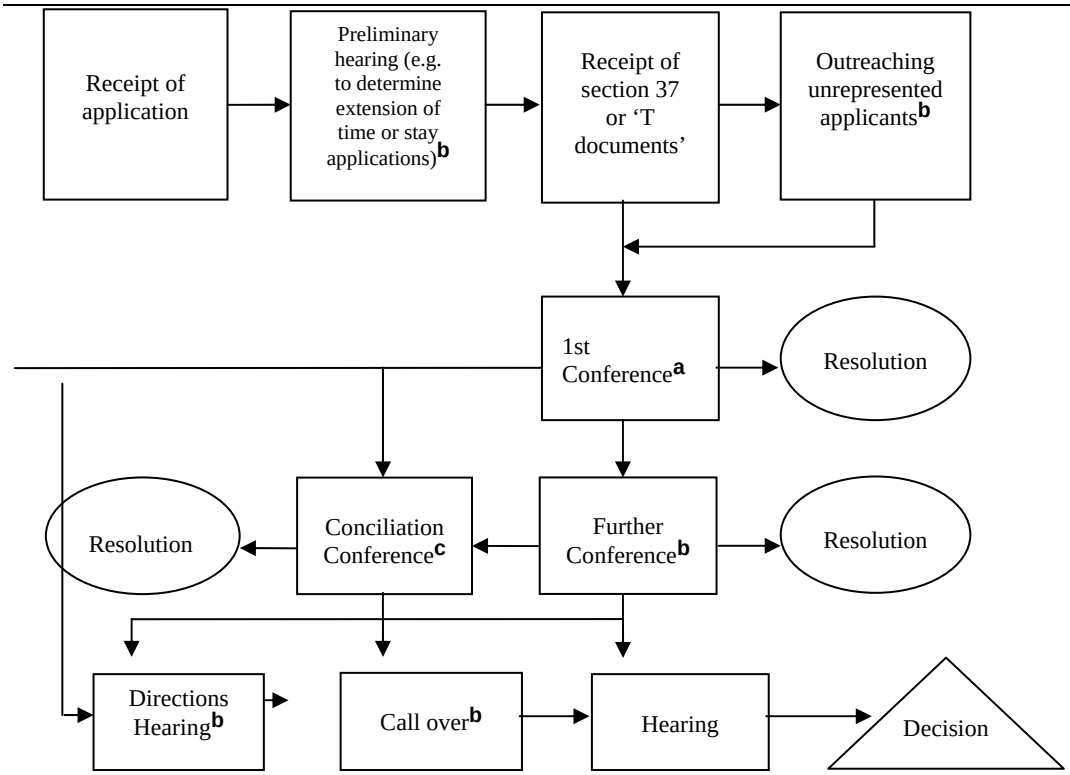
	Applications lodged	*Applications finalised*
Australian Postal Commission[a]	546	527
Comcare	800	829
Department of Defence	414	415
Seafarers' compensation	41	43
Telstra[a]	463	487
Other compensation decision makers	28	23
Total compensation	**2292**	**2324**
Compensation proportion of total AAT activity	(30%)	(22%)

a Self-insure under Comcare scheme.

Source: Administrative Appeals Tribunal (2003).

Upon acceptance, the AAT case manages each application to ensure an orderly and controlled passage from lodgement to resolution. The process involves pre-hearing conferences and, if mutually agreed, may include mediation before cases are listed for hearing and determination by Tribunal members. Tribunal hearings are normally open to the public. A flow chart of the dispute resolution process is given in figure F.1.

Figure F.1 **Flow chart of Administrative Review Tribunal's dispute resolution process in compensation matters**



a explore mediation possibility; **b** where necessary; **c** where the applicant is represented.

Source: Administrative Appeals Tribunal (2003), *Annual Report 2002-2003*.

Applications to the AAT for review of Comcare decisions must be made within 60 days after the internal review, and include brief reasons as the why the decision is considered wrong. There is no lodgement fee and the parties are free to seek help from lawyers and 'professional' persons to prepare their case. In most Comcare matters, the applicant is legally represented.

As part of its case management, the AAT uses a general practice direction, which sets out the procedures to be followed for all applications, to achieve the dual purpose of attempting to obtain an agreed resolution where possible and of ensuring that appropriate steps are taken to prepare for the hearing of those matters which do not settle. Where it is

obvious at the outset that settlement is either inappropriate or unlikely to be achieved, the AAT will concentrate on preparing the application for hearing.

The parties are expected to play an active part in identifying legal and factual issues early in the pre-hearing process. After lodgement, the AAT requests Comcare to file, within 28 days of receipt of the request, copies of specified documents (known as section 37 or T documents) with the Tribunal and send a copy to the applicant. The documents are to include a statement setting out the findings on material questions of fact, referring to evidence of other material on which the findings were based, and give reasons for the decision and a copy of every other document considered relevant to a review of the decision. Typically, it is five weeks before the applicant receives a copy of those documents.

The next step in the resolution process is a conference organised by the AAT. It is held in private and can either be in person or by telephone. A failure by the applicant to attend a conference as agreed and scheduled may result in the case being dismissed. Typically, the first conference is held some six to ten weeks after lodgement. Issues in dispute are discussed as is the need to gather any further evidence with a view to ascertaining whether a new decision, or process for reaching one, can be agreed.

Generally, only two conferences are held. If agreement is not reached at the first, then the second conference is usually held some 12 to 16 weeks after the first. For that conference, specific requirements are placed on the parties to produce all relevant material in a timely manner. At that conference, all the evidence is placed before the AAT and the merits of the case discussed with a view to settlement. If all matters are not settled, then the next steps in the resolution process are discussed, including the possibility of mediation and the requirements for a Tribunal hearing.

As disputes with Comcare decisions typically involve compensation issues, a compulsory conciliation conference is the next step in the resolution process. Conciliation conferences are held on a face-to-face basis, unless geographic or other considerations dictate otherwise. Conciliation conferences usually take place some four to six weeks after the final pre-hearing conference. During the conciliation conference, the conference convenor (a Tribunal member or Conference registrar) takes an active role, setting out options and discussing with the parties the merits of their respective cases. If the matter fails to be settled at conciliation, then it will proceed to a Tribunal hearing unless both parties and the AAT agree that mediation should be held.

For a Tribunal hearing, if the matter has not been settled, both parties have to lodge and serve a hearing certificate within seven days of the final conference. If a hearing certificate is not provided, then the application for a Tribunal hearing may be listed without further consultation or otherwise as directed. Generally, hearings are listed ten weeks after the last conference. Depending on the issues, the case may be heard and determined by one, two or

three Tribunal members. It is not unusual for a medically qualified member of the Tribunal to be included on the panel to hear Comcare matters.

Where issues of medical opinion are involved, the AAT will not generally require a doctor to give oral evidence where a report has been appropriately lodged and exchanged. However, where a party procures the attendance, by summons or otherwise, of a medical practitioner, the party must notify all other parties. The medical practitioner does not become the party's witness and may be cross-examined and re-examined. Recently, the AAT has experimented with a concurrent evidence procedure by which sworn evidence is taken from more than one expert at the same time. The procedure allows expert witnesses to listen to, question and critically evaluate each other's evidence and has the potential to reduce hearing time, narrow issues in dispute and reduce partisanship on the part of experts.

Under the *Safety, Rehabilitation and Compensation Act 1988* and the *Seafarers Rehabilitation and Compensation Act 1992*, the AAT has the power to order or recommend that the respondent pay the costs, or part of the costs, of a successful applicant. Unless the order determines otherwise, the costs payable may include: witness expenses at the prescribed rate; all reasonable and proper disbursement; and 75 per cent of all professional costs, including counsel's fees which would be allowable under the Federal Court scale.

At the end of a Tribunal hearing, its decision may be provided immediately and the reasons for it given orally, or its decision may be provided at a later date with the reasons given in writing. Typically, decisions are deferred where the Tribunal member, or members, need to give further thought to the law and what has been said and shown to them. AAT decisions are conclusive, except on points of law where appeals to the Federal Court are permitted. In many cases where the decision of the Tribunal is to set aside or vary the original decision this is the result of fresh or additional evidence being presented to the Tribunal that was not available to the original decision maker.

In 2002-03, some 90 per cent of the 2292 applications for review of compensation decisions were finalised by consent among the parties without recourse to a formal hearing before the AAT. Of total applications, 64 per cent were finalised within 12 months. Also in 2002-03, there were 22 appeals to the Federal Court from decisions made by the AAT.

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