NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

APLA Submission

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13 June 2003

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Background

The terms of reference accompanying the Issues Paper released by the Productivity Commission refers to comprehensive inquiries conducted by the Industry Commission in 1994 and 1995 into Australia's workers' compensation and occupational health and safety arrangements.' Discussion on national schemes did however pre-date these inquiries by some two decades.

In 1972, the Whitlam Labor Government sought to implement a national no-fault workers' compensation scheme. In 1974, a report chaired by Justice Woodhouse was released.[2] The report recommended a general accident compensation scheme providing compensation for all accidents regardless of cause, instead of the then existing schemes in Australia. The recommendations were taken up and implemented in New Zealand following a like inquiry but were not implemented in Australia.

As will be discussed later in this submission, the no-fault scheme implemented by New Zealand was spectacularly unsuccessful.

The 1994 inquiry report' expressed a preference for a National WorkCover Authority to run parallel to the then existing state schemes. Those responsible for the state and territory schemes took issue with the report in two respects:-

(i) Benefits Structure

The proposal in the report was perceived to amount to a departure from the best practice design principles and, in the opinion of those schemes, imposed an unjustified cost impost on Australian business.

(ii) Duplication

It was perceived that an extra layer of duplication and complexity might result in the existing schemes being destabilised or becoming unavailable.[4]

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1 Industry Commission, *Workers' Compensation in Australia,* AGPS, Canberra, Report No. 36, 4 February 1994; Industry Commission, *Workplace, Health &* Safety, AGPS, Canberra, Report No. 47, 11 September 1995

[2] Report of the National Committee of Inquiry into Compensation and rehabilitation in Australia, AGPS, Canberra, 1974 [3] Industry Commission, *Workers' Compensation in Australia,* AGPS, Canberra, Report No. 36, 4 February 1994

[4] Cath Wood, *Future Directions of Workers' Compensation in Australia,* Australian Plaintiff Lawyers National Conference, Hyatt Regency Coolum Queensland, 26 October 2001

Thereafter, in 1997, the then Heads of Workers' Compensation Authorities (HWCA) released a report entitled *Promoting Excellence* in May 1997.[5]

As Cath Wood, on behalf of Heads of Workplace Safety and Compensation Authorities (HWSCA), noted[6] -

> *"The jurisdictions have been implementing best practice elements outlined in this report to improve national consistency as fitting with government policy. Changes have occurred in areas of coverage, prevention, injury management, benefits and entitlements, premiums and service delivery."*

The then HWCA report came up with two models in relation to a national scheme.

Both models had identical benefits structures for the first five years with variations after that period.

The common benefit structures for the first five years were:-

(i) The first five days - employer liable for 100% income replacement (employer excess)

(ii) Day six to thirteen weeks - 100% income replacement

(iii) Fourteen weeks to five years - 70% income replacement (capped at 150% of the jurisdiction's average weekly earnings)

The variations after five years <u>included:-</u>

<u>Option 1 - No Common Law</u>

(i) 70% income replacement capped at 150% of the jurisdiction's average weekly earnings, plus medical and like benefits until retirement or return to work

(ii) Subject to a 30% impairment threshold at five years

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[5] Head's of Workers' Compensation Authorities, *Promoting Excellence: National Consistency in Australian Workers' Compensation,* May 1997

[6] Cath Wood, *Future Directions of Workers' Compensation in Australia,* Australian Plaintiff Lawyers National Conference, Hyatt Regency Coolum Queensland, 26 October 2001

(iii) A maximum of $100 000 00 for non economic losses

Option 2 - Common Law

(i) Nil weekly statutory benefits

(ii) Nil medical and like benefits

(iii) Access to common law, including medical and like costs

(iv) Subject to a 30% impairment threshold at five years

(v) Uncapped economic losses

(vi) A maximum of $200,000.00 for non-economic losses

It should be noted that HWCA's position was that:

> *"Common law damages are inconsistent with a no-fault system of statutory benefits. Nonetheless, as LMC has directed that HWCA should present two benefit options, one with and one without common law, this has been done"*[7]

As will be seen in discussion later in this submission, no-fault schemes which abandoned common law access have not proved to be as successful as many might have anticipated.

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[7] Cath Wood, *Future Directions of Workers' Compensation in Australia,* Australian Plaintiff Lawyers National Conference, Hyatt Regency Coolum Queensland, 26 October 2001

Issues for Discussion

APLA does not intend addressing all of the issues identified in the Issues Paper dated April 2003 but will address the following issues:

(a) National Frameworks

(b) National Self-insurance

(c) Access and Coverage

(d) Benefit Structures
(e) Early Intervention Rehabilitation and Return to Work

(f) Dispute Resolution

(g) The role of Private Insurers in Workers' Compensation Schemes

(a) National Frameworks

The inquiry seeks two outcomes in relation to the establishment of national frameworks:

(i) comprehensive workers' compensation arrangements across Australia and

(ii) consistency of this compensation arrangement across Australia;

The following question is posed by the Inquiry:

What are the main problems arising from having multiple jurisdiction-based regimes throughout Australia?

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.

An immediate concern for APLA is that the reduction of a number of schemes down to a single scheme to overcome perceived problems in multiple jurisdiction-based regimes will invariably result in the lowest common denominator adopted, to the significant detriment of workers across Australia.

There is no question that there exists significant disparity among the respective schemes in the country on many fronts.

APLA refers specifically to data released in the Comparative Performance Monitoring 4th Report issued by the Workplace Relations Ministers' Council.[8]

Comparisons of a number of benchmarks among schemes around the country suggest that some schemes run well while others do not. For example, on a pure funding basis within Australia, the lowest ratio of assets to liabilities was recorded in New South Wales at 69% and the highest was recorded in Queensland at 136%.[9]

A comparison of the movement in ratios of these schemes over a three year period shows that Queensland recorded the strongest growth in its asset to liability ratio. Queensland operates a common law scheme. Of interest is the fact that schemes like New South Wales, which have placed further restriction on common law entitlements, and indeed other schemes that did not operate on common law, have suffered reductions.[10]

APLA acknowledges that it is in the interest of all stakeholders in workers' compensation for schemes to be sufficiently funded to provide adequate compensation to workers and access to common law rights. Simply because there exists disparity among state schemes is not a reason for a national scheme to be adopted.

The New Zealand experience in the past 30 years has demonstrated the significant difficulty in the operation of a national scheme.

Closer to home, movements in the ratio of assets to liabilities within the Comcare Scheme demonstrate that over a three year period ending 2001, the ratio continues to fall."

National Employers

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

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[8] Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002

[9] Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at Figure 59

[10] Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at Figure 60

11 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation* Schemes, August 2002, at Figure 60

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.

The recommendations of the heads of Workers' Compensation Authority in 1997 spell out very clearly the level of potential discrimination against workers in state schemes in terms of what was then a proposal to operate for all workers in Australia.[12]

Surely the solution lies with streamlining administration processes to assist national employers without tampering with the rights of workers domiciled within the confines of particular states.

Potential Models

The Productivity Commission has identified six potential models in terms of a national framework for workers' compensation .[13] These models are:

(i) A co-operative model

(ii) A mutual recognition model

(iii) An expanded Comcare model

(iv) A uniform template legislation model

(v) An extended financial sector regulation

(vi) A new national regime

APLA's primary position is that the rights of workers ought to be preserved at least in the confines of their respective state schemes.

APLA submits that there ought to be co-operation between the relative state schemes, maybe through HWSCA, to adopt key lessons from successful schemes and implement them in not so successful schemes. APLA is of the view that, rather than enforce a national model (previous proposals of which have heavily discriminated against successful schemes), the solution lies in better co-operation between states to achieve efficiency.

Turning to the specific proposals of the Productivity Commission, APLA comments as follows:-

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12 Heads of Workers' Compensation Authorities, *Promoting Excellence: National Consistency in Australian Workers' Compensation,* May 1997

13 Productivity Commission, *National Workers' Compensation and Occupational Health & Safety Frameworks,* Issues Paper, April 2003, at 7

(i) A co-operative model

APLA's view is that this model is not inconsistent with the aims stated by APLA above in regard to co-operation between the states. The only qualification APLA places upon it is that it is subject to all states and territories co-operating and, in the event that one state does not, then no other states should be forced into such a model.

(ii) A mutual recognition model

As stated previously in this submission, APLA has no objection to multi-state employers seeking to streamline administration processes of workers' compensation insurance nationally. However, APLA states that any suggestion of a mutual recognition model be limited to purely administrative matters and not impede the substantive rights of workers as existing in their particular schemes.

(iii) An expanded Comcare model

On a performance basis, Comcare is not the premier model for workers' compensation insurance in this country, as is born out by the CPM4 Report.[14] Further, Comcare restricts workers' common law rights well beyond other schemes in the country.

(iv) A uniform template legislation model

Two proposals fall under this model. The first proposal is mirrored legislation to ensure uniformity in all aspects of a workers' compensation scheme. APLA strongly opposes any such model for the primary reason, already identified, that is based on historical proposed models. Such a proposition is likely to discriminate against many workers in Australia.

The second model put up involves truncation of certain aspects to fall back to the states including common law, premiums, rehabilitation and return to work.

Whilst APLA acknowledges that national consistency benefits multi-state employers, there is no justification for interfering with the schemes beyond that level. Any interference should be in relation to administrative matters only and should not affect the substantive rights of workers. The proposed model of

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[14] Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002

partial truncation still has the potential to interfere with the substantive rights of workers.

(v) An extended financial sector regulation model

Although this model creates the appearance of higher levels of protection for workers, it still potentially discriminates if the model proposed disadvantages workers as against their current rights.

(vi) A new national regime

APLA opposes the introduction of a Commonwealth national scheme in that any proposal, based on past proposals, will severely discriminate against the rights of many workers in this country.

(b) National Self-Insurance

A significant question is raised in the Issues Paper regarding national self-insurance:-

To what extent are differing approaches to self-insurance a source of significant additional administrative or compliance costs *for firms wishing to self-insure their workers' compensation liabilities in* more *than one jurisdiction?*

APLA accepts that national employers that elect to self-insure are subject to the provisions of schemes in the particular states in which they operate. APLA, however, repeats that any efforts to reduce administrative cost to national employers must not come at the expense of the rights of workers in particular states.

It is no reasonable answer that to reduce employers' costs, the mechanism by which that occurs is to take away rights of workers.

As will be discussed further in this submission regarding benefit structures, APLA is of the view that if administration costs are a burden to self-insuring employers, lessons can be learned from the most successful self-insurance schemes vis a vis administration costs and applied to schemes that are not so successful.

The Issues Paper also raises the prospect of self-insurance under the umbrella of the Comcare scheme. As against other successfully performing state schemes which provide greater protection to common law rights of workers, Comcare is not, in APLA's view, the preferred model to embody the concept of self-insurance.

(c) Access and Coverage

For years there have been variations in relation to the coverage of workers in the various schemes around the country. Most schemes operate off a "contract of service" test.

For a time, at least one jurisdiction included a "PAYE" requirement.[15] This had the effect of causing extra cost to an "otherwise" employee despite the fact that when the contract of service test is applied, the employee could quite properly be regarded as a worker in the true sense.

APLA submits that a "contract of service" test is the appropriate test to determine coverage in a scheme. Difficulties emerge in relation to some aspects of employment, that is, labour hire arrangements which probably need addressing in jurisdictions where the arrangement is not clear.

Statistics dating back to 2000 which include a more accurate picture of the New Zealand scheme preceding its amendments provide an interesting insight in relation to coverage and its effect in particular jurisdictions.[16] For example, in that period Victoria covered 1.96 million workers against 32,539 claims lodged which meant 1.67% of workers covered lodged claims in the period."

Across the country, the percentage of claims lodged against covered workers in each of the schemes was as follows[18]:

VIC	**NSW**	**SA**	**WA**	QLD	**TAS**	NT	ACT	**NZ**
1.67%	2.13%	4.59%	3.12%	5.4%	7.07%	5.88%	5.16%	0.84%

Of particular note is that Queensland, which offers access to common law and was the highest performing scheme, ran at 5.4%.[19] Yet New Zealand which, operating as a no-fault scheme, covered more workers, had less claims, but the scheme did not perform.

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15 See example, the Queensland WorkCover scheme prior to July 2000

16 Heads of Workers' Compensation Authorities *Comparison of Workers Compensation arrangements in Australian Jurisdictions,* 2001, at 18

17 Heads of Workers' Compensation Authorities *Comparison of Workers Compensation arrangements in Australian Jurisdictions,* 2001, at 8, 10

18 Figures are from Heads of Workers' Compensation Authorities *Comparison of Workers Compensation arrangements in Australian Jurisdictions,* 2001, at 18

19 Heads of Workers' Compensation Authorities *Comparison of Workers Compensation arrangements in Australian Jurisdictions,* 2001

(d) Benefit Structures

Ideally, uniform adequate benefit structures would be the preferred outcome for workers in Australia. The reality is that different structures are put in place in an attempt to cope with the financial issues governing respective schemes. For example, applying statistics compiled by HWSCA, the disparity between weekly benefit rates is of interest. According to that data, the Commonwealth, in the first 45 weeks, provided coverage for normal weekly earnings.[20]

Queensland, for the first 26 weeks, provided the greater of (a) 85% of the worker's normal weekly benefits or (b) an amount payable under the Workers' Award Agreement.[21] While, at the same time, New Zealand, in its no-fault capacity, provided (a) for weeks two to five, weekly compensation at 80% of the short term rate and (b) from the fifth week, 80% of the long term rate.[22]

The preservation of common law (which will be discussed below) is central to the equation when considering benefit structures.

A scheme must operate in circumstances where adequate benefits are provided on a statutory basis but access to common law is preserved. It is no answer to artificially increase benefit rates but exclude common law access.

Experience in no-fault schemes, both in this country and abroad, should demonstrate this.

Top-up income or make-up pay, as alluded to in the Issues Paper [23], by way of additional private insurance, is unlikely to provide an answer, at least in the context of common law.

Most private insurers require a charge on common law damages to the extent of any payments made. In addition, workers would find themselves at the mercy of private insurers operating on purely contractual bases rather than statutory rights for the benefit of income lost. If conflict occurred in relation to the right to such payments, the

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20 Heads of Workers' Compensation Authorities *Comparison of Workers Compensation arrangements in Australian Jurisdictions,* 2001, at 18

21 Heads of Workers' Compensation Authorities *Comparison of Workers Compensation arrangements in Australian Jurisdictions,* 2001, at 19

22 Short term rate = earnings in 4 weeks prior to incapacity divided by the number of weeks over which they were derived

Long term rate = earnings from that job in 52 weeks prior to incapacity divided by the number of weeks over which they were derived

Heads of Workers' Compensation Authorities, *Comparison of Workers' Compensation arrangements in Australian Jurisdictions,* 2001, at 19

23 Productivity Commission, *National Workers' Compensation and Occupational Health & Safety Frameworks,* Issues Paper, April 2003, at 11

remedies afforded to workers, or rather the avenue for which to pursue those remedies, is somewhat more difficult than review processes in statutory schemes.

Common Law

The Commission asks the following questions in its Issues Paper vis a vis the issue of common law:-

(i) Should access to common law damages be part of any national workers' compensation framework?

(ii) What are the implications of including, limiting or removing access to common law damages (on incentives for prevention of work-related injury and illness; on obtaining appropriate compensation; on facilitating effective rehabilitation; and for doing so, in a cost-effective and equitable manner) ?

As a matter of principle, APLA strongly submits that the preservation of common law rights to workers in Australia is a fundamental requirement of any workers' compensation scheme in this country.

As a matter of commercial practicality, APLA believes that properly constituted schemes providing access to common law should operate more productively and efficiently for the benefit of all stakeholders than pure no-fault schemes.

It is often claimed that the legal costs associated with the administration of the common law system are very high. However the legal costs of the common law are usually assessed on the basis of litigated cases. The vast majority of common law cases settle out of court. The cases that are litigated provide legal principles that enable other cases to be settled. The cost of administering the common law system must be viewed in terms of the claims that are settled as well as the claims that are finalised in court.

Furthermore an examination of the efficiency of schemes in Australia in relation to the issue of common law provides an interesting insight.

The average funding ratio of Australian workers' compensation schemes for the period 2000/01 ran at 87%.[24]

The two highest performing schemes, on a funding basis for that period, were Queensland at 136% and Western Australia at 120%.[25] Both schemes offer

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24 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at Figure 59

access to common law. Queensland offers access on an unfettered basis subject to a lump sum election. Western Australia imposes threshold requirements.

By comparison, schemes which offer no common law access had remarkably lower funding positions - South Australia averaged 88% and the Northern Territory averaged 72%.[26]

The data for the New Zealand scheme for the same period was distorted courtesy of amendments taking effect on 1 July 1999 to the *Accident Insurance Act* 1998. Pursuant to those amendments, the Accident Rehabilitation & Compensation Insurance Corporation (ACC) established a new fully funded scheme to manage accident compensation insurance from 1 July 2000. In the CPM4 Report, the following comment was made regarding this scheme and its statistical data produced from that period:

> *"Many of the ratios reported in Part B of this report are distorted* because the scheme *is new. For example, its* costs *of compensating injured employees are small, as all claims are in their* first *development year. The total* scheme costs are *therefore artificially low, so medical and rehabilitation* costs as *a percentage of the total* seem *high compared with the Australian schemes. "*[27]

An examination of New Zealand's statistics in previous periods paints a rather more telling picture. For example, in the previous period, the New Zealand scheme ran at approximately a 49% funding ratio.[28]

Of interest is the funding ratio of the Comcare scheme which ran at 118% .[29] By comparison to the best performing schemes which ran ahead of Comcare's funding ratio, Comcare's access to common law cannot be compared to the two better performing schemes.

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25 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at Figure 59

26 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation* Schemes, August 2002, at Figure 59

27 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation* Schemes, August 2002, at 132

28 Workplace Relations Ministers' Council, Comparative Performance Monitoring Third Report, *Australian and New Zealand Occupational Health &* Safety *and Workers' Compensation* Schemes, August 2001

29 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation* Schemes, August 2002, at Figure 59

Much has been said of the issue of common law access (particularly by employer groups) as a means to reducing the costs of schemes.

APLA submits that, when the CPM4 Report data is viewed as a whole, this statement cannot be substantiated in terms of scheme performance.

APLA submits that, as stated above, as a matter of principle, no government could responsibly remove workers' rights to common law damages. This is further reinforced by statistical data which demonstrates that access to common law can produce one of the most efficient workers' compensation schemes.

The common law was designed to provide redress in circumstances where wrongs have occurred.

Invariably, in APLA's experience, it is only access to common law that provides an opportunity for injured workers to give themselves a decent chance at occupational adjustment and therefore long term income against the backdrop of injury causing an inability to continue working in a pre-accident position.

The common law provides an incentive for the worker to readjust and, more importantly, for the employer to correct wrongs that resulted in injury in the first place.

In an era where governments have continually sought to restrict people's rights to common law remedies, it is ironic that, in the area of workers' compensation, statistical data shows that access to common law is a fundamental ingredient of the better performing workers' compensation schemes in this country.

(e) Early Intervention Rehabilitation and Return to Work

APLA does not propose to submit in any detail in relation to this matter. APLA supports early and effective rehabilitation for workers in any scheme that operates in Australia.

(f) Dispute Resolution

For the first time, the Workplace Relations Minister's council provided disputation rates and legal costs relative to workers' compensation schemes in the CPM4 Report.[30]

There is no question that reduction of disputation rates is a key ingredient to the success of any workers' compensation scheme.

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30 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at Part B3

The CPM4 Report data reveals that Queensland has the best performing scheme from a funding perspective and holds the lowest disputation rate in the country at 5% .[31] By comparison, the Comcare scheme, which ranks in funding, offers negligible common law access and runs at a 24% disputation rate.[32] This is the second highest in the country.

Explanations offered in the CPM4 Report for these disparities are that:

> *"Schemes with low disputation* rates (Queensland's) *have, typically, long standing benefit regimes, in-house experience to claims officers and well-understood dispute handling* processes, *although Comcare, a scheme with similar features and high dispute rate, is an exception. Schemes with higher dispute* rates *tend to have out-sourced claims management using insurers,* less *well-understood benefits because of more frequent legislative change and, in* some *instances,* a more active *legal culture, usually associated with lump sum availability and contingencies fees.* ,[33]

APLA does not believe that the entirety of this explanation can be substantiated. For example, the Queensland scheme has undergone some five changes to its legislation in six years, yet, by a long margin, holds the lowest disputation rate.

APLA does agree that there appears to be a pattern of higher disputation when private insurers are involved.

APLA believes that, at least the perception of a conflict between duties to shareholders against duties to beneficiaries under a scheme, may contribute to the appearance of higher disputation levels for private insurers.

Lessons should be learned from jurisdictions that have low disputation rates and applied to other schemes.

Co-operation between scheme operators would appear to be a preferred solution than attempting to impose a national framework.

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31 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation* Schemes, August 2002, at Figure 75

32 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at 83

33 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at 83

Of further interest in dispute resolution are the statistics in relation to second levels of appeals on disputation rates'. The second level of appeals on disputation rates are the number of matters that move through to a second level of appeal from first appeal systems, including conciliation or internal review processes.

To adopt the schemes in the previous discussion, Queensland ran at 11 % for the second level of appeal while Comcare ran at a staggering 45%, more than four times the rate in Queensland.[35]

(g) **The Role of Private Insurers in Workers' Compensation Schemes**

The debate in relation to the efficiency of private insurers in workers' compensation schemes has been ongoing for some time. Statistically, private insurers are not the best scheme operators in this country according to the CPM4 Report.

There are certainly arguments that might suggest that private insurers have a greater efficiency in scheme operation. Some experience in this country however suggests that efficiency in scheme operation may come at a cost to the rights of workers.

APLA does not oppose the role of private insurers in workers' compensation schemes provided that it could be properly said that there is no conflict between an insurer's duty to its shareholders against its obligations to its scheme beneficiaries.

In APLA's opinion, a necessary ingredient to private insurers in any compensation scheme is a regulator with appropriate powers to govern the conduct of insurers in the management of their schemes. This would provide a degree of comfort for beneficiaries of schemes who believe that the interests of shareholders come at the expense of those beneficiaries.

Regulators in some schemes such as CTP schemes, involving private insurers seem to provide evidence that this concept is workable.

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34 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at Figure 78

35 Workplace Relations Ministers' Council, Comparative Performance Monitoring Fourth Report, *Australian and New Zealand Occupational Health & Safety and Workers' Compensation Schemes,* August 2002, at Figure 78

Conclusion

Throughout the Productivity Commission's Issues Paper, a common theme exists of implementation of a national framework in the issues for discussion. APLA does not support the imposition of a national framework unless there is co-operation from all states and territories to do so, and only on the basis that a proposed national framework would deliver optimal outcome for workers at both statutory and common law levels.

Past experiences, outlined earlier in this submission, give APLA and Australian workers good reason to doubt the motives of stakeholders seeking to introduce national frameworks.

By way of example, the most recent proposal, which was raised in 1997 discriminates against workers in states where better common law and statutory rights have been afforded to them in the context of the schemes in which they operated.

On the assumption that there existed co-operation from all states and territories, APLA believes that, having regard to the viability of the various schemes in this country offering both statutory and common law access, a sensible model could be produced to provide adequate levels of statutory benefits to workers while still preserving access to common law.

APLA regrets that there does not appear to have been a closer examination in relation to a viable model, involving all stakeholders, in past times.

There can be no doubt that, when assessing the statistical data available in each of the schemes in Australia, there is a significant problem vis a vis the efficiency of the schemes.

Rather than attempting to impose national frameworks, APLA believes that greater efforts should be made in the co-operation of scheme operators and their stakeholders. APLA has played a significant role in assisting scheme operators throughout the country in relation to improvements that can be made to schemes to the benefit of all stakeholders. APLA reiterates the critical importance of the preservation of common law in any scheme. Aside from principle considerations, it has been demonstrated that scheme efficiency can clearly be achieved by the preservation of common law. No-fault schemes have not, in APLA's view, produced sensible outcomes for all stakeholders.

APLA believes that, had the Commonwealth embarked upon its no-fault proposals back in the 1970s, the state of workers' compensation in this country today would be in a terrible mess. Lessons in other jurisdictions appear to have borne this out.

APLA has commenced some groundwork in relation to finding a hybrid scheme which provides adequate statutory benefits whilst preserving common law. APLA's position, for the purposes of this submission, is as stated above, namely that APLA does not consider any such step should be pursued unless there is co-operation among all states and territories.

If co- operation among all states and territories is secured APLA submits that any national frameworks that are developed should ensure that workers rights are not restricted or diminished in any way as a result. APLA is strongly opposed to the implementation of national frameworks which would mean that the most restrictive provisions in each jurisdiction are adopted on a national basis.

In the event that co-operation among all states and territories is obtained and a hybrid scheme, providing adequate statutory benefits whilst preserving common law, is to be developed, APLA would be very interested in playing an active role in the development of any such model.

Appendix

(a) About APLA

The Australian Plaintiff Lawyers Association (APLA) is an association of lawyers and other professionals devoted to the protection and enhancement of the rights of those injured or adversely affected by wrongdoers, and dedicated to injury prevention through safer products, workplaces and other environments. APLA values a fair, just and democratic society, and aims to address the imbalance between the ample resources to the corporations and their insurers, and those available to members of the public.

Plaintiff lawyers are in a unique position to understand the challenges that face injured workers. They see first-hand the human cost of injury in the workplace. They are dedicated to representing the interest of their clients. This dedication extends to fighting for the rights of the injured and disadvantaged to fair compensation. APLA takes an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. APLA also supports a number of injury prevention campaigns.

(b) Organisational Structure

APLA is a company limited by guarantee that operates in every state and territory of Australia. APLA is governed by a board of directors made up of representatives from around the country. This board is commonly referred to as the APLA Council. The council meets four times each year to set policy and strategic direction for the organisation.

APLA has branch committees in every state and territory of Australia. These committees are elected annually by the membership.

APLA has set up special interest groups in particular practice areas in the law. The Workers' Compensation Special Interest Group is the largest and one of the most active groups. Its members have played key roles in the implementation of policy and legislation in workers' compensation schemes throughout Australia.

Development of policy by APLA nationally generally encompasses issues that affect all members in the organisation. Within the confines of each state and territory, policies are developed affecting matters pertinent to the particular state or territory.

This submission has been prepared with a national focus and does not represent the views nece‘ssarily of members vis a vis their state schemes.