18 June 2003

Mr Mike Woods
Presiding Commissioner
Inquiry into National Workers Compensation
and Occupational Health and Safety Frameworks
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Commissioner

**Insurance Australia Group Submission to the Productivity Commission Inquiry into National Workers Compensation and Occupational Health and Safety Frameworks.**

Insurance Australia Group (IAG) welcomes the opportunity to provide comment on the Productivity Commission's inquiry into national workers' compensation and occupational health and safety frameworks.

In support of this written submission and to respond to specific issues of interest to the Commissions inquiry, IAG will make a verbal submission to the Inquiry at 11.00am on Wednesday, 26 June 2003 in Sydney.

Any queries relating to the submission can be directed to Mr Mark Lever (Manager, External Affairs, Statutory Classes) on 02 9088 9363.

Yours sincerely

Douglas R. Pearce.

Mr Doug Pearce
Group Executive
Personal Injury
INSURANCE AUSTRALIA GROUP

# INSURANCE AUSTRALIA GROUP

## SUBMISSION

**PRODUCTIVITY COMMISSION INQUIRY INTO A NATIONAL WORKERS COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORK**

**JUNE 2003**

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## *Introduction*

Legal infrastructure such as workers compensation and occupational health and safety (OHS), like Corporations Law and the industrial relations system, is a key driver of economic prosperity and international competitiveness. While most of Australia's infrastructure has undergone substantial reform in recent times to support a single, open market economy, our workers compensation and OHS systems are a hangover from a time when travellers changed trains at state borders because of different rail gauges.

Insurance Australia Group strongly supports the reform agenda implicit in the Productivity Commission's terms of reference and the need for strong Commonwealth leadership in rationalising the current systems. The case for reform is strong now, and will become even more urgent as the population continues to age. This demographic trend is already a factor in increasing workers compensation and OHS costs to the community as the average age of injured workers increases, recovery times grow and return to work prospects fade.

Increasing labour market participation has been identified as a key strategy in addressing the challenges of an ageing population. The future policy prescriptions which aim to enhance rehabilitation and the return-to-work of injured workers will have a substantial bearing on Australia's ability to comprehensively respond to the challenges presented by this emerging demographic change.

Fundamental to any consideration of reform initiatives is the recognition that a competitive workers compensation and occupational health and safety regime is the best mechanism to reward positive employment practices with affordable premiums and capitalises on the opportunities for reduced risk and accident prevention that are the positive consequence of incentive and innovation.

A well-designed and administered national system for workers compensation can deliver fairer support for injured workers, by eliminating arbitrary differences in entitlements for the same injuries, and better social and health outcomes through better performance measures and better targeting of services. A competitive national market will reward good employment practices with affordable premiums and create real incentives to reduce risks and prevent accidents.

The knowledge base for designing such a system already exists in Australia and this inquiry has the opportunity to map out a pathway for governments to deliver these benefits to the economy and the community. In doing so, it must recognise the concerns of those who may, rightly or wrongly, fear disadvantage and suggest mechanisms to support stakeholders facing dislocation costs.

Reform is overdue and the costs of further delay in terms of Australia's international competitiveness and future prosperity will be far greater than those of dealing with any transitional issues.

While debate about reform options will no doubt concentrate on possible economic efficiencies, the important psychological consequences of work and its place in providing people with meaning, purpose and the means to enhance their quality of life can not be underestimated. Practices that assist workers to return-to-work should be regarded as delivering an important social outcome, and

not merely an economic one, to our community. Providing opportunities for meaningful work is at the core of providing a fair, stable and rewarding social fabric.

## *Insurance Australia Group*

As the largest general insurer in Australia and New Zealand, Insurance Australia Group has emerged as the leading player in Australian workers compensation. The Group's companies operate as an insurer or claims agent in every workers' compensation jurisdiction with private sector involvement. We provide the:

- Coverage for about 1.7 million workers
- Policies for 169,000 employers, and
- Injury and claims management services for about 43,000 claimants.

The Group's exposure to workers compensation began in 1998 with the acquisition of SGIO Insurance Ltd (and SGIC), a leading provider of workers compensation in Western Australia, by NRMA Insurance Group Ltd, the former name of Insurance Australia Group. In 2000 NRMA Insurance applied for a New South Wales workers compensation licence and in March 2001 acquired the HIH Workers Compensation business.

In October 2002 Insurance Australia Group announced the acquisition of CGU/NZI, taking effect on 1 January 2003, and the following month also acquired Zurich's NSW workers compensation business. His made the Group a clear market leader in almost every jurisdiction.

Through these acquisitions more than 1000 highly skilled and experienced people have joined together to form Australia's largest workers compensation operation, to be consolidated under the CGU Workers Compensation brand from July 2003.

## *Workers Compensation in Australia*

Throughout Australia, employers are required by law to provide workers compensation benefits to their employees. While this was not always the case, personal injury and industrial law had evolved by the early 20$^{th}$ century from its common law origins to a point where all employers have a statutory obligation to bear the financial burden of work-related injury or illness to their employees. Workers need not prove any negligence or fault on the part of the employer – a community standard which recognises that all workplaces are inherently hazardous and the financial burden of those risks should be carried primarily by the employer.

In most cases employer obligations are met through insurance policies, though the option of self-insurance is available for employers able to meet certain financial and other criteria.

The compulsory nature of workers compensation and its role in the broader industrial relations environment have resulted in a far more intense level of regulation and government intervention than any other insurance product. To date this regulation and government intervention has been almost entirely state-based in Australia (other than for Commonwealth employees and seafarers).

This 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.

The Commonwealth has constitutional authority to regulate workers compensation directly via the insurance power (s51xiv), or indirectly via a number of other heads of power such as the corporations power. However, apart from the failed 1975 national insurance legislation, the Federal Government has continued to leave matters largely in the hands of the states and territories. The *Insurance Act 1973* has specific provisions permitting state-based arrangements such as workers compensation to operate outside the regulatory framework for insurers. These provisions also have the effect of allowing the states to create monopolies.

The result is the current patchwork of different schemes for each state and territory, plus specific national schemes for federal government employees and seafarers as well as special schemes such as the coal miners' in New South Wales. Each has evolved largely in isolation with very limited co-ordination at the national level.

While all these schemes are under almost continual review, there has been no change to the fundamental structure since the 1980s. Provision of workers compensation continues to be dominated by the state public sectors and licensed private insurers remain excluded from direct underwriting in four of the five larger states.

Workers compensation dominates the balance sheets of public sector insurers and was mainly responsible for the net $640 million loss reported by public sector insurers in 2001-2002.

Some losses were due to the longer term trend of underlying deterioration in claims costs. But over the past two years the poor financial performance of all public sector insurers has been mainly the result of high risk investment mandates, usually based on superannuation models, rather than the matched strategies used by private insurers (and effectively mandated by new APRA standards) to minimise the investment risk to claims reserves.

APRA statistics for 2001-02 show public sector workers compensation providers, including NSW, collected $5.50 billion in premium compared to $950 million in private sector premium income for this product. Public sector provisions for net outstanding workers compensation claims reached $20.45 billion compared to $1.88 billion for the private sector.

APRA acknowledges that outstanding claims provisions for public sector workers compensation insurers are understated relative to the private sector because NSW, Victoria and SA do not add prudential margins. This means that the net asset deficit of public sector insurers – $3.20 billion at June 30 2002 is also understated relative to private insurance sector net assets of $16.37 billion.

## *Previous Industry Commission Inquiries*

In 1994 the Productivity Commission's predecessor, the Industry Commission, conducted a wide-ranging review of workers compensation arrangements and there was a separate review of OHS arrangements a year later.

The 1994 terms of reference were less prescriptive than the current inquiry, with a broad focus on identification of inefficiencies, best practice and proposals for change. Its key recommendations centred on a staged approach to develop a national framework for workers compensation similar to that being examined in the current inquiry.

Key recommendations included:-

- The creation of National WorkCover Authority to develop national compensation standards, including coverage, definitions, benefits, service levels; establish key performance indicators; and to collect data and monitor and report on performance of all workers compensation schemes.

- Agree with the states on a national legislative framework for all workers compensation and OHS schemes, including uniform coverage, definitions, standards, benefits and licensing and prudential requirements.

- If agreement cannot be reached, implement uniformity via over-arching national legislation using existing Commonwealth powers.

- Establish a competitively underwritten national scheme for all employers, supervised by the National WorkCover Authority to compete with existing state schemes.

- Use federal-state financial agreements to recover costs shifted from state schemes to federal health and social security systems as a result of employer excesses, benefit cutoffs etc.

The workers compensation and OHS environment has undergone significant change since those reviews, including substantial amendments to legislation in every state and territory and in some cases more than one round of legislative overhaul.

The Australian private insurance industry has also been transformed, not just due to the demise of HIH. New national prudential requirements took effect in 2002 to provide firm foundations for a strong and stable insurance industry. Intense consolidation has seen the emergence of a smaller number of larger, well capitalised, world class insurance enterprises. Insurance Australia Group is perhaps the obvious example. But in 1994 the household names of Suncorp, Allianz and Promina did not exist in the Australian market and QBE was a fraction of the size it is today.

The importance of scheme design to the efficiency and affordability of the workers compensation and OHS system is also much better understood today than it was in 1994. Some of the principles identified in the 1994 review, such as the need for more objective and efficient mechanisms for supporting injured workers and resolving disputes, have been applied to good effect in a number of the reviews of individual schemes. There is growing acceptance, backed by medical evidence, that an injured worker’s best long term health interests may not necessarily be served by adversarial processes designed simply to maximise their entitlements.

But in many other respects the challenges identified almost a decade ago remain much the same today. Australia still has the same number of different workers compensation and OHS schemes and their main structures are largely unchanged. There is at best only a very limited correlation between

risk – as measured by attention to OHS and/or actual claims experience – and the cost of premiums to many employers.

Most importantly, the ability to understand the performance of our workers compensation and OHS systems remains as constrained today as it was in 1994 by a bewildering variety of definitions, benefit structures, processes and so on. In the absence of any effective national co-ordination mechanism, schemes have continued to deal with similar emerging issues in isolation and developed their own unique approach to essentially the same basic tasks. The duplication of management systems and compliance requirements adds considerably to the direct costs of employers operating in more than one jurisdiction.

Insurance Australia Group suspects much greater costs result from the lack of useful and accurate national benchmarking for overall scheme performance or for individual industries and employers. This means that those responsible for delivering schemes outcomes are slow to recognise emerging issues and even slower to respond.

This was recognised as a key challenge in 1994 and some progress has been made, with the Australian and New Zealand Heads of Workers Compensation releasing four editions of comparative performance monitoring reports. Each iteration made progress in the development of standardised measures but, as other submissions have noted in more detail, the value of this report remains limited by the inconsistencies in data and the questions this raises over the reliability of the standardised measures.

The fragmentation of the knowledge base also means that little progress has been made towards developing a clear understanding of - and a coherent national policy response to - the fundamental questions facing workers compensation in Australia today. These remain much as they were in 1994. That review highlighted how the reported incidence of workplace injury had been in long term decline. Yet that had not translated into cost reductions to employers due to the relentless rise in the cost of individual claims.

## *Findings of the HIH Royal Commission*

The HIH Royal Commission also made a number of important findings that support the case for reform of workers compensation and OHS arrangements. In particular, it saw that the Commonwealth had under-utilised its constitutional authority and that the fragmentation of state-based compulsory insurance schemes had inhibited the development of an efficient national insurance market.

It said the different approaches to regulation of public and private sector insurance should be a key area for further reform of the Australian insurance market and recommended that this be the responsibility of a new national ministerial council for insurance regulation.

Insurance Australia Group strongly supported reform in its submission to the Royal Commission, together with related measures such as the establishment of a national policy holder protection scheme. The proposed protection scheme will 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.

## *Issues for a National Framework*

Insurance Australia Group's starting point for considering issues for a national framework is to clearly understand the costs for all key stakeholders in the current inefficient arrangements, both in terms of equity for injured workers and efficiency for employers and the economy as a whole. We then consider the options for reform and the costs and benefits.

### Equity

Through its national operations, Insurance Australia Group has its own perspective on the implications for injured workers of the different approaches to workers compensation around Australia. To assist this inquiry, we identified statistically significant and comparable cohorts of recently finalised claims for some of the most common injuries. The results, detailed in Appendix 1, confirm the wide variation in outcomes on essentially similar claims in terms of injury type and demographics.

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).

Meanwhile psychological injury claims appear far more prevalent in Victoria than in WA but cost barely half as much ($1680 v $3195).

Some clues for the huge variations in costs may emerge from de-identified case file information from a random selection of the cohorts. Plausible explanations can be found in the level of disputation, the type of treatment provided, the availability of suitable return to work opportunities and whether there were any pre-existing health or other factors which might influence the course of the claim. Different definitions and approaches to recording injury details etc may also be factors. But it is also clear that the actual scheme design, including benefit structures, dispute processes, the level of legal involvement and so on come into play.

This analysis supports the view that under existing arrangements the outcome of a workers compensation claim for many injured workers is a lottery, subject to a huge range of variables over which they may have little or no control.

### Direct Compliance Costs for Insurance Australia Group

An analysis of the impact of multiple schemes on Insurance Australia Group's own operating costs show the most significant direct costs are for computer systems. These can be divided into two categories – development and business as usual (including costs associated with ongoing legislative changes).

Creating Australia's largest workers compensation operation requires the progressive rationalisation of a legacy of more than 40 different systems (or different versions of the same system) used by the companies that have become part of the group to service the different jurisdictions.

For systems development, Insurance Australia Group costed a single national IT platform at $34.3M. Of this, $24.2M was the estimated cost of developing a 'base' system i.e. a standard system with the same functionality in each jurisdiction. The difference of $10.1M represented the additional project cost associated with having to develop the system to meet the specific requirements of each jurisdiction. Thus the $10.1M can be regarded as the additional development cost to Insurance Australia Group of not having a single national scheme. Over the expected life of an IT system (say 10 years) this translates to about $1M per year.

For business as usual costs, using 2002 as a typical example, Insurance Australia Group spent about $1.1M on changing systems to meet legislative requirements in NSW, WA and ACT workers compensation. Under a national framework the frequency of legislative changes would be expected to drop significantly. Assuming that there is only one legislative change per year, this would translate to a saving of about $0.7M per year.

In total, it is estimated that having to comply with multiple jurisdictions adds about $1.7M to IT costs annually.
The second area where multiple jurisdictions add to costs is in staff training where the total annual budget is about $3.3M. A national framework may not deliver significant direct savings because there would still be the same number of staff requiring training. But there would be improvements in the quality of training resulting in improved business performance (e.g. lower claims costs).

Benefits would include:

- Only having to develop one training package rather than 11, leading to more detailed and focused training delivery.
- Portability of skills between jurisdiction, providing more flexible career paths.
- Easier transference of information.
- The ability to use training to drive national consistency in processes.
- Standardisation of claims updates and letters.
- Greater innovation in training due to fewer constraints on delivery etc.
- Possibly lower staff turnover due to more highly skilled staff and greater career opportunities.

Perhaps more significantly, a national scheme would also help to overall ongoing operating costs ($118M this financial year) due to greater standardisation of practices etc. A one per cent saving would reduce annual operating costs by $1.2M. This is conservative because it ignores any savings in underwriting costs, which would be expected through standardisation of pricing and underwriting models.

Another cost likely to be affected by a national scheme would be independent actuarial costs (liability valuations etc). Insurance Australia Group's Personal Injury division currently spends about $1.8M on external actuarial costs and it would be realistic to expect savings of around 20 per cent or $400,000 because there would not be the need for as many valuations.

In total, direct savings of in excess of $4 million can be readily identified if Insurance Australia Group were able to operate its workers compensation business under a single national framework.

While significant in its own right, these 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.

## Convergence of Existing Schemes

The concept of a uniform national framework for workers compensation is not particularly new or radical. It has been on the national agenda in some form since at least the 1970s. Increasingly in recent years we have seen an organic trend towards greater consistency in key aspects of scheme design as successful reforms are copied or adapted in other jurisdictions. There are some recurring themes in Appendix 2 which lists major reforms to workers compensation in recent years, such as restrictions or elimination of common law access and binding, independent medical assessment of injury.

## Options for Change

There are several tiers of potential benefits to the wider community and the Australian economy from rationalising the existing arrangements into a single national framework that reflects the reality of a single Australian market for goods and services:

- Equity for injured workers – greater certainty and consistent entitlements throughout Australia.
- Direct savings to businesses operating in more than one jurisdiction through the elimination of duplication in compliance costs.
- Potential reductions in premiums through more efficient scheme design, a more competitive market, more consistent and predictable outcomes and more efficient management due to better reporting and benchmarking frameworks.
- Productivity gains through improved OHS performance and return to work rates as a result of better targeting or resources.
- Reduction in the human and social costs often associated with workers compensation claims.
- More efficient operation of public health, income support and labour market programs by identifying cost shifting.
- A more efficient general insurance market with greater capacity across all lines and a larger and more diverse capital base.

Quantification of these benefits is a challenging task and may be best carried out in the public sector where some of the key pieces of empirical information reside. It is important that this inquiry have

full access to any previous policy work within the government sector that may assist in better understanding these issues.

The results are likely to reinforce the case that a concerted drive to reform workers compensation arrangements is in the national interest. However there are some legitimate stakeholder interests in the current arrangements and some legitimate questions about the dislocation costs of change that will need to be acknowledged in mapping a path forward.

## (1) First Option

Ideally, workers compensation in Australia would be brought together under a single set of national legislation and a national regulator to cover all aspects of both workers compensation and OHS. This would deliver the optimal direct and indirect economic and social benefits outlined above.

A single national scheme, properly designed and implemented, would ensure

- consistent levels of support for injured workers regardless of employer or where they work.
- a competitive market with efficient service providers and real incentives to prevent accidents.
- a single set of compliance requirements for all employers.
- timely and relevant national data on the incidence and cost of workplace accidents.
- timely and relevant benchmarking and performance measures for administrators and OHS and health service providers and transparency for all stakeholders.

However it would also involve the most significant transitional challenges including:

- Balancing the competing interests of employers and employees in designing a completely new “best practice” scheme and securing passage through the Parliament.
- For a competitively underwritten scheme, presenting a convincing case to financial markets that the regulatory and legislative arrangements will provide stability and certainty and allow an adequate return on the substantial capital required by insurers.
- Managing the impact on state and territory finances as existing schemes move into runoff and unfunded liabilities are brought onto their balance sheets.
- Acknowledging that some employers and parts of the economy may face higher premiums and will require support to reduce their risk profiles and minimise the level of dislocation during the transition.
- Providing a similar level of comfort and support for those sectors of the workforce that may feel disadvantaged by a rationalisation of existing arrangements (eg those in schemes with above-average benefit levels such as Comcare and the NSW coal scheme).

Insurance Australia Group believes all these transitional challenges can be met, provided there is a sustained, high level commitment from the Commonwealth and co-operation and good will from state and territory governments and other key stakeholders.

## (2) Second Option

The benefits for the wider community will be directly proportional to the progress made towards a single national workers compensation scheme. It is realistic to expect the need for some compromise to accommodate stakeholder interests and a staged approach which includes a significant continuing role for states and territories in the short to medium term. This is broadly envisaged by the terms of reference of the current inquiry, although they leave open the question of the ideal distribution of roles between the different levels of government.

It may be possible to create a single national scheme via uniform template legislation with the Commonwealth and the States passing mirror legislation ensuring uniformity for all core aspects of workers compensation and OHS. Similar arrangements have been put in place quite effectively to govern many other areas of public policy, from Corporations Law to consumer protection.

However the effectiveness of a co-operative scheme in creating a single market and capturing the benefits of reform will depend on the degree of ongoing variation at a state and territory level. If the current jurisdictions maintain their own reporting and compliance requirements, even within a uniform framework, or apply significantly different interpretations and processes to a national framework in regulating the management of injuries and to resolving disputes, then few if any of the savings in direct compliance costs will materialise. The additional complexity in data analysis and interpretation will also make it more difficult to develop better performance measures.

There is also the time factor. Reaching agreement between nine jurisdictions on every aspect of a uniform framework for an inherently complex policy area like workers compensation will not happen quickly, particularly against the background of the significant transitional issues we have identified. The task of implementing the 1994 Industry Commission report was delegated to the Heads of Workers Compensation forum, which produced its own report in 1997 outlining some of the issues but made no real progress beyond a number of iterations of a national data set.

Given the complexity and the financial risks associated with a poorly thought out scheme design, it may appear wise to hasten slowly. But in the meantime the costs of the current arrangement will continue to accrue and the benefits of reform will remain out of reach.

## (3) Third Option

In the short term, the Commonwealth has the option now of providing an alternative national scheme for employers, alongside the existing arrangements. This was broadly the model contemplated in the 1994 Industry Commission report.

This option has the advantage of being able to be implemented almost immediately through the existing Comcare regime, albeit with some modifications.

The current legislative provisions also allow, with ministerial approval, organisations which were previously Commonwealth owned or which compete with a current or former Commonwealth entity to join the scheme as a client of Comcare or as a self-insurer. This covers a very broad field and the reasons for the limited take up of provisions allowing certain significant categories of

private sector employer to enter the Comcare scheme require closer scrutiny in considering this alternative.

The Comcare scheme is designed specifically for the Commonwealth's employees who are predominately long term white collar workers. This is reflected in a benefit structure with generous income replacement by most standards and very limited access to common law. While Comcare premiums appear low, it may not be as cost effective in other parts of the labour market with different workers compensation and OHS issues. It is also questionable whether Comcare's main dispute resolution forum – the Administrative Appeals Tribunal – is suitable for resolving private sector disputes. Comcare's financial performance has deteriorated in the past two years, both in absolute terms and relative to other schemes. Last month a 27 percent premium increase was announced, bringing total increases in average premiums over the past two years to 43 percent.

Comcare has been largely unchanged for 13 years while most other workers compensation schemes have undergone substantial reform. This may reflect the robustness of the original scheme design, which was ahead of its time in eliminating common law, as well as the homogeneity of the workforce and the management efficiencies flowing from data collection capabilities and a relatively small number of large employers.

However it is clear from Comcare's recent deterioration that an overhaul of some of its key features is due, particularly if it is to be considered as the basis for any national private sector arrangements.

Some key areas of reform include:

- Earlier "step down" in weekly income replacement at 26 weeks (bringing it into line with most other schemes) rather than 45 weeks, perhaps offset by increased lump sum benefits for serious injuries if affordable.
- Establishment of a specialist alternative dispute resolution forum with a clear accountability for the impact of its decisions on the stability of the scheme as a whole.

More detailed discussion of scheme design issues is provided later in this submission.

Under a reformed Comcare model, private insurers would be able to provide the necessary infrastructure relatively quickly and the additional capital requirements would be more progressive and manageable than the "big bang" influx of capital required to support a single national scheme. But the savings in operating costs and some of the other operational efficiencies through better benchmarking etc would be limited if this type of national scheme continued to operate alongside different state schemes.

If the eligibility criteria were opened up to a wider range of employers, there would be economic benefits flowing from direct and indirect savings in those industries. But it needs to be recognised that there would also be some costs fo the Commonwealth, in terms of additional regulatory requirements, and some employers might actually face increased compliance costs if, for any one of a number of reasons (eg contractual), some parts of their workforce had to remain in state and territory schemes.

A more significant concern is the impact on employers who remain in state and territory schemes, particularly in the small to medium business sector. The 1994 inquiry envisaged that these schemes would be forced to improve their operation and efficiency to remain competitive.

It is generally assumed that the employers most attracted to a national model are those with effective OHS systems who believe they are subsidising less efficient employers. By exiting the state and territory schemes they reduce the size of the pool for those remaining. This would mean higher premiums for employers who in many cases may be least able to afford it. There are also legitimate concerns that the potential for direct efficiency gains is limited without reducing benefits to injured workers, with all the attendant political and industrial implications.

But it is also true that those employers facing increased premiums in a state/territory pool are losing a cross-subsidy and will have to start paying their way. It will increase incentives to reduce accidents and the greater transparency will lead to better targeting of OHS initiatives to those with the worst track records.

## Options in Summary

On balance, Insurance Australia Group believes that the Commonwealth has a responsibility to take the initiative in reforming Australian workers compensation. A revamped and expanded Comcare model, supported by the private insurance market, can deliver "quick wins" in reducing costs and improving competitiveness for key sectors of the economy.

It can also be a catalyst for more comprehensive reform if it is accompanied by a recognition that some stakeholders may be disadvantaged, a strategy to mitigate those risks in the short term and a clear commitment to work constructively with the states to deliver the benefits of a fairer and more efficient workers compensation and OHS system to the entire Australian workforce.

## *Role of Self Insurance*

All schemes currently allow some form of self-insurance but place significant hurdles in the way of employers wishing to pursue this option. Large employers wishing to self-insure nationally must navigate a bewildering maze of different requirements. (See Appendix 3)

Despite these hurdles, the cross subsidies within existing state schemes are enough incentive for employers with good risk management practices and good claims records to pursue self insurance. The following table estimates potential savings based on claims experience for larger Insurance Australia Group clients in just one government monopoly underwritten scheme.

| | **Annual premium** | **Est saving$** | **%** |
|---|---|---|---|
| Employer 1 | 2,876,732 | 1,939,530 | 67% |
| Employer 2 | 5,325,750 | 1,744,186 | 33% |
| Employer 3 | 5,885,217 | 1,531,883 | 26% |
| Employer 4 | 5,708,983 | 1,470,716 | 26% |
| Employer 5 | 5,216,471 | 1,385,380 | 27% |
| Employer 6 | 1,683,829 | 1,037,081 | 62% |
| Employer 7 | 1,135,321 | 978,959 | 86% |
| Employer 8 | 2,352,462 | 896,474 | 38% |
| Employer 9 | 1,331,132 | 889,363 | 67% |
| Employer 10 | 1,101,168 | 785,403 | 71% |
| | | | |
| Total | 32,617,065 | 12,658,975 | 39% |

Self-insurance is less of an issue in privately underwritten schemes as the premiums for larger employers usually more closely mirror their actual performance. Some employers still choose this option as they prefer to carry the liabilities on their own balance sheets and to manage claims in-house. But many others take advantage of flexible premium arrangements such as “burner” policies – where the premium is topped up after the event if claims exceed an agreed threshold – to effectively self insure while keeping the full exposure off their balance sheets.

Cross subsidies have become an integral feature of most government schemes, usually justified on public policy grounds to ensure the affordability of workers compensation across the economy. There are also isolated instances in competitively underwritten schemes – in Western Australia no premium can be more than double the benchmark rate and in the ACT there have been moves to cap premiums for the building and construction industry training agency.

Barriers to self insurance exist primarily to minimise the number of good risk employers exiting the scheme and therefore the cost of the cross subsidies for those remaining. While there may be good public policy reasons for cross-subsidising certain categories of employers (such as small to medium enterprises) these reasons are rarely transparent and have some obvious economic inefficiencies in reducing pressure on poorly performing individual employers to improve OHS.

Both the 1994 Industry Commission inquiry and the current terms of reference explore the potential for the Commonwealth to provide a national scheme allowing self-insurance under Comcare as an alternative to self-insurance through state-based schemes for national employers. As discussed earlier, the same objectives can be achieved for a wider range of employers by creating a competitive insurance market for Comcare services, subject to some changes to that scheme. Alternatively, a competitive market could be created by insurers providing claims management services and/or reinsurance to employers under the Comcare self-insurance arrangements.

Another option is a system of mutual recognition for state-based self-insurance arrangements. This would simplify matters for employers but also create forum-shopping, with self-insurers attracted to the jurisdiction with the lowest entry requirements and possibly the lowest benefit structures.

Mutual recognition becomes less of an issue if all jurisdictions are able to agree on a high degree of uniformity or consistency in scheme design and operation. National employers would have the benefit of a single operating and compliance model for their workers compensation requirements and a single set of benefits for all their employees. But this will take time.

Once a genuine national scheme is in place, self-insurance would be reduced to a question of whether – or to what extent - an employer wishes to carry the liabilities on their own balance sheet or outsource the risk to an insurer, and to manage the claims and related services in-house or to outsource to suitable providers. Under any national framework, whether based on Comcare or mutual recognition, 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.

## *Occupational Health and Safety (OHS)*

Currently in Australia, health and safety in the workplace continues to operate primarily at a state and territory level despite the creation of the National OHS Commission. There are a myriad of legislative requirements including;

- A principle OHS Act in each state and territory plus commonwealth and seafarers workplaces.
- 22 principal OHS Regulations.
- 37 ‘other’ relevant Acts.
- 34 ‘other’ relevant Regulations.
- Over 250 Codes of Practice, Advisory Standards and Guidelines.

That said there are some common themes in all OHS operations including the key elements of

- Education and training.
- Enforcement.
- Research.
- Some focus on ‘national’ approaches/consistency/comparison.
- Regulatory reform.

Appendix 4 provides a comparison on several aspects of OHS highlighting both similarities and differences between jurisdictions.

Each state/jurisdiction recognises the link between workers compensation scheme costs and the prevention of workplace injuries and illness through the structural links between the workers compensation authority and those responsible for workplace health and safety. This relationship is stronger in some states/jurisdictions than others with varying views on the appropriate level of independence that each authority should have.

The regulatory frameworks for both workers compensation and OHS are usually better understood and acted upon by larger employers than small to medium sized employers. Larger employers have the scale of operation and capacity to enable them to have in-house specialist advice about OHS and operations to assist injured workers, particularly as they return to work. Small to medium employers generally have fewer resources to meet and understand the highly prescriptive regulations, yet they make up the vast majority of Australian employers. Through their contact with their workers compensation clients, insurers can assist larger employers with OHS and risk management, and are well placed to help smaller employers understand and meet their OHS obligations and prevent workplace injuries.

The link between OHS, workers compensation and the role of insurers is further highlighted by the fact that most employers regard premium reductions as the greatest incentive for accident and injury prevention. Yet there are also avoidable indirect costs to the business as accident prevention has a positive impact on business sustainability. This powerful motivator for improved safety performance provides the opportunity for close interaction and cooperation by insurers and their clients to support improved safety performance and reduced claims costs.

Insurance Australia Group alone has about 43,000 active claims under management for 169,000 employers. Insurers can and should be playing a greater direct role in providing OHS support to employers due to their depth of knowledge on actual incidents and the consequences - in both human and financial terms.

A genuine competitive market for workers compensation creates clear economic drivers for insurers and employers to work together and to invest in risk reduction and accident prevention. The costs of accidents are clearly understood by managers and the benefits of a safe workplace are integral to the health and profitability of the business.

It is no coincidence that Australia has no private sector research capacity (and very little publicly funded capacity) on OHS issues when large parts of the private sector have no direct financial interest in their actual OHS performance and most of the focus is on compliance and enforcement of complex regulatory arrangements. This is in stark contrast with the United States, where commercial insurers play a much greater role in workers compensation and where leading insurers such as Liberty Mutual and Kemper fund major research institutes which are world leaders in OHS science.

There are some parallels in Australia in the area of road safety, where Insurance Australia Group has a long history of actively working with other stakeholders on a range of projects as an integral part of its compulsory third party (CTP) business. Road safety strategies have become much more sophisticated and better targeted over time. By utilising crash and injury data, claims information, technical expertise and educational approaches, highly targeted interventions have been developed and implemented. In road safety, a multi-faceted approach is now used which focuses on the broad areas of engineering, enforcement and education. Each of these approaches alone is limited in its scope but together, they are much more effective.

A simple example is that of drink driving. As the technology developed which allowed roadside breath testing, there was intensive enforcement accompanied by large-scale mass media public education, both about the enforcement activities themselves and the dangers of drink driving. Through this coordinated approach over time, it has become socially unacceptable to drink and drive. While enforcement and education activities continue and technology is further developed, evaluation studies and crash statistics have demonstrated the effectiveness of this approach.

Mass media campaigns continue to be used in road safety to target identified safety issues that affect large segments of the community. Issues such as double demerit point periods, anti-speeding campaigns and driver fatigue, have wide-spread application and relevance in the community and a broad community-wide campaign is necessary and appropriate. However not all road safety issues utilise this approach as they have a more targeted audience, for example recent work targeting parents of young children to alert them to the dangers of reversing in their own driveways.

Currently, similar expensive mass media campaigns are being used to try to target workplace health and safety issues. While mass media can be effective in increasing community knowledge about safety issues, it is questionable whether this approach is the most effective for dealing with OHS. Firstly, only part of the mass media audience is in employment and therefore able to identify with the message. Secondly, many of these campaigns focus on manual work in building and manufacturing environments. This further narrows the audience for whom this message will be relevant. Finally, the issues to be targeted in these campaigns are selected without the involvement of insurers who have access to extensive claims information which could be utilised to target the messages and identify emerging injury and illness trends. So while the use of mass media to increase knowledge may be similar to road safety, the coordination of information on which these interventions are developed is less comprehensive and its effectiveness difficult to assess.

The current work in NSW on child safety and reversing in driveways is a good example of how involving all relevant stakeholders can be invaluable. The issue was initially identified by the Child Death Review Team which lead to the formation of a working party. Representatives included the Roads and Traffic Authority (though they are the lead agency for road safety, data about these incidents is not collected as they mainly occur ‘off-road’ in driveways), hospital emergency department representatives who have and will continue to collect information about these incidents from their emergency departments, the Motor Accidents Authority (MAA - the CTP scheme regulator) and Insurance Australia Group, which as the state’s largest CTP insurer had access to accident information not available from other sources. This has resulted in a more strategic and co-ordinated approach than would have been possible if each agency had worked in isolation.

Another example of well-targeted and informed activities is the work jointly conducted by the MAA and Insurance Australia Group targeting parents to increase learner driver practice on the roads. Research has showed that safety gains are possible if learner practice is increased. Crash and claims data clearly demonstrates that new, young drivers are at increased risk of being involved in a crash. The TV and bus back campaign with the tag “Practice Helps Your Children Survive”, was based on sound research and complemented the activities of the licensing authority in NSW.

These project examples demonstrate the value of involving insurers in accident and injury prevention, both in terms of target identification and campaign and intervention funding.

## *Access and Coverage*

Insurance Australia Group expects that the practical difficulties arising from the inconsistencies in access and coverage for different schemes will be well documented in employer submissions. We support the view that the inability of some schemes to deal with the changing nature of employment inhibits the development of a more efficient and dynamic labour market. There are also clear inequities in the exclusion of some types of working arrangements under some schemes.

The task of achieving national consistency for all key definitions relating to access and coverage is critical to achieving overall national consistency as well as capturing essential data for driving more efficient and equitable outcomes for injured workers and employers. However it will require time, a clear commitment at the political level and dedicated specialist resources to work through the issues and to develop a consistent package of reforms.

As a starting point, this inquiry may be able to assist by proposing a single, clear set of objectives for workers compensation. Once a set of objectives is agreed at the political level, the task of developing a comprehensive set of definitions to achieve consistent levels of access and coverage would be a much simpler one.

Insurance Australia Group proposed the following key principles that are universally desirable in all personal injury schemes, including workers compensation, in its submission to the HIH Royal Commission.

- Uniformity between jurisdictions, i.e. consistency irrespective of where the accident occurred.
- Uniformity between various schemes, i.e. consistency irrespective of how the accident occurred.
- Maximum stability and predictability.
- Affordability by those who are required to pay the premiums, and
- Fair and just compensation to all, but with more emphasis on protecting the seriously injured.

The submission went on to say that the key features of an ideal scheme are:

- Fully-funded according to APRA standards with stable and predictable performance, which allows the scheme to be sustainable without legislative change for a substantial period.
- Maintenance of premiums that can be afforded by all sections of the community.
- Competively underwritten.
- Focused on injury management and optimal health outcomes.
- Full or close to full indemnity for the economic loss of persons who have suffered serious injury.
- Ensuring scarce community resources are husbanded by limiting the damages for less serious injuries and ensuring benefits are preserved for and applied to the purpose for which they are awarded.

- Retention of a high element of individual assessment within an objective framework. The result of this is a smaller need for the external intervention settling claims by courts or tribunals.
- Optimal return of scheme funds to claimants, and minimising funds needed to meet the financial imperatives of other stakeholders, and
- Providing a framework where the veracity of claimants can be properly tested and in which only those who are properly entitled to receive benefits do so.

## *Benefits*

Benefit design is a key driver of behaviour and therefore scheme predictability and will be central to the national rationalisation of workers compensation at the national level, whether under the Comcare scheme or some other legislative framework.

Insurance Australia Group has looked extensively at best practice internationally, as well as gathering data and experience from within Australia, in developing views on good scheme design including benefit structures. By looking at the components of all schemes individually, a design was developed for a revamped compensation system that recognises the inter-relationship between the various components.

The result is a model of an "ideal" scheme to help promote discussion and debate about the future of
injury compensation in Australia, including workers compensation. The model was outlined in some detail to the HIH Royal Commission, which said that while the issue was outside its specific terms of reference, personal injury scheme design was vital to the stability and efficiency of the insurance market and deserved closer scrutiny in an appropriate national forum.

### Access to Common Law Damages

Unlike the United States, which abolished all common law actions for work related injury when no-fault workers compensation insurance became compulsory in the 1920s, Australia continued to retain a predominantly common law basis for damages until relatively recently. The role of common law has been progressively wound back by statute to contain costs, but most Australian schemes continue to retain some element of common law at least for more serious injuries.

Common law actions for recovery of full loss are also available where an injury results from workplace negligence outside the direct employment relationship (eg equipment or design fault) and therefore outside the workers compensation framework. These types of actions have become increasingly common in Australia in recent years as the benefits available under workers compensation policies have been progressively restricted.

The advantages of common law may be summarised as follows:

- Once-and-for-all assessment.
- Full indemnity.
- Detailed assessment of the individual which takes account of the impact of the injury on the claimant according to their age, sex, occupation, social activities, etc.

- Individual assessment is undertaken by an independent judicial officer.
- Finalisation of the issue for the claimant. The claimant can get on with their life and does not need to demonstrate ongoing compensable symptoms in order to receive benefits.
- Claimant can use the damages to reconstruct their lives, e.g., to invest in a business to produce income for the future.
- Insurers can finalise both the claim and its cost.
- Insurers can more accurately assess full funding requirements for liabilities.
- Lower administration costs because insurers can close off files.
- Preserves the element of fault to meeting community expectations that those who are responsible for damage will pay for it.
- Adversarial process tests the claimant's right to funds.
- The common law is flexible and adaptable to changing social and economic circumstances.

But there are also disadvantages:

- The once-and-for-all approach requires a speculative guess at the progress of the claimant's injuries and the loss that will flow from them. This assessment may result in under or over compensation.
- Damages may not be used for the intended purpose, with claimants later falling back on the public system.
- Individual assessment can become highly subjective with inconsistent results in similar cases.
- Subjectivity of assessment, with new heads of damage and judicial generosity, results in unpredictable scheme performance and unstable prices.
- High in-built legal, medico-legal and other costs.
- Service providers (legal, medical etc) have a financial interest in the complexity of the process.
- A significant burden on the court system and is a drain on judicial resources.
- Delays in finalisation and the medico-legal process work to discourage rehabilitation and cause financial hardship to claimants in the interim.
- Adversarial process causes stress for injured people, also affecting recovery.
- The common law preserves the element of fault.

The major hurdle to common law damages for a work related accident is to establish negligence on the part of the employer.

Historically, the principle of fault underlying the common law negligence action was based on notions of moral culpability and social responsibility. The idea that a wrongdoer should be required to compensate an innocent victim for the injury inflicted is founded on concepts of community justice such as:

- Providing restitution for the victim.
- Punishing the wrongdoer.
- Acting as a deterrent against such conduct in the future.

A case can be made that the relevance of these concepts has been eroded over time and arguments against retaining fault as a basis for any form of personal injury damages include:

- The wide availability and compulsory nature of insurance to cover compensation obtained by a wrongdoer has rendered the idea of individual responsibility for negligent actions irrelevant. It has also called into question the deterrent effect of an award of damages against the wrongdoer.
- The application of contributory negligence has watered down the application of pure fault principles.
- There are evidentiary problems in allocating fault/determining negligence.
- The standard required to prove negligence has been watered down over recent years.
- The application of the fault principle results in inequity as a significant number of injured persons are unable to prove fault and hence qualify for access to higher benefits.

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.

There are other more pragmatic arguments for rejecting access to common law that arise from the costs of an inherently adversarial system. During the 1990s it became clear that common law claims were responsible for the major part of the blow-out in costs in workers' compensation schemes. The report of the Commission of Inquiry into Workers' Compensation Common Law Matters in NSW (the Sheehan Inquiry), which recommended tight restrictions on future access, said:

> The NSW experience is reflected generally across Australian schemes, and research on the Australian schemes (by Coopers and Lybrand 1999 for the New Zealand Department of Labour) indicates that the availability and level of lump sums is the single strongest predictor of adverse scheme outcomes.

This report 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 quoted earlier. Swift and effective treatment, rehabilitation, and early return to work at maximum earning capacity, do not fit comfortably with the 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 the 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 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.

Similarly, a review of the Review of the Western Australian Workers' Compensation System in June 1999 said:

> The cost of damages of common law was the issue of most concern in the submissions. It has been the main cost driver in recent years, increasing by 20% a year on average over the past 7 years (from $57M in 1991/92 to an estimated $137M in 1998/99).

This report also recommended significant new restrictions on access to common law.

The inappropriateness of the fault criteria combined with the problems of cost containment of common law claims leads us to conclude that access to common law damages should not form part of any national workers' compensation framework.

## Benefit Design Issues

If a fault-based common law negligence claim is no longer be available, other criteria need to be available to determine access to a higher level of benefits that the minimum provided by statute where community standards suggest this is warranted. Insurance Australia Group believes that there is merit in retaining access to a level of higher benefits for those people who suffer serious long term injuries and with no realistic prospect of returning to their pre-injury circumstances. However the concept of serious injury as a means for determining higher benefits needs to be viewed in the context of a whole scheme design which provides a basic level of benefits for more minor injuries and a higher level of benefits for serious injuries.

In concluding that fault should have no place in determining access to compensation for workplace injury, this does not necessarily mean rejecting all aspects of common law based assessment. Each of these aspects must be looked at on their own merits. Insurance Australia Group's approach to scheme design combines elements of both no-fault and common law schemes to provide the best overall solution in a model which provides:

- Encouragement for risk management and injury prevention;
- Objective assessment of injury.
- Appropriate treatment to maximise health outcomes.
- Immediate periodic payments for a limited period with "basic benefits" available to people who qualify for access to the scheme.
- Encouragement and support for early return to work.
- Longer term benefits available only to seriously injured people.
- Statutorily defined benefit levels for basic benefits.
- Higher, longer-term benefits for the seriously injured people including lifetime medical and other care costs through a pooled arrangement. Payments for loss of future earning capacity would be compensated by a lump sum or structured settlement, and
- An administrative structure and review process limiting access to the courts.

The major feature of this model is separating basic benefits from long-term benefits. However, the criterion for long-term benefits is determined according to how serious the injury is.

Risk management, injury management, return to work and dispute resolution are dealt with elsewhere in this submission. But it is important to recognise that they are as critical to the design and overall effectiveness of the scheme as the benefit structure.

## Proposed Benefit Structure

The benefit design proposed is a two-tiered structure consisting of "Basic Benefits" and "Long Term Benefits" designed to strike a fair balance between the affordability of the scheme and the need to provide immediate support to workers after injury, a pathway back to independence for those who are able and long term support for those who will not recover.

"Basic benefits" would be available to all claimants. These would be available for an initial defined period, taking into account the likely maximum recovery period for most injuries. The intention during this period is to cover all medical, rehabilitation and out-of-pocket expenses and an income stream at a level that will prevent any hardship but still provide an incentive for return to work.

"Long term benefits" would be available only to those who are able to establish that they have suffered a "serious injury". The parameters of what constitutes a "serious injury" would be clearly defined and an injured person would be assessed by objective medical assessment to determine whether they have met these parameters. The assessment process would take place at or before the end of the basic benefits period. Once the assessment requirements have been met, an injured person would continue to receive income support and have expenses met until finalisation of the insurance claim. They may also be entitled to additional benefits for loss of earning capacity.

## Basic Benefits

The reasonable costs of hospital, ambulance, medical, personal and respite care would be met as incurred, provided that the treatment iss reasonable, necessary and appropriate according to relevant clinical practice guidelines or other evidence based medicine.

Payment for loss of earning capacity would be made by periodic payments linked to the injured person's net average weekly earnings prior to the accident and capped to ensure equity and affordability, perhaps as a percentage of national average weekly earnings. They would continue until the worker returned to work or the overall basic benefit limit (eg 104 weeks).

### *Serious Injury*

Access to long term benefits would be subject to an accepted medical standard, which can be objectively measured by independent medical assessment. This may involve the use of measures of impairment based on American Medical Association Guidelines or measures of disability based on the Functional Independence Measure (FIM). Different editions of the American guidelines already provide the basis for objective measurement tools in a number of workers compensation jurisdictions. The FIM is an Australian Standard used in the Health System to measure a person's ability to perform basic life activities. It is important that there is an actuarial assessment of the impact on premiums so that the cost implications are clearly understood when determining the level of injury at which the gateway is set.

Once the level of injury is established, **medical/rehabilitation/care** expenses would continue to be paid until finalisation of the claim. At that point, future payments would be included in the

settlement or preferably funded through a pool designed to eliminate the risk that the settlement will be inadequate over the lifetime of the claimant.

In order to be eligible for **loss of earning capacity** benefits, the injured person will demonstrate a permanent loss of capacity through an independent medical assessment. It is proposed that loss of earning capacity be determined by calculating pre-accident earning capacity and deducting residual earning capacity. This might also be subject to a cap of a percentage of pre-accident earning capacity but not necessarily to an average weekly earnings cap.

Again payments will continue as required until finalisation, when a lump sum provides some real choice for injured people in providing for their longer term future. From an insurance perspective, a lump sum also has the common law advantage of finalising a claim once and for all, improving the financial predictability and stability of the scheme and reducing the cost of capital needed to support uncertainty. A pool to fund medical and care costs would also increase the level of security and certainty for injured people.

**Structured settlements** should be available to ensure that tax issues do not stand in the way of people making decisions about their own best long term interests. Workers compensation was excluded from legislation passed late last year allowing structured settlements for personal injury compensation and a recent draft tax ruling (TR2002/D13) seeks to extend the taxable status of payments for economic loss.

It is proposed that **death benefits** be paid by way of a lump sum where there is a family relationship and material dependence.

## Non Economic Loss

Our proposed model excludes benefits for non economic loss because experience has shown this head of damage:

- Can absorb a disproportionately high percentage of claims pay outs.
- Is the major driver of the propensity to claim for less serious injuries.
- Discourages early return to work and claim finalisation.
- Is a significant cause of disputation.
- Has a high degree of subjectivity in how it is assessed, and
- Is the major cause of instability and unpredictability of how schemes perform.

The difficulty with the pure common law approach to non-economic loss is that assessments are subjective and there are no thresholds or caps, leading to inconsistent awards and inflation over time as the balance of judicial discretion leans towards “deserving” cases.

Responses to these problems have included:

- Raising the level of severity of injuries required before damages for non-economic loss are available. This approach usually involves determining a “whole-of-person” impairment, and the percentage of whole-of-person impairment that determines access to non-economic loss. However, once access is granted, assessing award damages remains still subjective.

- Another approach to improving objectivity is to restrict payment of non-economic loss to specified injuries. Under this approach, each injury carries set amount of compensation or a percentage of a specified maximum amount.
- The final alternative is to totally remove all entitlements to non-economic loss. This avoids all the difficulties outlined above and the potential to create instability.

Insurance Australia Group prefers the total removal of damages for non-economic loss, particularly if there is an efficient and equitable mechanism for providing lump sums to cover future economic loss. This is more directly relevant and appropriate to serious work-related injury when fault is not at issue.

If there are policy imperatives for retaining damages for non-economic loss, Insurance Australia Group recommends a specified injury approach with a comprehensive schedule of defined amounts, consistent with the objectives of consistency and stability and of preserving funds for those with the most serious injuries.

## *Dispute Resolution*

An effective and efficient dispute resolution mechanism will be critical to the success of any national framework or to reform of the Comcare scheme.

Workers compensation has been a traditionally adversarial area of law, where the interests of workers and employers or insurers are assumed to be opposed. Yet there is also evidence that the adversarial approach shifts the focus away from returning to pre-injury health and work and emphasises monetary outcomes. Alternative dispute resolution (ADR) mechanisms play a role in breaking down the adversarial nature of disputes and help to refocus the emphasis on to the health of the worker.

Insurance Australia Group is a strong supporter of ADR mechanisms where they bring about a final binding decision that is just, inexpensive and efficient. However, there is a danger in introducing any ADR process that simply acts as another stepping stone to a judicial determination – this only further promotes the adversarial nature of the scheme.

ADR mechanisms are essentially administrative. Unlike the formal judicial process, it is possible through accountability measures to strike a balance between the need to provide fair individual outcomes and an overall responsibility for the impact of ADR on the equity, efficiency and affordability of the scheme as a whole.

Some jurisdictions are inherently adversarial and a significant amount of work and time will need to be devoted to changing the culture, establishing the relevant processes and creating measures for success. Other jurisdictions with less adversarial histories may embrace new approaches to disputes more readily. In designing a consistent national framework, it is important to recognise that it is difficult to compare the various approaches as the results may reflect broader scheme design and cultural issues.

ADR is an intrinsic element of scheme design. 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. For example, it is much more important in a scheme that retains elements of common law for there to be access to a court hearing than it is in a statutory scheme where most matters can be determined

administratively. To determine the most suitable ADR process, scheme objectives need to considered and then matched to the appropriate process.

Insurance Australia Group believes the key criteria for an effective dispute resolution process are:

- Just
- Speedy
- Inexpensive
- Independent without bias
- Procedurally fair
- Efficient
- Promotes early settlement
- Final (binding decision) and
- Consistent.

Insurance Australia Group has experience in the full range of ADR processes used in workers compensation in Australia, particularly informal conferencing, conciliation/mediation and arbitration.

## *Informal Conferencing*

Generally informal conferencing takes place prior to any of the "formal" ADR methods, particularly in Tasmania, the Northern Territory, Victoria and the ACT. Informal conferences generally involve the insurer/employer and the worker discussing the issues and attempting to achieve a settlement.

Informal conferencing meets the majority of our key criteria. It is quick and efficient and tends to produce results that are acceptable to all parties. The costs are minimal as there is little need for extensive documentation or legal representation.

Informal conferencing is the least adversarial method of dispute resolution. The parties participate of their own free will and generally have a vested interest in obtaining compensation appropriate to the injury, regaining pre-injury health and returning to work.

An informal conference can be run as an independent meeting between the parties or a mutually appointed mediator may be used, as often happens in Tasmania. All jurisdictions that utilise informal conferencing consider it to be one of the more successful mechanisms.

The US Workers Compensation Research Institute (WCRI)[1] said of informal ADR:

> "[i]n making and evaluating settlement offers, the parties must rely on their expectations of the outcome at a formal hearing. If both parties expect roughly the same outcome, they are likely to settle the case; but if the parties expect vastly different outcomes, they probably will not arrive at a settlement. The benefits each party expects from the outcome will outweigh the delay and cost of a formal hearing".

[1] Ballantyne, Duncan and Mazingo, Christopher. *Measuring Dispute Resolution Outcomes.* Workers Compensation Research Institute. April 1999.

This point underlines the need for consistency in all dispute resolution processes. WCRI found that informal mechanisms are often preferable to formal mechanisms because of the certainty that settlement creates. The certainty of an informal settlement outweighs the cost and length of time to obtain a formal settlement.

Any national ADR framework should allow, if not encourage, disputes to be dealt with informally in the first instance.

## Conciliation/Mediation

There is little difference in process between conciliation and mediation, and the terms are often interchangeable[2]. Conciliation is generally used in workers compensation schemes and will be used to refer to both conciliation and mediation in this submission.

Conciliation usually involves a neutral third party conciliating the discussions between the worker and the insurer/employer. The conciliator will often help the parties to determine the issues in dispute. They do not influence the final settlement, although in some cases they may express a view as to the likely outcome[3]. The danger in a conciliator expressing a view is that the conciliation may become more like arbitration.

Our experience has been that in some situations in Victoria, the 'Accident Compensation Conciliation Service' by default becomes an arbitration when the conciliator expresses a view. If a recommendation was made for conciliation to form part of an ADR process, Insurance Australia Group would suggest that it be a conciliation in the pure sense to avoid an arbitration by default.

In Western Australia we find the conciliation system to be generally just but in some circumstances the lack of legal qualifications produces inconsistent decisions. Where the process is legislated our experience has been that it is always followed. For example matters referred for conciliation or review required to be heard within 14 days yet at present there is an average time delay of 21–28 days.

The system is designed to operate without legal representation but both parties tend to extensively use para-legal or compensation experienced advocates to represent them at significant cost.

In many jurisdictions, including Northern Territory and NSW, the proceedings in a conciliation conference are inadmissible in court. This encourages frank disclosure between the parties. This is characteristic of the non-adversarial nature of conciliation and promotes early settlement of disputes.

Conciliation, in some form, is used as one of the first stages in every workers compensation scheme. Anecdotally, conciliation is considered favourably by users as it provides an opportunity for the parties to discuss the issues in dispute and to negotiate a settlement in a non-threatening environment. It is also effective in more complicated matters or where there are multiple parties.

[2] Australian Law Reform Commission. *Issues Paper 25: Review of the adversarial system of litigation.* June 1998 p 29.
[3] Australian Law Reform Commission. *Issues Paper 25: Review of the adversarial system of litigation.* June 1998 p 31.

## Arbitration

Of all the ADR mechanisms, arbitration is the most adversarial and most closely resembles a judicial determination.

NSW workers compensation incorporates a system of both conciliation and arbitration. An officer of the Workers' Compensation Court acts as a conciliator in the preliminary stage of the conference. If the parties are unable to reach a settlement the officer becomes an arbitrator and makes a decision. The two stages are taken to be separate and the conciliator is not to be prejudiced by the proceedings of the conciliation. In our experience this method has been effective in resolving disputes. The decision of the arbitrator is binding and can only be appealed on a matter of law. This ADR process meets all of our key criteria; particular in promoting early settlement, efficiency and procedural fairness. We have also found that the decisions of arbitrators tend to be consistent.

By way of contrast, in South Australia arbitration is the final stage before judicial determination. The ADR process is 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. The process can be drawn out (waiting lists for conferences and judicial determination are long) and expensive as costs are not structured to promote early settlement. Decisions are inconsistent and there is a perception that tribunal officers are prejudiced in favour of one party or the other. This discourages early settlement and a tendency to "try their luck" with a judicial determination.

## Costs

A key requirement for efficient dispute resolution is a cost structure that promotes early settlement by weighting fees towards early resolution and penalising parties for not reaching an early settlement when they had a reasonable opportunity to do so.

In NSW solicitors fees and conciliators/arbitrators fees are weighted so that, proportionately, they will be paid more by achieving an earlier settlement.

In South Australia and NSW a cost order will be made against an appealing party if the results of the appeal do not achieve at least ten percent (in SA) or 20% or $5000 (in NSW) greater than the previous award. This acts as a disincentive to continue to appeal unmeritorious claims.

## Streaming of Disputes

Rather than providing a "one size fits all" approach, ADR should involve a streaming process to find the most suitable method for resolving a matter. The starting point may be informal conferencing, conciliation or arbitration depending on the issues and the history. There should also be an option to send certain types of disputes straight to a court hearing or administrative determination.

Disputes of a medical nature and liability disputes should be dealt with separately. Medical disputes should be resolved by medical experts and objective evidence. A medical panel trained in the

relevant assessment method should to ensure that the correct issues are considered. The findings should be final and binding on all parties.

Examples include NSW (both in workers' compensation and CTP), Victoria (in workers' compensation, CTP and recently recommended in the *Wrongs and Limitation of Actions Act (Insurance Reform) Bill*) and in Western Australia.

In the NSW CTP scheme medical panels have been successful in streaming medical disputes away from the liability disputes resolution process and increasing the consistency of decision making. But there are significant delays due to the volume of applications for assessment which appear to have little prospect for success. This probably is a reflection of the adversarial history of this scheme which will take time to change.

In Victoria the medical panel operates as a tribunal and is able to determine matters of mixed fact and law. The findings are final and conclusive and the system has been extremely effective. S68(1) of the *Accident Compensation Act* states that decisions must be handed down within 60 days of referral.

In Tasmania medical panels have been legislated but no formal panel has been established. An ad hoc panel has been making competent determinations on disputes for access to common law.

### *Collection of Data*

A significant issue for any ADR process is the collection of data about that processes and its success in achieving its objectives. In our experience very little data is collected about ADR processes by the scheme administrators in each jurisdiction. As such, unless individual insurers collect this data, it is very difficult to track the effectiveness of the process.

Benchmarking and performance measurement is as critical to ADR as to any other part of the scheme design. Without timely and relevant data collection, it is extremely difficult to understand the impact of different approaches to ADR and for the relevant authorities to be accountable for their impact on the overall stability of the scheme and the cost of workers compensation.

## *Early Intervention, Injury Management and Return to Work*

A report by the Australasian Faculty of Occupational Medicine and the Royal Australasian College of Physicians (Compensable Injuries and Health Outcomes, 2001) found

> "People with compensable injuries have poorer health outcomes than do those with similar but non-compensable injuries. Not only do people with compensable injuries have worse health outcomes, the benefits and medical treatment they receive vary from jurisdiction to jurisdiction."

This report compiled evidence to support the proposition that a person's state of mind is critical to better health outcomes. In a workers compensation context, this means that any system that encourages a person to appear injured so they can receive a more favourable outcome is unlikely to produce a state of mind focused on recovery.

It has been widely recognised that an integrated multi-disciplinary approach to injury management is the key to an effective and efficient workers' compensation scheme. Early notification of claims and referral to an injury management specialist is vital to successful rehabilitation and sustained return to work.

The adequacy of injury management is defined by:

- How quickly after the injury it commences – early notification is vital.
- Real opportunities for recovery are explored and affected.

Factors which influence effective injury management include:

- Communication between all stakeholders.
- Bio-medical capacity.
- Psycho-social condition.
- Opportunities for employment.
- Commitment by the employer to get the claimant back to work, and
- The capacity and willingness of the medical practitioner to cooperate in the return to work process.

Unfortunately the current mix of incentives and penalties (or lack of them) for employers, claimants, treatment providers and insurers in most Australian schemes tends to encourage institutionalisation into the system instead of activities aimed at a durable return to work.

In particular, employers, treatment providers and workers need incentives to notify their insurer quickly of potential claims. Early notification of workers compensation claims is vital to ensuring that claims are managed as quickly and efficiently as possible. It should be mandatory and supported by legislative and compliance requirements.

It is well documented that early notification leads to timely appropriate intervention and ultimately better outcomes. US research has shown that notification time has a direct correlation to cost[4].

- Claims reported within two weeks of the injury were 18 percent more expensive than those reported within one week.
- Claims reported within three weeks were 29 percent higher
- Claims reported at four weeks were 31 percent higher
- Claims reported at five weeks were 45 percent higher

Correlation between notification time and duration [5]:

- Claims reported after two weeks, 29 percent became litigated
- Claims reported after three weeks, 31 percent became litigated
- Claims reported after four weeks, 47pecent became litigated

Reporting delays leads to delays in the injured person returning to work, less control on inappropriate treatment and associated costs, increased likelihood of litigation and prolonged duration of claims. There are also the increased business costs associated with absenteeism, training and loss of productivity.

While this is now well recognised in all workers compensation schemes, the following table illustrates the different approaches adopted and the degree of compliance.

[4] Source: Hartford Insurance 2000
[5] Source: Kemper Insurance 1994

## *Injury Notification and Compliance*

| Scheme | Injury Notification | Actual notification 1/5/00-30/4/03 | Comments | Liability |
|---|---|---|---|---|
| **NSW** | 48 hrs-serious injury<br>7 days-no serious injury | 22.36 | | 7 days to commence weekly payments.<br>Provisional liability 12 wks |
| **ACT** | 48hrs to Insurer or a cost penalty is applied | 20.24 | | 21 days to determine |
| **VIC** | Worker to employer- 30 days.<br>Death and non-economic claims forwarded within 10 days | 57.10 | Employer pays 1st 10 days - discourages early notification | 28 days for serious injury.<br>50 days for impairment.<br>50 days for medical expenses |
| **WA** | Employer has 3 days to lodge after notified. Worker must give notice "as soon as practicable" | 33.17 | Most delays due to the worker | 14 days |
| **SA** | Worker to Employer-48hrs<br>Employer to Insurer-5 days | 31.88 | | No distinction between minor and serious injury. Liability determination within 10 days |
| **QLD** | 10 days for all injuries | not known | | 3 mths to determine |
| **NT** | 3 days for all injuries | 29.44 | | 10 days-if deferred final decision in 8 wks. |
| **TAS** | Completed claim form - 5 days for all injuries | 23.63 | Employer excess – 1st 5 days, $200 | If not disputed in 14 days deemed accepted |

Since January 2002 NSW employers have been required to lodge claims within seven days of the incident occurring. WorkCover can fine employers who do not comply but is yet to use this power and does not to have processes in place to do so.

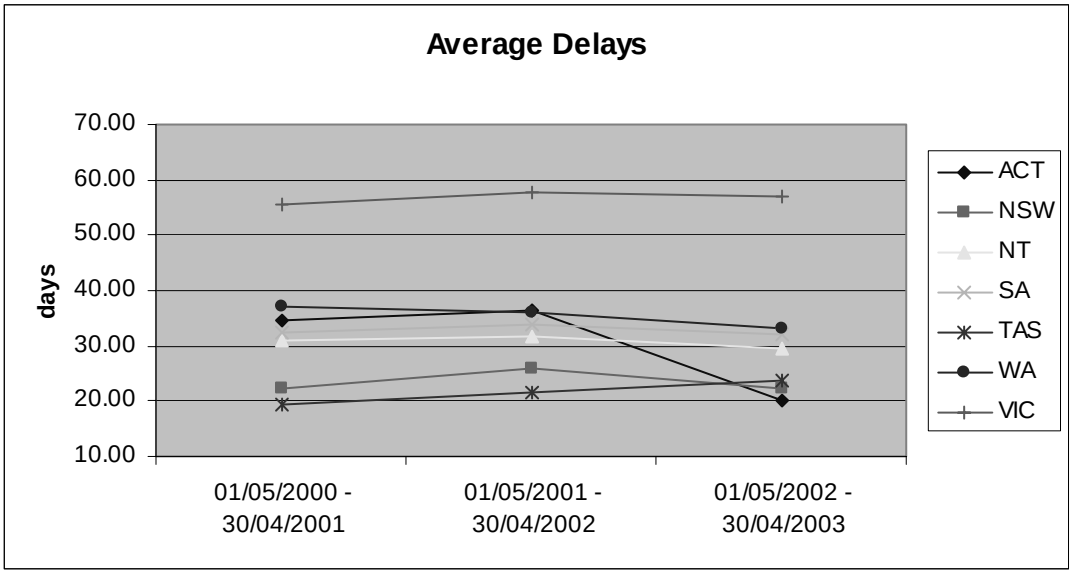
Under provisional liability provisions in NSW, notification of injury can be done either by the employer or the employee. The aim of this provision is to encourage early notification by employers. The incentive is that through early notification, employers will have greater control over the claims, injury management and return to work processes than they would have had their employee notified the insurer of their injury.

In July 2002, the ACT scheme implemented a similar policy whereby employers must notify their insurer of a claim within 48 hours of an injury. Insurance Australia Group data (graph below) suggests that this has resulted in a dramatic decrease in notification time from 34.5 days to 20.2 days – a significant improvement though still short of the statutory objective.

Workers compensation provisions in Victoria state that the employer pays the first ten days of compensation and a set amount of medical expenses. These provisions were intended to encourage early notification by employers but there is no real incentive to do so until the claim exceeds these retention periods and it is clear that a workers compensation claim will be needed. Many employers do not have expertise in injury management and with the best of intentions can be slow to identify

those incidents likely to become significant claims. The results can cause more damage than if the employee was immediately referred to the workers compensation insurer.

**Time from Injury to Notification: Insurance Australia Group Data**



Another area of concern is the ability of employers to provide return to work opportunities. In NSW, Victoria and South Australia there are financial incentives to employers who are willing to offer full-time or part-time permanent employment to a work-ready worker. These programs are used to varying degrees and the VWA has just commissioned a review of their WorkCover Incentive Scheme (WISE).

Injured workers also need incentives to return to work as quickly as possible. In an adversarial workers compensation system workers often feel their claim is not being believed by the insurer. The result can be an "I'll show them I'm really sick" mindset. A recent survey of ill and injured workers suggests that more effort on communication will hasten return to work.[6]

The impact of different cultures is well illustrated by the comparative costs (table below) of Insurance Australia Group's motor vehicle accident claims managed through the workers compensation system (costs are recovered from the third party scheme) and other claims which involve payments for economic loss (ie time off work but not workers compensation).

**Cost Comparison where Workers Compensation involved in Claims Management**

| | **Workers Comp Involved** | **Workers Comp Not Involved** |
|---|---|---|
| **Average Medical Cost** | $6,384 | $2,144 |
| Average Future Medical Cost | $2,311 | $1,849 |
| Average Rehab Cost | $58 | $113 |
| Average Eco Loss Cost | $7,547 | $3,132 |
| Average Future Eco Loss Cost | $11,078 | $6,726 |
| **Average Cost Overall** | **$27,377** | **$13,964** |

## Accountability and Incentives for Treatment Providers

Some schemes have legislative requirements for doctors to remain active in the injury management process, for example by returning phone calls and following up on outstanding matters. But there is minimal enforcement and many GPs are also reluctant to sign off on injury management programs for professional indemnity insurance reasons. The result is further delays in treatment and further reductions in the prospects of successful rehabilitation and return to work.

An injury management program also depends on the preparedness of employers to pay for value and the capacity of providers to give value. This has been an issue in the Victoria workers' compensation scheme, where VWA paid low rates to injury management providers. A number of quality providers withdrew their services and lower quality providers, who were more commercial operators and tended to over-service, entered the market. This practice was effectively encouraged by the absence of monitoring by VWA.

[6] Scardellette F. Communication Counts: Satisfaction Affects Return to Work. *The Workers Compensation Journal 2002.*

## *Premium Setting*

Premium setting methodologies are another critical component of scheme design. Premiums can drive investments in OHS and ensure that employers who create risks will also meet the costs. Premium regulation can also be an instrument of social and economic policy by creating cross subsidies to redistribute costs, both between different groups of employers and between different generations of employers (at least in government-underwritten schemes).

Premiums are usually linked to OHS through various methods of risk rating. ANZSIC (Australia and New Zealand Standard Industry Code) is the most widely used measure for premium rating between industries. However, it was designed to differentiate on an economic basis between industries and not specifically designed for the purpose of risk rating for the calculation of premiums.

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.

The preferred way to calculate premiums is to consider it from a risk-based perspective. This involves looking within an industry at discrete risk-based categories, perhaps most appropriately defined by *occupational characteristics*. The reasons that this method has not been adopted universally are because of the differing views about the rating for such characteristics and the difficulty of collecting relevant, detailed data.

In July 2001 the ANZSIC code was replaced in NSW with the WorkCover Industry Classification System (WICS). This has removed many of the issues under the previous ANZSIC system. WICS 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, WICS is a much more effective system than ANZSIC, as it was specifically designed for workers' compensation.

Another method, often used in conjunction with ANZSIC-based rating, is experience rating which can be split into two groups:

*Objective* experience rating is usually used by State monopolies eg three years claims can be used as a base for the majority of the risk premium for a large employer.
*Subjective* experience rating is more common with private insurers who assess the company's risk and claims experience from a more commercial perspective taking a wider range of factors into account.

In both cases there are difficulties in accurately rating smaller employers who tend to be grouped with similar organisations of the same size without considering individual risk mitigation activities.

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.
In many jurisdictions data is scattered among a large number of public and private organisations with large differences in recording requirements and reporting standards. It is extremely difficult if possible at all to establish meaningful national benchmarks and performance standards to identify and monitor trends at the national level.

To overcome the lack of uniformity in data collection the National Data Set (NDS) was developed for compensation-based statistics. The objective of the NDS is to *"assist in the prevention of occupational injury and disease by the production of uniform national, and nationally comparable, indicators of OHS performance and experience"* (National Data Set for Compensation-based Statistics 3rd Edition, May 2001). The NDS provides a high level of data in a format that can be compared within and across industries on a national scale. This is a positive step towards enabling accurate risk rating based on individual organisations.

## *Cost Shifting*

The 1994 Industry Commission inquiry dealt in some detail with the issues of cost shifting from state workers compensation schemes to the Commonwealth health and social security system, due to thresholds on medical expenses and access to income support. Since that time, little has changed although the extent of cost shifting may well be greater as a result of further restrictions on benefits since that time.

The 1994 review proposed that a mechanism be developed within federal-state funding arrangements to reimburse the Commonwealth for this cost shifting. While this is sound in principle, the whole area of cost shifting needs to be subject to more detailed and thorough quantitative and qualitative analysis.

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.

Most of the growth in workers compensation liabilities over the past decade has been driven by non-demonstrable soft tissue (eg musculoskeletal strains) and psychological conditions (eg stress). The latter is particularly evident in some areas of the public sector workforce. These conditions are often attributable to a number of factors, including changes in the composition of the labour market and changing employment arrangements and work practices, as opposed to actual workplace injury or OHS.

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.

Dealing with these claims raises as many human resources/ labour market issues as health issues. In many cases the question arises as to whether there are gaps in existing labour market programs which are being at least partially being filled by workers compensation.

## *Competitive Underwriting v Public Sector Monopoly*

In Australia, governments have become involved in underwriting workers compensation as a result of market failure – usually when premiums were regulated at uneconomic levels relative to claims

costs. With the benefit of hindsight, this is more accurately characterised as regulatory failure. The role of scheme design and claims cost stability in the overall efficiency of insurance markets is now better understood than when those decisions were made.

The role of the market will be a threshold question in the design of any national framework or scheme for national employers. As detailed earlier in this submission, the public sector currently dominates workers compensation insurance in Australia, accounting for 85 percent of premium collected. Private insurers are limited to underwriting in four smaller jurisdictions and manager/agent roles in three of the four larger jurisdictions.

This has a significant impact on the size and capacity of the private insurance industry as a whole.

For instance, competitive underwriting in just the NSW workers compensation market would gradually require - over a period of five years or so - between $1.5 billion 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.

An interesting “by-product” of such private sector market growth may be an increase in domestic capacity to service the broader liability insurance market, a significant proportion of which is currently either insured overseas or serviced outside the existing prudential framework through the use of discretionary trusts. In the medical indemnity insurance market, new legislation requires such trusts to progressively move to a commercial capitalisation by 2008, requiring significant injections of capital.

This is due to the actuarial benefits of diversification, whereby an insurer with multiple lines of different liability products can reduce the amount of capital supporting each individual class on the reasonable assumption that adverse experience is unlikely to occur simultaneously in a number of different classes. The reverse of this is recognised in the 2002 changes to prudential regulation which included a “concentration charge” in the minimum capital requirement formula.

There would also be less tangible but also significant spinoffs in capacity to underwrite other liability classes through greater depth of expertise in commercial underwriting and claims management.

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.

Arguments in favour of retaining government involvement in underwriting workers compensation rest on the need to ensure equity for workers and affordability for employers. Government underwriting, it is argued, provides more flexibility to meet competing demands of the labour movement and of employers. Premiums are compulsory and markets are rarely perfect, often creating political costs to the government of the day.
The role of government also blurs distinctions between workers compensation as an insurable risk and as part of the broader public health and welfare system. It is understandable that many employers see compulsory premiums as a tax rather than a risk management expense, particularly if

the price appears to be set arbitrarily. Similarly, benefits for injured workers are usually determined by statute rather than the actual loss.

This leads to a threshold question of whether workers compensation schemes should be fully funded – ie that premiums would at all times be set at a level that would fully fund all claim payments arising from the period of cover for many years into the future. This is the insurance model and the cornerstone of competitive underwriting.

The alternative is pay as you go – effectively the welfare model which is common in European workers compensation. However 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. 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.

The erosion of full funding in state-underwritten schemes reflects the fact that they have been allowed to remain outside the scope of the national system of prudential supervision. The HIH Royal Commission recommended that this deficiency be addressed by the proposed Ministerial Council for Insurance and this is also a critical reform for any national framework for workers compensation.

Competitively underwritten insurance, in contrast, is unsustainable on any other basis than full funding – HIH being the classic case study. Any attempt by regulators to hold premiums at levels which did not keep pace with claims costs will force insurers to exit the market. Most government underwriting of workers compensation has its origins in precisely these circumstances.

It has been argued that government underwriting is inherently more efficient because there is no requirement to provide a return on the significant amount of capital required to support this type of long-tail insurance business. Insurance Australia Group's submission to the HIH Royal Commission estimated that the total additional capital requirement for government monopoly workers compensation insurers would be about $12 billion if they were subject to the new APRA prudential standards (though the actual capital required by the private sector would be somewhat lower due to diversification benefits). This capital would earn normal investment returns and the additional risk of supporting workers compensation business would be met at a premium loading, typically around 8 per cent or about $400 million on the $5 billion public sector premium pool.

But there also a real, albeit less transparent, cost in the balance sheet exposure of state and territory governments to underwriting workers compensation. This exposure affects credit ratings and less directly creates a "capital strain," reducing funding options for major infrastructure and other capital intensive activities.

Ultimately, the success of any workers compensation scheme is a function of its overall design and its ability to allocate costs and benefits equitably and efficiently through incentives to minimise risks. On balance, we believe a strong economic case can be made that private underwriting has certain inherent characteristics that will create a better incentive mix.

In particular, full funding ensures that costs are most directly borne by those who create the risks, rather than distributed inter-generationally or to other businesses via the hidden cross subsidies of premium controls and arbitrary rating mechanisms. There may well be good public policy reasons for subsidising the risks of certain types of economic activity, but these would be better met through direct subsidies. This would improve transparency and ensure much better targeting of OHS activities to areas of greatest need.

From a worker's perspective, arguments have been advanced in the past that government insurers will always be more likely to protect their interests than a commercial organisation clearly focussed on containing claims costs. Yet there is no correlation between the level of disputation and the underwriting arrangements in different Australian schemes. Our experience suggests that the level of disputation is almost entirely a function of the scheme design.

This argument also fails to understand that paying legitimate claims is the core business of insurance companies. Huge advances have been made in recent years in the delivery of claim payments in the highly competitive, largely unregulated insurance classes such as private home and motor. Given the opportunity and the economic incentives in a more stable and predictable claims cost environment, similar advances can be expected in delivery of medical, income support, rehabilitation and return to work services.

This argument also reflects an adversarial approach to workers compensation which is a hangover from another era in industrial relations. It should be clear that employees, employers and the insurer have a common interest in an efficient workers compensation system that delivers on its objectives. In particular, it is in the employee's interests for their employer to have a clear economic incentive to maintain the safest possible workplace and to provide all the support necessary to achieve a quick recovery from any injury and a return to full working capacity as soon as possible.

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.

Importantly, competitive underwriting also 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.

In Australia's largest competitive market, Western Australia, a cost blowout due to poor benefit design lead to massive premium increases in the late 1990s and there was an immediate a political groundswell for change. Since those changes took effect in 1999, the regulated benchmark rate has fallen by one-third. This translates to a direct reduction in labour costs of more than one percentage point, a tangible boost to competitiveness and job prospects in Australia's most export-oriented state.

It should be added that the actual average premiums in the WA market are consistently below the benchmark rate due to competition between insurers. And there is at least anecdotal evidence that

the premium hikes of the late 1990s spurred an increased focus on OHS which is now helping to drive down claims.

## *Conclusion*

Economic modelling for the 1994 Industry Commission review suggested a 20 per cent reduction in direct workers compensation costs would increase gross domestic product by 0.5 percentage points. The potential for a long run gain in national output of this magnitude indicates that reform of workers compensation is as important as any other microeconomic reform in recent years, such as those involving indirect tax and the waterfront.

That analysis remains as valid today as it was in 1994. While there have been some significant developments in workers compensation and OHS since that time, the fundamental structure is essentially unchanged and the long term trend of rising claims costs against falling injury rates has continued unabated.

A 20 per cent reduction in direct workers compensation costs is not only realistic but conservative under an efficient national framework with competitive underwriting and service delivery. As we have noted previously, workers compensation costs in the largest competitive market, Western Australia, have fallen by one-third since reforms in 1999.

These figures also do not include large potential savings in compliance and administrative costs or better targeting of support services due to reductions in cost shifting.

There is also the human cost to consider. If a more efficient national framework means faster average return to work times, then there are clear social benefits for tens of thousands of people and their families who are now supported by the workers compensation system.

Insurance Australia Group sees no grounds for fears that injured workers will be worse off under a well-designed national framework. It does not mean a lowest common denominator benefit structure. The real social and financial benefits lie in faster return to work times and improved health outcomes. And there should be scope for injured workers to share in those savings. Ideally, benefit levels under a national framework should be minimums with scope for negotiation of higher benefits within enterprise or industry agreements.

There are also the indirect benefits if the national framework results in an orderly and progressive transition from government to competitive underwriting over a period of some years. States would have more flexibility to fund major capital works such as transport, health and education infrastructure. Australia's financial markets would benefit from the influx of additional capital. And the strength and scale of Australia's insurance market would be transformed, increasing its capacity and appetite for providing other economically vital products such as public liability and professional indemnity.

In the short term, Insurance Australia Group believes the first step should be to reform Comcare and open up the scheme to a broader range of employers operating nationally. There is clear legislative power for the Commonwealth to take the initiative in workers compensation reform and to create a catalyst for engaging the states in a constructive dialogue to minimise transitional costs for those with legitimate concerns about the impact of change.

This dialogue should be the starting point for a constructive process, with clear objectives and realistic time frames, to rationalise the existing patchwork of inconsistent and inequitable schemes into a single, efficient national framework to protect the interests of all Australian workers.

There is much to gain from a concerted, co-operative effort by all governments. To some extent a degree of rationalisation is already occurring organically and there is convergence on some critical principles of good scheme design. But it is slow, ad hoc and unco-ordinated and the results remain much as they were a decade ago – a myriad of different ways to meet the same basic needs.

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## *Appendix 1*

**State profile report by injury type**

For the purposes of compiling this report we looked at five different injury types - sprain/strain, psychological injury, hearing loss, and shoulder and knee injuries. We then examined in which industries these injuries are likely to occur in each state. The following tables give a brief profile of what the claims with these injury types might look like. This comparison in itself was a challenging exercise as injuries are classified differently in some jurisdictions.

### Table 1. Claims profile; Sprain/strain injuries

| SPRAIN/STRAIN | | | | |
|---|---|---|---|---|
| | **NSW** | **SA** | **VIC** | **WA** |
| **Claim Age** | 2-5 years | 2-5 years | 2-5 years | 2-5 years |
| **Claimants Age** | 30-40 | 30-40 | 40-50 | 30-40 |
| **Body Location** | Lower Back | Lower Back | Lower Back | Lower Back |
| **Industry** | Meat Processing | Employment Services (category 1) | Employment Segment - Production Sector | Non-building construction |
| **Injury Agency** | Body Stress-Muscular-lifting | Muscular Stress-handling | Muscular Stress-lifting, carrying | Muscular Stress while handling object |
| **Occupation** | Machine/Plant Operator | Machine/Plant Operator | Machine/Plant Operator | Machine/Plant Operator |
| **Emp Premium Range** | 100k-->500k | 100k-->500k | 1M+ | 100k-->500k |
| **Emp Remuneration Range** | 10M+ | 1M-->5M | 10M+ | 10M+ |

- **Sprain/strain**: The majority of claimants are between 30-40 years old. The body location most afflicted is lower back. Most workers are classified as machine operators. The injury is incurred whilst handling, lifting or carrying an object. Claims are currently 2-5 years old. The larger employers are incurring the majority of these claims.

## Table 2. Claims profile; Psychological injuries/incidents

| Psychological Injuries | | | | |
|---|---|---|---|---|
| | **NSW** | **SA** | **VIC** | **WA** |
| **Claim Age** | 1-2 years | 1-2 years | 1-2 years | 2-5 years |
| **Claimants Age** | 40-50 | 40-50 | 40-50 | 40-50 |
| **Body Location** | Psychological system | Psychological system | Psychological system | Psychological system |
| **Industry** | Security and Investigative Services (except Police) | Hotels, bars etc | Secondary Schools, Non-Private | Non-residential Care Services |
| **Injury Agency** | Contact/exposure stress factors | Contact/exposure stress factors | Work Pressure | Exposure to mental stress factors |
| **Occupation** | Clerks | | Teachers | Clerks |
| **Emp Premium Range** | 1M+ | 100k-->500k | 1M+ | 100k-->500k |
| **Emp Remuneration Range** | 10M+ | 1M-->5M | 10M+ | 10M+ |

- **Psychological Injuries:** The majority of claims are 1-2 years old, which highlights the emergence of this injury type. Most claimants are 40-50 years old. Our larger employers incurred the majority of claims. The education and training industries dominate this injury type.

## Table 3. Claims profile; Hearing loss

| HEARING LOSS | | | | |
|---|---|---|---|---|
| | **NSW** | **SA** | **VIC** | **WA** |
| **Claim Age** | 2-5 years | 2-5 years | 1-2 years | 1-2 years |
| **Claimants Age** | 60+ | 60+ | 60+ | 60+ |
| **Body Location** | Ear | Ear | Ear | Ear |
| **Industry** | Non-residential Building Construction | Road freight transport | Road & Bridge construction or general repair | Television Services |
| **Injury Agency** | Sound/pressure-prolonged exposure | Sound/pressure-prolonged exposure | Long term exposure to sounds | Long term exposure to sounds |
| **Occupation** | Machine/Plant Operator | Structural Steel Construction Workers | Machine/Plant Operator | Clerks |
| **Emp Premium Range** | 1M+ | 100k-->500k | 1M+ | Ceased Emp |
| **Emp Remuneration Range** | 10M+ | 1M-->5M | 10M+ | 10M+ |

- **Hearing Loss:** Most, if not all claims are medical only. Claimants are usually 60+ years old. Again the larger employers have incurred the majority of claims.

## Table 4. Claims profile; Knee injuries

| KNEE INJURIES | | | | |
|---|---|---|---|---|
| | **NSW** | **SA** | **VIC** | **WA** |
| **Claim Age** | 2-5 years | 2-5 years | 2-5 years | 1-2 years |
| **Claimants Age** | 30-40 | 30-40 | 40-50 | 30-40 |
| **Industry** | Security & Investigative Services (except Police) | Road freight transport | Secondary schools, non-private | Non-building Construction |
| **Injury Agency** | Falls/trip-same level | Falls on the same level | Falls on same level | Falls on same level |
| **Occupation** | Machine\Plant Operators | Machine\Plant Operators | Teachers | Skilled workers |
| **Emp Premium Range** | 1M+ | 100k-->500k | 1M+ | 100k-->500k |
| **Emp Remuneration Range** | 10M+ | 1M-->5M | 10M+ | 10M+ |

- **Knee Injuries:** Most of the claims are in the 2-5 years old. The mechanism of injury is predominately falls and the claimants are aged 20-40 years. Again, employers at the larger end of the scale are where most of these claims occur.

## Table 5. Claims profile; Shoulder injuries

| SHOULDER | | | | |
|---|---|---|---|---|
| | **NSW** | **SA** | **VIC** | **WA** |
| **Claim Age** | 2-5 years | 2-5 years | 2-5 years | 2-5 years |
| **Claimants Age** | 40-50 | 30-40 | 40-50 | 30-40 |
| **Industry** | Meat Processing | Employment services (Cat 1) | Hospitals (exc Psych) Non-private | Underground Mining |
| **Injury Agency** | Body stress-muscular-lifting | Muscular Stress-handling | Muscular stress - lifting, carrying | Muscular stress-handling |
| **Occupation** | Machine\Plant Operators | N/A | Machine\Plant Operators | Machine\Plant Operators |
| **Emp Premium Range** | 100k-->500k | 100k-->500k | 1M+ | 100k-->500k |
| **Emp Remuneration Range** | 10M+ | 1M-->5M | 10M+ | 10M+ |

- **Shoulder injuries**: Most of the claims are 2-5 years old. The industry varies from State to State but the occupation is classified as machine operators in most cases. The majority of claimants are 30-40 years old.

## State Profile - Claims Cost by Injury Type

Using the profiles outlined in tables 1-5 we looked at the difference in cost associated with these injury and claim types in each State. We have not included NT, TAS or ACT as the numbers were too small to demonstrate a statistically significant result. The following tables are based on the profiles listed above.

When assessing these claims the following are variables that need to be taken into account:

- Notification times vary in each State.
- Victoria and Tasmania have employer excesses. Victorian employers are responsible for the 1st 10 days wages and Tasmanian employers are responsible for the 1st five days and $200 of medical expenses and NSW has provisional liability provisions in place.
- Differences in the duration in claims are impacted by different return-to-work measures.
- Differences in thresholds and difference medical assessments.

### Table 6. Sprain/strain- Dollar cost per claim.

| **Sprain/Strains** | | | | | | |
|---|---|---|---|---|---|---|
| **State** | **Average** | **Median** | **Max** | **Min** | **Std Dev** | **Frequency** |
| NSW | 904 | 606 | 8947 | 22 | 1209 | 89 |
| SA | 1929 | 339 | 93641 | 500 | 8659 | 134 |
| VIC | 2875 | 990 | 31195 | 165 | 4822 | 84 |
| WA | 3083 | 611 | 78944 | 35 | 9301 | 227 |

### Table 7. Psychological injuries – Dollar cost per claim

| **Psychological injuries** | | | | | | |
|---|---|---|---|---|---|---|
| **State** | **Average** | **Median** | **Max** | **Min** | **Std Dev** | **Frequency** |
| NSW | 8280 | 1880 | 74864 | 30 | 14835 | 101 |
| SA | 9582 | 930 | 103274 | 70 | 25300 | 17 |
| VIC | 5089 | 1680 | 136076 | 10 | 11384 | 252 |
| WA | 15076 | 3195 | 160086 | 83 | 35521 | 37 |

### Table 8. Hearing loss - Dollar cost per claim

| **Hearing Loss** | | | | | | |
|---|---|---|---|---|---|---|
| **State** | **Average** | **Median** | **Max** | **Min** | **Std Dev** | **Frequency** |
| NSW | 10682 | 9433 | 49070 | 125 | 8557 | 369 |
| SA | 11727 | 9973 | 35449 | 39 | 9861 | 31 |
| VIC | 7986 | 7740 | 25006 | 83 | 6704 | 174 |
| WA | 10126 | 10527 | 28856 | 67 | 6966 | 48 |

## Table 9 – Knee Injury- Dollar cost per claim

| Knee Injuries | | | | | | |
|---|---|---|---|---|---|---|
| **State** | **Average** | **Median** | **Max** | **Min** | **Std Dev** | **Frequency** |
| NSW | 4069 | 649 | 142202 | 13 | 13383 | 349 |
| SA | 2854 | 355 | 38018 | 35 | 5807 | 150 |
| VIC | 3317 | 1915 | 35411 | 5 | 4917 | 172 |
| WA | 7247 | 799 | 142751 | 39 | 20481 | 207 |

## Table 10 – Shoulder Injury- Dollar cost per claim

| Shoulder injuries | | | | | | |
|---|---|---|---|---|---|---|
| **State** | **Average** | **Median** | **Max** | **Min** | **Std Dev** | **Frequency** |
| NSW | 4173 | 884 | 276034 | 36 | 20005 | 217 |
| SA | 2791 | 368 | 33607 | 38 | 6682 | 49 |
| VIC | 4491 | 1214 | 37423 | 9 | 8305 | 86 |
| WA | 6919 | 877 | 131329 | 55 | 20307 | 101 |

## Psychological Injury

| | NSW | VIC | TAS | SA | WA |
|---|---|---|---|---|---|
| Brief description of claim | 47 year old male employed as a truck driver. Difficult to assess a specific incident date as his claim is general anxiety relating to unsafe practices and threats from work colleagues. There was evidence that there were issues prior to February 2000 however, there was no concrete evidence of this. No real time of work and there was some conflict with his employer. | 42 year old security guard became nervous and agitated when his Employer failed to take maintenance action on a lift that he was working on. He then lodged a workers compensation claim and an investigation was requested where the Employer disputed the circumstances and the claim was eventually denied and then went to Conciliation on 28/10/2000 and failed to resolve there and was referred to the Magistrates Court where the matter was resolved. No rehabilitation was provided. | A claim was submitted after this Service Manager complained that he had not been coping at work. Increasingly feeling tired and anxious. He was referred to a psychologist with stress/depression. He is a manager of a service department, working long hours – he has a supportive employer. Liability accepted and rehabilitation commenced including gym and massage, eventually returning to work for 4 hours/per day. RTW failed as he was unable to cope and he eventually resigned. | A claim was lodged by a female who worked as a personal carer in a nursing home. The worker claimed that there were distressing circumstances at work, in particular she did not get on with her co-workers or managers and they were understaffed for the duties they performed. Further to this, she suffered a back injury which caused her pain and resulted in anxiety. She had a history of mental illness, beginning in 1992 following her break-up from her husband brother's death. There was ongoing conflict with employers- she did eventually go back to part time work only. | Male employed by a labour hire company was assaulted in the local railway station on his way home from work. He stayed at work on normal duties for the following 2 months but when he was told that the work would be winding down at this particular company his anxiety symptoms began. He had a previous history of psychological problems and received $200,000 as compensation from a previous claim in 1997. Medical Certificate was backdated and had "reactive depression" as the diagnosis. Victim's compensation claim concurrently lodged and social security received. |
| Age | 47 | 42 | 46 | 34 | 41 |
| Male/Female | Male | Male | Male | Female | Male |
| Occupation | Truck driver | Security Guard | Service Manager | Nursing Assistant | Labourer |
| Date of injury to date of notification(days) | 153 | 12 | 21 | 90 | 45 |
| Duration (months) | 23 | 17 | 11 | 15 | 21 |
| Liability | Denied | Denied | Accepted | Denied | Denied |
| Resolved by | On the day of Court | Magistrates Court | Settlement conference | Redemption | Agreement |
| Total incurred cost | $27400 | $27000 | $190,000 | $105400 | $47600 |
| Rehabilitation | | | $3500 | | $5000 |
| Medical | $2000 | $1600 | $9200 | $2000 | $15000 |
| Wages | | $9400 | $45500 | $61600 | $9000 |
| Commutation/ Redemption/Lump sum | $5000 | | | $37800 | $15000 |
| Insurer legal | $7900 | $7000 | | | |
| Claimant legal | $10000 | $5700 | $3000 | | |
| Claims Admin costs | $3000 | $4000 | $1500 | $2000 | $3000 |

## Strain/Sprain

| | NSW | VIC | TAS | SA | WA |
|---|---|---|---|---|---|
| Brief description of claim | This man was previously employed as a builder with a history of back problems since 1990. He changed employment to storeman/forklift driving in an attempt to improve his back condition, however, his condition continued to deteriorate causing his disc herniation at the L4-5 level to need surgery. Claim lodged direct from solicitor, proceeded to Conciliation on 09/02/2001 and then to Court on 27/02/2001. Complex liability issues as two previous employers were noted in the Proceedings. | 30 year old male sustained a back injury whilst lifting a heavy box weighing approximately 20kg. He felt a twinge of pain, kept working and then reported this to Employer hours later. Conflict with his employer ensued. He was referred to Rehabilitation on 20/7/2001. He was also treated for depression and when he failed to continue to comply with rehabilitation payments was ceased. Claim was then referred for conciliation. | 29 year old male process worker sustained a lower back injury whilst pushing a trolley. Employer referred to rehabilitation provider. Radiology showed a soft tissue injury only and at one stage a reasonable and necessary dispute was lodged with the tribunal. Rehabilitation involved, however, claimant did not return to work. | 39 year old female employed s a cleaner who suffered an injury to her lower back while vacuuming. Following the incident the worker had one day off work and then returned to work but did not undertake any vacuuming duties. She was found to have injuries at 10% cervical spine, 15% lumbar spine and 10% right leg above the knee. | old female sustained a back injury whilst bending to lift a bucket of water during the course of her employment. She was immediately certified unfit for work for 2 weeks. Radiology showed a disc bulge at L4/5. On return to work she was unable to complete her duties and eventually in October 2002 was referred for a work trial program but again was unable to carry out the tasks involved. The claim was resolved before she went back to full duties |
| Age | 34 | 30 | 29 | 39 | 37 |
| Male/Female | Male | Male | Male | Female | Female |
| Occupation | Builder | Process Worker | Process Worker | Cleaner | Domestic |
| Date of injury to date of notification (days) | 124 | 8 | 32 | 127 | 20 |
| Duration | 30 | 15 | 6 | 6 | 13 |
| Liability | Accepted | Accepted | Accepted | Accepted | Accepted |
| Resolved by | Magistrates Court | Conciliation | Agreement | Settlement | Agreement |
| Total incurred cost | $66400 | $31259 | $4200 | $25500 | $75300 |
| Rehabilitation | | | $3500 | | $12400 |
| Medical | | $5800 | | $500 | $18000 |
| Wages/Weekly Comp | | $24100 | | | $6000 |
| Commutation/Redemption/Lump sum | $50000 | | | $22500 | $37000 |
| Insurer legal | $6000 | | | | |
| Claimant legal | $8300 | | | | $2500 |
| Claims Admin costs | $1700 | $800 | $600 | $1600 | $3000 |

## *Appendix 2*

### Recent changes in workers' compensation schemes

| | NSW | Queensland | Victoria | ACT | SA | WA | Tasmania | NT |
|---|---|---|---|---|---|---|---|---|
| **Impairment measurement** | Introduced AMA 5 Guides for objective assessment – replacing table of maims | Assessment by Medical Assessment Tribunal using AMA Guides - binding | AMA Guides – but not binding | | Table of disabilities | Table of maims | AMA 4 Guides used for all lump sums | AMA 4 Guides used |
| **Common law** | Threshold of 15% WPI<br>Eliminated election requirement<br>CL award precluded further Stat benefits<br>Can only claim damages for eco loss – limited to 65yrs<br>Introduced pre-litigation processes | Unlimited benefits for people with a 30% WPI (based on a combination of Table of Disabilities and AMA Guides)<br><br>Also available to people with <20% WPI, but must pay own costs | Reintroduced in 1999 with a threshold of 30% WPI (based on AMA Guides) | Unchanged | Abolished in 1995 | Restrictions if >30% WPI | Only available for <30% WPI. Damages limited, and a irrevocable election required within two years | |
| **Commutations** | Restricted to:<br>Where s66 payment already made, greater the 15% WPI, two years have elapsed since weekly payments began, currently receiving weekly payments and all avenues of injury management have been exhausted | | | Restrictions on commutations and redemptions | | Redemption of weekly payments available | Reintroduction of redemptions. Only available when injury is stable, 12 months since claim lodges and >5% permanent impairment | |
| **Gratuitous services** | Introduced a new benefit for domestic assistance | | | | | | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Non-economic loss** | Maximum benefit for permanent impairment - $200,000<br><br>Maximum benefit for pain and suffering - $50,000 (threshold 10% WPI) | | | | | | | |
| **Psychiatric injuries** | Psychiatric injuries now included, but only awarded if above 15% WPI (assessed separately to physical injuries) | | | | | | | |
| **Liability** | Provisional compensation to be paid within seven days of notification of injury until liability determined (max 12 weeks) | Relatively slow liability acceptance | Relatively slow liability acceptance | Early reporting and liability acceptance | Early reporting and determination of liability | Early reporting and determination of liability | | |
| **Dispute Resolution** | Introduced *Workers Compensation Commission*<br><br>Introduced *Claims Assistance Service* | ADR through pre-litigation hearings, but recently reviewed to improve process | ADR has been in place for some time through pre-litigation hearings | | Dispute Resolution via a Tribunal | Conciliation, review and hearing | | Mediation and Directions hearings |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Costs** | Legal costs regulations limiting legal fees payable, limits on fees recoverable and changing mechanisms for assessment of costs. | | | | Very low levels of litigation and legal expenses | | | |
| **Other** | | 4 day employer excess means employers are under-reporting claims to avoid experience rating premium increases | 10 day employer excess means that employers are under-reporting claims to avoid experience rating premium increases | Introduced new legislation in July 2002<br><br>New requirements for injury management | Active agent management<br><br>Injury management with provider contracting | No compensation for journey injuries | Introduced new legislation in 2001 | |

## *Appendix 3*

### Self Insurance requirements

| STATE | | NSW | ACT | TAS | VIC | SA | QLD | WA | Comcare |
|---|---|---|---|---|---|---|---|---|---|
| **Relevant Legislation** | | Workers Compensation Act 1987 | Workers Compensation Act 1951 of the Australian Capital Territory (updated 21 December 2000) | Workers Rehabilitation & Compensation Act 1988 | Accident Compensation Act (1985) as amended | Workers Rehabilitation & Compensation Act 1986 | WorkCover Queensland Act 1996. | Workers Compensation & rehabilitation Act 1981 | Safety, rehabilitation & Compensation Act 1988 |
| **Eligibility Criteria** | **# of Employees** | Minimum 500 employees in NSW - discretion allowed where SI licence is held in another jurisdiction | No minimum specified. Consideration given to Self-Insurer status having been granted in NSW or Vic | No minimum specified | No minimum specified | 200 workers connected with SA operations | Minimum 2000 full time workers in QLD. | Not specified | Minimum 500 employees (some flexibility applied) |
| **Eligibility Criteria** | **Specialised/Group License** | Group Licences cover all wholly owned subsidiaries of the licensed entity - no provision for excluding subsidiaries. Otherwise single licensing rules apply to each applicant entity | | | Licence coverage for holding company and all subsidiaries. Non employing holding company may be deemed employer for licensing purposes. Licences for corporations in partnership. Cannot be a wholly owned subsidiary of another corporation (other than a foreign company) | Group licenses - nominated employer treated as the employer of all workers employed by the various members of the group | | No corporate structure constraints are specified. Applicants need to satisfy the commission that they have adequate expertise and resources, residing within the sate, to determine and pay claims within timeframes required under the Act and submit timely statistical returns | Class A licenses relate to a single (Gov) authority - subsidiaries need to apply separately - claims mgt is contracted to QWL corp (a ComCare subsidiary) Class B licences allow claims mgt to be out-sourced to parties other than QWL |
| **Eligibility Criteria** | **Definition of "Employee"** | "Employee" means all permanent staff, whether full-time or part-time | | | | | | | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Eligibility Criteria** | **Financial Viability and Strength** | No specific measures, but financial strength is assessed by satisfying WorkCover that the applicant is:<br>- adequately capitalised, without any undue reliance on external borrowings<br>- net tangible assets are healthy<br>- sound profit history and positive cash flow | Needs to be a company listed on the ASX. Must produce a statement declaring ability to meet present & future claims under own resources. | Application addressing (pro-forma) financial & claims/ohs performance criteria | Body Corporate under Corporations Law. Demonstrate Financial Viability under several measures, including: debt/equity, liquidity & Net Assets. WorkCover also apply a statistical model to calculate claims liabilities and determine the appropriate level of net asset coverage require | Body Corporate. Can be a group of employers. Also requires: proof of financial sustainability, competency to manage claims & demonstrated track record of RTW etc | Net tangible assets of $100M. Competency to manage claims & OHS track record | Not specified | Current or previous commonwealth authority or a corporation that competes with a current or previous commonwealth authority (subject to minister's approval) Assessed by ComCare as having the financial resources to discharge its liability to pay compensation |
| **Bank Guarantee** | **Type** | Must lodge a deposit or bank guarantee.<br><br>Bank Guarantee equal to central estimate plus 30% prudential margin | Guarantee in favour of the ACT Nominal Insurer to cover current o/s liability plus 1.5 times incurred costs forecast for the licensing period<br><br>Bank guarantee based on current ACT liability for applicant plus 150% of estimated incurred for term of SI arrangement. Or $500,000 | Bank Guarantee or similar arrangement. Provided at the time of permit issue.<br><br>Equal to 150% of outstanding claims liability | Bank Guarantee provided at the time of permit issue.<br><br>Equal to 150% of scheme assessed outstanding claims liability. | Financial Guarantee.<br><br>Based on Actuary Valuation of settlement payout for past/present claims | Bank Guarantee<br><br>150% of estimated claim liabilities or $5M (whichever greater) | Bank Guarantee or Bond deposited at State Treasury<br><br>Minimum $100,000 contribution to the commission. Bank bond 150% of actuarial claims liability valuation or 5 x prescribed amount. Supplementary fund contributions | Can form a captive insurer entity as an alternative to bank guarantee.<br><br>Effective 1st July 2002, licences must meet the same APRA standards issued for general insurers. (for the protection of Govt and employees against unfunded liabilities) |
| **Accounting & Reserving** | | Make and disclose a provision based on the net central estimate of claims liability (assessed by a qualified actuary) as a separate item in its annual balance sheet | | | | | | | Make provision in its accounts in accordance with actuarial assessment of current & non-current liabilities under the SRC ACT |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Reinsurance** | **Levels** | Retention levels between $100k - $1m per event. Excess of $1m requires WorkCover approval | Reinsurance cover of $500,000 to $1M for a single catastrophic event | $50M excess of loss cover for any one event. Threshold not to exceed $1M per event | | Minimum excess of loss cover of $100 M. Excess not to exceed $600,000 per claim (increased to $1M if remuneration above $50m per year) | | Minimum of $50M Common Law & CAT cover for any one or series of events | |
| **Injury & Claims Management** | **Audit** | Self-audit (based on injury Management Self-Audit Tool) to be performed 6 months prior to licence renewal | | Annual Performance Audits. Prescribed work practices & performance benchmarks. Independent Auditor appointed and paid by Self Insurer | Annual self Audit | | | | |
| **Injury & Claims Management** | **Outsourcing** | WorkCover may approve outsourcing of this function | Yes | Yes | Yes - Subject to WCA approval (existing VWA agents generally accepted) | Not specified | Generally not permitted. Only allowed as a special concession handed to Local Government Employers | Yes - Subject to WorkCover approval. Material claims management resource to be located within the state | Yes - currently 7 out of 10 ComCare self-insureds are managed by third party administrators |
| **Provision of Data (Statutory Reporting)** | | Monthly Claims data | | | | Claim extract reports to WorkCover and reports on Group Financial position | Provide data extracts in format compatible with Q-Comp specifications. | IT systems reporting as per scheme specification | Provide information to ComCare as part of regular monitoring of financial viability to self-insure |
| **Tail** | | Self-insured may buy "tail" or make annual contribution to PAF | SI assumes liability coverage from date of commencement as self insurer | | SI assumes past & present liabilities in exchange for scheme settlement payout. Valuation determined by WorkCover Actuary | SI must assume both past & present liabilities in exchange for scheme settlement payout. Valuation determined by WorkCover Actuary | SI must assume both past & present liabilities in exchange for scheme settlement payout. Valuation determined by WorkCover Actuary | | SI Assumes past & present liabilities |
| **Claims Run-Off** | | If self-insurance licence is no longer held, employer will still be responsible for claims incurred whilst self-insured | | | | | | | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Term** | | Initial license is granted for 3 year period (WorkCover can grant license for a shorter term) | Maximum - 3 year term. Renewable | 1 year initial term. Upgradeable to 2 and 3 years based on performance rating from Annual Audit | 3 year initial term with subsequent re-approvals for 4 year terms | not exceeding 3 years for each term | 2 years. Renewable term | | Not specified |
| **Comments** | | | | | | | Following recommendations of recent national competition policy review. Outsourcing to TPA's and relaxation of the 2000 QLD based employee criteria are earmarked for reform. Legislation is at least 12 to 18 months away | Eligibility assessment requires independent audit report. Performance issues include measures such as claim incidence per 100 employees | Self-Insurance under Comcare is specifically structured toward outsourcing of claims management to a competent 3rd party provider or the Comcare agency provider |

Appendix 4

## OHS regimes

(Source Workplace Relations Ministers' Council, Comparative Performance Monitoring August 2002)

| | **NSW** | **Vic** | **Qld** | **SA** | **WA** | **Tasmania** | **NT** | **ACT** | **Seafarers** | **Commonwealth** |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of injuries resulting in 5 or more days compensation | Per 1000 employees | | | | | | | | | |
| 2000-2001 | 18.1 | 11.8 | 15.4 | 16.1 | 14.8 | 14.5 | 13.5 | 11.1 | 16.7 | 12.0 |
| 1999-2000 | 18.9 | 12.1 | 17.4 | 17.6 | 16.6 | 14.3 | 14.2 | 9.8 | 21.4 | 12.8 |
| 1998-1999 | 20.6 | 12.5 | 16.7 | 18.2 | 17.5 | 13.2 | 15.3 | N/A | 24.5 | 14.5 |
| Scheme administration costs | | | | | | | | | | |
| 2000-2001 | $183.24M | $243.2M | $35.34M | $10.3M | $12.35M | $3.35M | $7.12M | N/A | N/A | $4.95M |
| 1999-2000 | $150.57M | $232.7M | $31.5M | $9.3M | $12.44M | $3.53M | $6.21M | N/A | N/A | $4.71M |
| 1998-1999 | $175.04M | $215.4M | $32.6M | $9.2M | $12.16M | $2.98M | $5.63M | N/A | N/A | $4.78M |
| No. of field active inspectors 2000-2001 | 301 | 220 | 136 | 57 | 75 | 45 | 24 | 20 | 45 | 190 |
| No. of prosecutions resulting in conviction | | | | | | | | | | |
| 2000-2001 | 404 | 107 | 129 | 1 | 41 | 9 | 2 | Nil | 0 | 1 |
| 1999-2000 | 496 | 73 | 54 | 6 | 122 | 9 | 4 | 1 | 0 | 3 |
| 1998-1999 | 617 | 85 | 43 | 12 | 50 | 5 | 1 | 1 | 4 | 0 |
| Who does Act cover? | | | | | | | | | | |
| - employers | Yes | Yes – duty of care not to themselves | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| - employees | | Yes | | | | | | | | |
| - public at work | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| - manufacturers (plant and substance) | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| - principle contractors | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Examples of targeted industries or sectors for enforcement activities | Industry teams and Industry reference groups identify issues | Manufacturing Agriculture Construction Transport and storage Public sector and community service | Local councils Sawmills and forestry Meat processing Refineries | Furniture Wine industry Building and construction | Agriculture Transport | All sectors | Automotive Construction Retail Transport | Amusement park rides Christmas retail | All sectors | Commonwealth public sector |
| Common law claims for damages when a breach has occurred | Yes for WC | No – a person can request WorkCover to prosecute | Yes | Against negligent third parties only | Yes | Yes | No | Yes | No | No |