INSURANCE COUNCIL OF AUSTRALIA

Submission to the Productivity Commission Inquiry into National Workers Compensation and Occupational Health & Safety Frameworks

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1 Introduction

Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia. ICA members account for over 90 per cent of total premium income written by private sector general insurers.

ICA members, both insurance and reinsurance companies, are a significant part of the financial services system. Recently published statistics from the Australian Prudential Regulation Authority (APRA) show that the private sector insurance industry generates over $20.5 billion per annum in gross premium revenue and has assets of $59.2 billion[1]. The industry employs about 25,000 people.

ICA makes this submission on behalf of ICA members that are licensed insurers and subject to the *Insurance Contracts Act*, *1973*.

ICA welcomes the Productivity Commission's consideration of national frameworks for workers compensation and occupational health and safety (OH&S).

The Productivity Commission's terms of reference cover both workers compensation and OH&S frameworks however ICA has confined the majority of this submission to the workers compensation frameworks.

ICA also makes reference to work undertaken in relation to personal injury motor accident insurance schemes where similar issues and regulatory structures to those experienced in workers compensation schemes lend valuable insight.

In principle ICA is committed to the long term aim of a nationally regulated and consistent workers compensation framework however realistically such an outcome is predicated on a number of reforms to be progressively implemented. ICA therefore makes a number of recommendations that provide a pathway to the option of a nationally regulated framework for workers compensation.

ICA specifically addresses the following broad areas where opportunities to foster consistency between the State and Territory schemes exist:

- the regulatory framework for insurers[2]
- principles for premium setting[3]
- benefits structures including access to common law[4]
- definitions[5]
- workplace injury management[6]
- dispute resolution[7]

[1] APRA, 2002, Selected Statistics on the General Insurance Industry – Year Ending 30 June 2002", p. 5, see: www.apra.gov.au/Statistics/.
[2] Refer to Scope of inquiry reference 9 (h) and (i).
[3] Refer to Scope of inquiry reference 9 (f).
[4] Refer to Scope of inquiry reference 9 (b) and (c).
[5] Refer to Scope of inquiry reference 9 (a).
[6] Refer to Scope of inquiry reference 9 (d).

- an alternative national framework for self insureds[8] and
- cost sharing and cost shifting[9].

ICA makes a number of submissions, most significantly that:

- the core principles of efficiency, consistency, equity, affordability and fair return provide a sound basis for the development of regulatory reforms
- recommendations of the HIH Royal Commission should be implemented particularly the establishment of a Ministerial Council and a policyholder support scheme
- APRA should be the only regulator with responsibility for prudential regulation of all entities underwriting insurance, including entities underwriting workers compensation
- if government underwrites workers compensation insurance, it should be on a competitively neutral and commercial basis, in accordance with the requirements of the *Insurance Act 1973*, and with proper pricing of risk
- premiums should ideally be risk-based, with minimal cross-subsidisation and price control which would create appropriate incentives (and rewards) for the provision of safe working environments
- States and Territories move to encourage consistency and predictability of benefits which may include, inter alia:
  - a reduction (and where possible removal) of existing disincentives to return to work
  - careful design and use of lump sum payments
  - the use of structured settlements where appropriate and where possible
  - limited damages for gratuitous services based on a "Griffiths v Kerkemeyer" model and also that losses of this type be capped
  - moves to discourage 'forum shopping'
- access to common law be limited to cases of negligence and for serious and catastrophic injuries
- clear and consistent definitions among schemes be developed
- initiatives to improve workplace injury management be encouraged
- standard dispute resolution procedures be introduced in all schemes and
- consideration of an alternative national framework for self insureds.

[7] Refer to Scope of inquiry reference 9 (e).
[8] Refer to Scope of inquiry reference 9 (g).
[9] Refer to Scope of inquiry reference 9 (j) and (k).

2 Major inquiries already undertaken

Already there is a considerable body of work that has been undertaken at various State, Territory and Commonwealth levels which has considered the very complex nature of the differing regulatory regimes and structures.

In 1994, the then Industry Commission undertook a report into "Workers Compensation in Australia"[10]. The Commission found that the "multiplicity of schemes" did little to encourage desirable behaviour, with the result that the costs of workplace injury were exacerbated[11]. In response to this, and other findings, the Commission called for greater national consistency in workers compensation and even recommended that the Commonwealth Government establish a national scheme[12]. The Commission also recommended, inter alia, no-fault compensation for workers, that cross-subsidies between firms and the artificial suppression of premiums be discouraged, and that a common definition of a "worker" be adopted by all jurisdictions[13].

In 1995 the Commission compiled a report on "Work, Health and Safety"[14]. The report stated that the annual mortality rates from occupational disease and death (up to 2700) exceeded that of road deaths and that as many as 200,000 people are, at any time, unable to work due to an injury or disease sustained at work[15]. A further 270,000 persons have, as a result of occupational injury or disease, been forced to either change their jobs or permanently reduce their hours of work[16]. The Commission concluded that a conservative estimate to the community of work related injury and disease was at least $20 billion per year, not including any consideration for pain, suffering and anguish[17]. The report found that the inflexibility, multitude and inconsistency of legislation covering OH&S exacerbated the problem and, among other things, recommended the use of template legislation to achieve a nationally consistent regime for OH&S and that there should be a national approach to the enforcement of OH&S[18].

Little has changed since these two landmark reports. As discussed later, workers' compensation and occupational health and safety are still governed by multiple jurisdictions and competing objectives.

Most recently the HIH Royal Commission specifically made recommendations in regard to the State and Territory regulation of statutory insurance and the Royal Commission into the Building and Construction Industry considered specific issues related to the building industry sector.

The HIH Royal Commission broadly considered the issue of State and Territory regulation of statutory insurance (including workers compensation) and made recommendations in regard to the prudential regulatory role of APRA and the States and Territories, issues arising as a result of constitutional powers of the Commonwealth in regulating insurance, financial regulation of state run insurance schemes, the lack of clarity and coordination regarding the operation of various regulatory layers and the need to minimise gaps, overlaps and inconsistencies between schemes, the role of the nominal insurer and opportunities offered by a national scheme for the protection of policyholders in the event

[10] Industry Commission, 1994, "Workers' Compensation in Australia", Report No. 36, 4 February 1994, AGPS, Canberra.
[11] Ibid, p. xxxi.
[12] Ibid, p. 217.
[13] Ibid, pp. 59, 71 and 93.
[14] Industry Commission, 1995, "Work, Health and Safety", Report No. 47, 11 September 1995, AGPS, Canberra.
[15] Ibid, p. xviii.
[16] Ibid, p. xviii.
[17] Ibid, p. xviii.
[18] Ibid., pp. xlvii and xlviii.

of an insurer failure[19]. ICA supports the package of reforms recommended by the HIH Royal Commission and a number of specific recommendations are referred to in this submission.

In June 2003, the House of Representatives Standing Committee on Employment and Workplace Relations handed down a report titled "Back on the job: Report into aspects of Australian workers' compensation schemes"[20]. The terms of reference for the report included matters incidental and relevant to the existence of fraud in workers compensation and safety records from industry to industry[21].

The report held that the aim of workers' compensation schemes should be to provide the worker with a meaningful and sustainable outcome following injury and that this is best achieved by a return to work appropriate to the workers capability, in coordination with appropriate rehabilitation and retraining (if required)[22]. Among its recommendations (Recommendation 14) was that "the Commonwealth Government support and facilitate, where possible, the development of a national framework to achieve greater consistency in all aspects of the operation of workers compensation schemes"[23]. ICA also supports this recommendation.

Among the other reviews conducted in the various jurisdictions in recent years and relevant to the terms of reference for this Inquiry are:

- the current Review of NSW Workers Compensation Scheme design
- "Stanley Report", a Review of Workers' Compensation and Occupational Health, Safety and Welfare Systems in South Australia, Volume 1: Report, Volume 2: Workers' Compensation, and Volume 3: Occupational Health, Safety and Welfare, December 2002
- New South Wales Parliament Legislative Council, General Purpose Standing Committee No. 1, NSW Workers Compensation Scheme, Final Report, September 2002
- "Guthrie Report", a Report on the Implementation of the Labor Party Direction Statement in Relation to Workers' Compensation, a report for the Workers' Compensation and Rehabilitation Commission and the Hon Minister for Consumer and Employment Protection, July 2001 and the
- the "Grellman Report", The Enquiry Into Workers Compensation System in New South Wales - Final Report. KPMG, 1997.

3 Background to workers compensation insurance

During the twentieth century Australian States and Territories responded in various ways to the need to provide guaranteed access to compensation or benefits for people suffering loss in certain circumstances such as employees injured while at work or people injured in a motor vehicle

[19] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons.
[20] The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee, "Back on the job: Report into aspects of Australian workers' compensation schemes", June 2003, Canberra.
[21] Ibid, p. xi.
[22] Ibid, p. xix.
[23] Ibid, p. xviii.

accident[24]. Historically the States and Territories have become involved in workers compensation and other statutory insurances for social policy reasons so that there would be universal coverage of third party risks and in some states so as to influence the affordability of this type of insurance.

Workers compensation insurance is compulsory for employers in every State and Territory in Australia and provides compensation for loss arising from personal injury, disease or death sustained by employees in the workplace, and in certain circumstances, non-employees in a workplace. Various Acts in the States and Territories can govern the way in which this insurance is administered, priced and underwritten, as well as the benefits that are payable to the injured party.
In all jurisdictions, compensation for workplace injury is provided on a no fault basis. Some jurisdictions also provide that a person injured in a workplace may be able to claim damages at common law, if he or she can demonstrate that the employer was negligent or at fault in not providing a safe workplace.

Some jurisdictions have relied on general insurers to underwrite compulsory statutory insurance. In other jurisdictions, governments have underwritten or funded the compensation or benefits[25].

General insurers in Australia are potentially subject to differing regulatory requirements in eight jurisdictions for statutory insurance in relation to any of the following features of a particular scheme[26]:

- the prudential and financial regulation of general insurers involved in the scheme, either as underwriters of, or agents for the scheme;
- the setting of premiums for a scheme or supervision of price;
- compensation or benefits and controls on access to certain types or levels of compensation or benefits;
- the regulation of service providers for a scheme such as the medical, health and legal professions;
- claims handling and dispute resolution processes; and
- mechanisms to deal with non-insured parties.

In addition, general insurers involved in statutory schemes may also be subject to Commonwealth regulation under the *Insurance Act*[27].

4 The role of licensed insurers

Insurance companies have a vital role to play in the function of any market economy. Insurance provides protection against the unfortunate consequences of future events and the risk of financial losses that may arise, by transferring the possible risk of loss from a person or organisation (the

[24] For a history of accident compensation, see NSW Law Reform Commission, Report on a Transport Accidents Scheme for New South Wales, Volume 1, LRC 43/1, 1984, Chapter 2.
[25] Appendix 1 lists general insurers which either underwrite or act as agents in workers compensation insurance.
[26] Appendix 2 provides a comparative table of workers compensation schemes in the States and Territories and Appendix 3 provides a summary of workers compensation schemes.
[27] And other Commonwealth legislation such as the *Corporations Act 2001* and the *Insurance Contracts Act 1984*.

insured) to the insurer. In exchange for this vital service, insurers charge and collect premiums based on factors relevant to the policy being underwritten.

The basic principle underlying insurance is that of sharing risks. The premiums paid by policyholders to insurance companies are pooled to meet any insurance claims. The cost of meeting claims arising from personal injury or property damage or loss, is spread among a large number of policyholders. Not all policyholders will make a claim, yet they are all covered for certain risks and can lodge a claim if necessary. In addition to appropriate premium levels being set, insurance companies seek to invest wisely to maximise returns and increase the value of the pool of funds to ensure there is sufficient money available to meet claims. Investments include property, shares, government securities, cash and fixed-term deposits and trusts.

To ensure that there is enough money to meet possible claims, insurers assess the level of risk associated with each type of cover. Risk is determined by factors such as the likelihood of the event occurring, its timing and magnitude. These factors will be based on past experience and predictions of future trends for groups or events with similar risk characteristics. The premiums reflect the insurer's assessment of the degree of risk for the policy.

Recent amendments to the *Insurance Act* have implemented a new prudential regime for the Australian general insurance industry. A range of new prudential standards covering capital adequacy, assets, liability valuation, risk management and reinsurance arrangements now apply to general insurers regulated by APRA under the *Insurance Act*.

In the course or pricing their policies, licensed insurers take account of, among other things, prudential margins and additional capital required. The prudential standards require significant prudential margins on top of net central estimate reserves and the new minimum capital requirement (MCR) calculation is more robust and generally results in higher MCR levels. These factors are of particular importance in ensuring protection for both insurers and insureds from future liabilities arising out of policies. This is an essential element of a fully-funded insurance scheme and licensed insurers are well skilled to perform this important function.

One particularly important factor in the setting of premiums for compulsory insurance such as workers compensation is the cost drivers that exist within scheme benefit structures. If cost drivers can be controlled through legislative reform the market delivers price benefits to those paying premiums. Recent examples of the flow on effects of scheme reforms have been demonstrated in both Tasmania and Western Australian workers compensation insurance and in the New South Wales motor accidents scheme.

Both Tasmania and Western Australia experienced significant increases in common law costs, well in excess of inflation. Both jurisdictions introduced reforms: Tasmania introduced more robust common law thresholds in 2001 and in 1999 Western Australia amended the common law second gateway. As a result the market is now responding to such reforms with premium reductions in those schemes.

Similarly as a result of NSW motor accidents reform programs that were introduced in 1999, the effects of which, over time, have been a cost-reduction to insurers, insurers have been able to reflect this reduced premium levels.

The active participation of licensed insurers in privately underwritten jurisdictions brings with it certain advantages including:

- the application of strong prudential standards – which include appropriate reserving, and a regular reporting regime to APRA.
- risk-based pricing – where insurers can adjust premiums based on risk which ensures that:
  - premiums reflect the actual performance and hence create the appropriate financial signals and incentives, and
  - cost-shifting and cross-subsidisation is minimised.
- choice of insurer for employers, with the benefits of a truly competitive market.

With these benefits in mind, licensed insurers who should be encouraged to participate actively in workers compensation insurance across all Australian jurisdictions.

5 General principles of good regulation

Recommendation	The core principles of efficiency, consistency, equity, affordability and fair return, which provide a sound basis for the development of regulatory reforms, should be adopted.

In assessing and regulatory framework for underwriters of workers compensation insurance a number of core principles are proposed. These core principles provide a sound basis for regulatory reforms:

- efficiency
- consistency
- equity
- affordability and
- fair return.

These principles are necessarily inter-related in their application to the operation and regulation of statutory insurance.

5.1 Efficiency

The concept of efficiency in the context of industry regulation requires that levels and types of regulation should be designed to effectively achieve stated goals with minimum impact on the commercial behaviour of the industry, and the consumers it supplies with goods or services.

It is accepted that an effective and workable regulatory framework generates compliance costs. However, the cost of compliance should be kept to the necessary minimum so that the resources of the industry can be best utilised in efficiently delivering the goods or services to the market[28]. Efficient delivery to market enhances the stability and viability of an industry.

[28] Gary Banks, Chairman, Productivity Commission, 'Challenges for Australia in Regulatory Reform', Address to the Conference, *Regulation Reform Management and Scrutiny of Legislation*, hosted by the NSW State Parliament, Sydney, 10 July 2001. This address can be found on the Commission's website at http://www.pc.gov.au.

Excessive, poorly designed or duplicative regulation can all lead to significant inefficiencies within an industry and the market it serves.

General insurers (as underwriters and agents) and other underwriting entities are required to comply with a range of regulatory requirements covering statutory insurance in up to nine (Commonwealth, State and Territory) different jurisdictions. The absolute cost of compliance as well as the potential for wasted resources due to regulatory overlap is a significant concern for the industry in the field of statutory insurance. As such, regulatory duplication and the associated costs should be eliminated where possible.

Further, the potential for economies of scale and innovative national approaches in the insurance market is adversely affected because of involvement of some State and Territory governments in the underwriting of statutory insurance outside the requirements of the *Insurance Act*.

The creation of a genuine national market for lines of statutory insurance including workers compensation has the potential to enhance the stability of the industry as a result of economies of scale and incentives for innovation by insurers through:

- increased market size
- increased knowledge and expertise in the line of insurance
- better quality and consistent data collection and
- greater incentives for insurers to fund national research and development initiatives.

5.2 Consistency

A consistent framework for the prudential regulation of workers compensation insurance would lead to greater efficiency within the industry due to lower costs of regulation, as well as consistent protection for all policyholders and third party claimants, regardless of the underwriting arrangements for a particular scheme.

Consistency would also be of significant benefit to employers who operate within different schemes and who also need to be able to deal with multiple regulatory requirements and claims systems.

5.3 Equity

A fully funded[29] statutory insurance scheme would deliver 'inter-generational equity' with the fair distribution of the costs of the scheme. That is, today's policyholders pay for the cost of compensation and benefits for today's accidents or losses. A fully funded scheme is a stable and equitable scheme.

[29] A fully funded insurance scheme is one in which the premiums collected in any given year are sufficient to meet all claims arising from accidents in that year, whether or not payments are actually made in that year. Under a fully funded scheme, the insurer should set aside reserves sufficient, with investment income, to meet the estimated cost of outstanding claims.

5.4 Affordability

This is an important concept for general insurance, and particularly for compulsory insurance such as workers compensation. Affordable and appropriately priced premiums for insurance are critical to the maintenance of a sustainable market and thus the stability and efficiency of the Australian economy. However, these factors must be considered in the context of a fully funded scheme.

A primary responsibility of general insurers is ensuring that pricing of policies is sufficient to fully fund expected liabilities arising under a class of insurance, and to meet prudential requirements under the *Insurance Act* in terms of maintaining sufficient capital and prudential margins. If workers compensation insurance is properly priced but not affordable for sections of the community, it is incumbent upon government and the community it represents to address the cost drivers of the class of insurance.

Affordable premiums also raise the issue of cross-subsidies in workers compensation insurance to ensure that high risk individuals or organisations are able to afford compulsory insurance. The implementation and funding of cross-subsidies should be transparent, and demonstrably necessary to encourage universal compliance with the mandatory requirement to be insured.

5.5 Fair returns

The regulatory framework for statutory insurance as it relates to general insurers must enable general insurers to earn fair profit on committed capital required to enable involvement in a particular compulsory scheme. This is necessary to encourage and sustain investment in the general insurance industry.

6 Approach to the terms of reference and scope of the inquiry

The Productivity Commission's terms of reference for the review cover a number of specific areas. ICA considers that the most relevant areas for input by the industry are the following broad areas where opportunities to foster consistency between the State and Territory schemes exist:

- the regulatory framework for insurers[37]
- principles for premium setting[38]
- benefits structures including access to common law[39]
- dispute resolution[40]

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[30] WorkCover New South Wales, Annual Report 2001/2002, p. 88.
[31] Ibid., p. 88.
[32] WorkCover Corporation of South Australia, Annual Report 2001-02, p. 11.
[33] Ibid., p. 11.
[34] "No bail out necessary for WorkCover", Media release dated 12 May 2003, www.workcover.com
[35] There is actually 10 systems in operation in Australia. For the purposes of this submission "Seacare", which is a Commonwealth scheme, has been excluded.
[36] The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, "Back on the job: Report into aspects of Australian workers' compensation schemes", June 2003, Canberra, p. xxiii.
[37] Refer to Scope of inquiry reference 9 (h) and (i).
[38] Refer to Scope of inquiry reference 9 (f).
[39] Refer to Scope of inquiry reference 9 (b) and (c).

- an alternative national framework for self insureds[41] and
- cost sharing and cost shifting[42].

These areas represent the core of a consistent national approach to workers compensation. By increasing harmony in these areas the problems described above could be significantly reduced.

Benchmarking

A further advantage of increased consistency between the existing state and territory regimes is that it will enhance the capacity to collect data on workers compensation in Australia. This data could then be used as a basis for benchmarking between jurisdictions and industries and even for individual employers and insurance companies. The aim of which would be to continually drive improvement in workplace safety and workers compensation management.

Indeed, the recent House of Representatives Standing Committee on Employment and Workplace Relations noted that:

> "if all jurisdictions work cooperatively there is the potential to develop *best practice* initiatives and greater consistency in scheme design and administration. This would provide opportunities for benchmarking of scheme performance if comparable data collection facilitated greater analysis"[43]. [emphasis added]

This approach is also gaining in popularity in the United States[44].

6.1 Multiple regulatory frameworks

Recommendation	Recommendation 54 of the HIH Royal Commission which recognises that an intergovernmental forum would enable the consideration of measures to avoid duplication of prudential oversight and other regulatory inconsistencies, should be adopted and a Ministerial Council should be established.

In Australia workers compensation is dominated by the multiplicity of arrangements in place across 8 State and Territory jurisdictions, plus the Comcare scheme for certain Commonwealth employers. Other specialist schemes also exist (Seafarers, Joint Coal Board(JCB)). Even within a jurisdiction multiple arrangements can occur. For example, workers' compensation arrangements in NSW include:

- WorkCover "licensed insurers"
- self insurers
- specialist insurers underwriting risks, subject to prudential regulation by both APRA and NSW WorkCover and

[40] Refer to Scope of inquiry reference 9 (e).
[41] Refer to Scope of inquiry reference 9 (g).
[42] Refer to Scope of inquiry reference 9 (j) and (k).
[43] House of Representatives Standing Committee on Employment and Workplace Relations, 2003, p. xxiii.
[44] For information on the types of benchmarks used, see: http://www.wcrinet.org/

- special workers' compensation arrangements for both the State Government (TMF) and the coal industry (JCB).

The resulting complexity and lack of uniformity continues to pose significant problems for both employers and employees operating in more than one jurisdiction.

Employers often face significant compliance and human resources costs, associated with, inter alia, the differing definitional and reporting requirements, and the transactions costs associated with the possibility of having different insurers. For self insurers these problems are compounded as there are also licensing arrangements to consider for each jurisdiction.

Employees may be subject to uncertain benefits as a result of work experience that cuts across jurisdictions. Also, there are issues of equity and fairness, as the benefits structures differ between the jurisdictions, even for comparable or identical injuries.

Insurers that operate across multiple workers compensation schemes are also faced with multiple regulatory regimes, with different pricing controls, benefits structures and reporting requirements. The recent examination of the regulatory frameworks for the general insurance industry by the HIH Royal Commission recognised that general insurers are subject to extensive regulation by State and Territory governments as well as by the Commonwealth. In addition some States also provide a range of insurance that causes fragmentation in the Australian insurance market and adds to the complexity of the market to those who do business in it[45].

The House of Representatives Standing Committee on Employment and Workplace Relations noted that the administrative costs for the existing schemes currently exceeds more than 16% of total premiums collected and that this excludes further costs to employers and injured workers[46].

In effect the 10[47] workers compensation schemes essentially seek to serve the same function, however have cover that is either limited by geographical boundaries, or subject to strict eligibility criteria. Alternatives to this unnecessary duplication exist and a process should be established to:

- harmonise the existing state and territory regimes
- provide a national model under which, initially, self-insurers could seek cover which would be recognised within all other jurisdictions.

6.1.1 Political risk

Statutory insurance schemes have been both privately and publicly underwritten at different times, and governments are capable of changing schemes from one form of underwriting to another in a relatively short space of time.

A recent example of the potential for change in underwriting arrangements for workers compensation insurance was in regard to privatisation of the NSW workers compensation scheme where:

[45] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons, p 259.
[46] The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, "Back on the job: Report into aspects of Australian workers' compensation schemes", June 2003, Canberra, p. xxiii.
[47] 8 State, Territory and Commonwealth jurisdictions plus Seacare and Comcare

- 1998, the NSW Government enacted legislation providing for the transition to private underwriting of the NSW workers compensation scheme on 1 October 1999;
- 1999, legislation was enacted to defer private underwriting for one year;
- 2000, further legislation was enacted to defer again the commencement of private underwriting;
- 2001, legislation was enacted to repeal the provisions enabling private underwriting.

In 1999, 2000 and 2001 reforms were enacted without a competition policy review, required for legislation of that nature by the National Competition Policy Agreements.

This continuing lack of political certainty is not conducive to stability and greatly detracts from the willingness of insurers to enter and remain in the market for workers compensation insurance.

ICA strongly endorses Recommendation 54 of the HIH Royal Commission which recognises that an intergovernmental forum would enable the consideration of measures to avoid duplication of prudential oversight and other regulatory inconsistencies. The recommendation states:

> "that the Commonwealth Government move to identify or establish a ministerial council or like arrangement to provide a ready and regular forum for the discussion and resolution by the Commonwealth and the states and territories of matters relevant to general insurance—and perhaps to other financial services.
>
> The ministerial council (or other similar body) should consider measures to:
>
> - avoid duplication in the prudential regulation of general insurers
> - remove regulatory inconsistencies
> - achieve a consistent approach to the prudent management of state and territory monopolies.
>
> It could also play a part in:
>
> - moves to introduce greater price flexibility in statutory schemes
> - the introduction of a policyholder support scheme
> - the removal of anomalies in the taxation arrangements applicable to general insurers."[48]

[48] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons, p 270.

6.1.2 Reduction in the regulatory burden and compliance costs

Recommendations	To avoid duplication of regulation and unnecessary compliance costs, APRA should be the only regulator with responsibility for prudential regulation of all entities underwriting insurance, including entities underwriting statutory insurance. The Commonwealth should adopt Recommendation 61 of the HIH Royal Commission and establish a policyholder support scheme. Following the establishment of a policyholder support scheme, States and Territory governments should remove nominal defendant/nominal insurer schemes for statutory insurance that relate to insurer failure.

General insurers underwrite workers compensation insurance in Western Australia, Tasmania, the Northern Territory and the ACT.

In workers compensation schemes underwritten by general insurers, the relevant authorities have various powers to monitor the financial position of the general insurers[49].

General insurers must either be licensed or approved by the relevant State or Territory authority to issue workers compensation policies in Western Australia, Tasmania, the Northern Territory and the ACT.

ICA accepts that State and Territory regulators may rely on an approval regime for general insurers and other underwriting entities to underwrite workers compensation insurance in a particular jurisdiction to ensure that the objects of the scheme and minimum standards are met.

However, general insurers and other underwriting entities should only be required to gain authorisation from APRA in order to underwrite insurance, including workers compensation. This logically flows from the above proposal that APRA should be the only regulator with responsibility for the prudential regulation of general insurers and other underwriting entities in their capacity as underwriters of insurance, including workers compensation insurance.

ICA considers that state authorities that are only concerned with one line of insurance do not have the technical capacity or proper access to necessary information to undertake prudential regulation. This type of regulation requires significant resources and technical expertise which should rightly reside with APRA as the regulator of general insurers and the industry overall.

Approval regimes in the States and Territories should not be concerned with the capacity of a general insurer or other entity to underwrite insurance. Rather, approval regimes should be solely concerned with the capacity of the underwriter to meet specific requirements of the particular workers compensation scheme, such as reporting requirements and standards of claims management.

Nominal insurers and policyholder protection

In addition, the HIH Royal Commission recommended that a policyholder support scheme be established by the Commonwealth whereby claimants would be provided protection in the event of an

[49] HIH Royal Commission Background Paper 9(a), 'State and Territory Statutory Insurance Regimes: Compulsory Personal Injury Insurance', as prepared by ICA, November 2001.

insurer failure[50]. Although the design of the scheme was not detailed the Commissioner drew on the proposals made by ICA[51] which required that policies under statutory personal injury motor accidents and workers compensation schemes, loss of income policies and personal injury claims (by third party claimants) would receive 100% payment of loss.

If the Commonwealth adopted this recommendation the current provisions for establishing nominal defendants or special funds (in the event of insurer default) for State and Territory statutory insurance, including the capacity to impose levies to fund nominal defendants or funds in the event of insurer insolvency, would no longer be required[52].

Similarly the State and Territory regulators of workers compensation scheme would receive little benefit in duplicating the prudential regulatory role of APRA.

6.1.3 State provision of insurance

Government underwriting of statutory insurance in the absence of stringent prudential controls and proper pricing of risk has the potential to expose governments to significant unfunded liabilities with the consequent risk to public funds and implications for the financial rating of a jurisdiction.

It has been demonstrated that a major cause of 'failures' in statutory insurance schemes has been the method of pricing or setting of premiums by governments, which has led to the development of significant unfunded liabilities in some schemes[53].

The problem of unfunded liabilities persists. For example, while it is not clear who underwrites the risk[54], the estimated deficit in the NSW workers compensation scheme at 30 June 2002 is $2.80 billion[55]. The scheme's funding ratio at 30 June 2002 was 67% compared to 70% as at 30 June 2001[56]. As at 31 December 2000[57], the scheme had a funding ratio of 76%. The significant deficit in the NSW workers compensation scheme is evidence of the political imperative at work to maintain average premium rates below the real cost of risk. It is not yet clear which funding mechanism will be used to make up the shortfall in the NSW workers compensation scheme.

Another example is the Victorian workers compensation scheme, which at 30 June 2002 had a funding ratio of 87% and unfunded liabilities of $781 million[58]. The WorkCover Corporation of South Australia announced, in its 2002 Annual Report, a jump in unfunded liabilities from $55 million in 2001 to $192 million in 2002[59]. Over the corresponding period, the funding ratio of the Corporation fell from 93.5% to 79.7%[60]. The situation in South Australia has deteriorated further. In a press release dated

[50] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons, Recommendation 61, p 301.
[51] ICA Submission to the HIH Royal Commission Protection for general insurance policyholders in Australia, August 2002 and Supplementary Submission to the HIH Royal Commission on future policy directions, February 2003.
[52] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons, p 268.
[53] G Atkins, National Competition Policy Legislative Reviews – Presentation to Workshop on Statutory Monopoly CTP Arrangements, *Understanding Scheme Failures*, July 1998.
[50]The question as to who underwrites the NSW workers compensation scheme was considered by the Grellman Inquiry which found that: 'no sector of the workers' compensation system is legally and financially responsible for the statutory funds', RJ Grellman, *Inquiry into Workers' Compensation System in NSW*, Final Report, September 1997, p 36
[55] WorkCover New South Wales, Annual Report 2001/2002, p. 88.
[56] Ibid., p. 88.
[57] WorkCover NSW, Actuarial Review of the Outstanding Liabilities of the WorkCover Scheme Statutory Funds as at 30 June 2001, Volume 1, 26 September 2001, as prepared by Tillinghast – Towers Perrin, p 6 (Summary of results). This Report was tabled on 17 October 2001 before the General Purpose Standing Committee No 1 (NSW Legislative Council) as part of its Inquiry – Review and Monitoring of the NSW Workers Compensation Scheme.
[58] Victorian WorkCover Annual Report 2002, p. 39.
[59] WorkCover Corporation of South Australia, Annual Report 2001-02, p. 11
[60] Ibid., p. 11.

12 May 2003, the WorkCover Corporation announced that unfounded liabilities had jumped and as at 31 December 2002 were $350 million[61].

Licensed insurers are best placed to assess, price and underwrite risk to fully fund statutory lines of insurance, free of the political imperatives placed on government insurers or schemes to price in a way that does not reflect the real cost of the risk. Risk reflective premiums provide a fair economic incentive to minimise risky behaviour, which in turn reduces costs for the scheme, and ultimately for policyholders.

General insurers are also required to meet stringent prudential standards under the *Insurance Act* designed to ensure that funds are available to meet long tail liabilities. Government insurers or compensation authorities are not subject to these standards of solvency and prudential risk management. Indeed, new prudential standards applying to general insurers from 1 July 2002 are a world-leading model of a risk based capital regime specifically designed to provide a high level of confidence in long tail liability provisions.

The HIH Royal Commission supported the need for improved financial viability of state underwritten insurance schemes and recommended that "state and territory governments apply relevant prudential requirements to government insurers and statutory fund schemes"[62].

The application of the prudential requirements to government insurers of statutory insurance would require a carefully managed transition period.

Government provision of workers compensation insurance on anything other than a competitively neutral basis should be avoided due to the following:

- ***adverse selection*** - as state workers compensation schemes are subject to price controls, only "bad" risks have an incentive to seek insurance through government providers. This adverse selection leads to unfunded liabilities in state schemes.

- moral hazard arising from ***under-pricing*** – where price caps and price floors exists there does not exist either an incentive for poor performers to improve their workers compensation outcomes, nor rewards for those who have exemplary records. To create the proper incentives via the price mechanism it is essential that prices be unregulated. The economic effect of such practices is an increase in workers compensation claims.

- ***cross subsidies*** - where price controls are in place, it is inevitably the case that the poor risks are subsidised by the good risks. Again, this practice distorts and retards the economic incentives which would exist in the private market. The use of cross-subsidies or any other price controls interferes with the competitive pricing mechanism. However if cross-subsidies or price controls are to occur, they should be explicit and transparent, with the amount of the cross subsidy and the reasons for such cross subsidies being publicised.

- ***under-reserving*** - the combined effect of a non-market based pricing mechanism is that the liabilities exceed the revenues or assets. By failing to properly price policies initially, the flow on effect over time is that liabilities are unfunded.

[61] "No bail out necessary for WorkCover", Media release dated 12 May 2003, see: www.workcover.com
[62] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons, Recommendation 52, p 268.

- ***cost-shifting*** - as a state scheme fails to fund itself, the costs are borne by other programs, such as public health, or by future policyholders, so that past losses become a burden for new businesses and employers.

6.1.4 Fair and open competition for statutory insurance

Recommendation	If government underwrites statutory insurance, it should be on a competitively neutral and commercial basis, in accordance with the requirements of the *Insurance Act*, and with proper pricing of risk. Recommendation 52 of the HIH Royal Commission that "state and territory governments apply relevant prudential requirements to government insurers and statutory fund schemes" should be adopted.

Ongoing exclusions of general insurers as underwriters of many workers compensation schemes have a significant effect on the size of the insurance market in Australia, and therefore its capacity to be competitive. If general insurers were able to underwrite all lines of statutory insurance in all jurisdictions, the size and strength of the insurance market would increase, and significant economies of scale could be achieved.

If governments are to remain involved in underwriting or funding statutory insurance, that involvement should be on a competitively neutral and commercial basis. As such, government entities underwriting insurance should be free to properly price risk in a commercial manner, while being subject to the same prudential requirements as general insurers under the *Insurance Act*.

The potential benefits of neutral and competitive pricing have been explicitly recognised by governments in Australia with the signing of the National Competition Policy agreements in 1995. These agreements support the principles that governments, should, among other things:

- ensure independent price oversight of government businesses which are monopoly, or near monopoly suppliers of goods and/or services;
- foster competitive neutrality between Government and private businesses where they compete; and
- reform the structure of public monopolies to facilitate competition[63].

This recommendation is consistent with the HIH Royal Commission's recommendation that "state and territory governments apply relevant prudential requirements to government insurers and statutory fund schemes"[64].

[63] NSW Treasury, Office of Financial Management, Policy and Guidelines Paper, *Policy Statement on the Application of Competitive Neutrality*, January 2002, pp 1-3. See also National Competition Council, *Compendium of National Competition Policy Agreements*, Second Edition, June 1998.
[64] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons, Recommendation 52, p 268.

6.2 Premium setting principles

Recommendation	To create appropriate incentives (and rewards) for the provision of safe working environments, premiums should ideally be risk-based, with a minimal cross-subsidisation and price controls.

The capacity to properly price risk is fundamental to the financial stability of a general insurer or underwriting entity. To gain market share and operate in a competitive market, general insurers and other underwriting entities also need the flexibility to offer price incentives to policyholders who minimise risky behaviour[65].

However, price supervision may be an aspect of statutory insurance to meet key regulatory goals, such as:

- ensuring that anticipated liabilities are fully funded; and
- ensuring reasonable pricing, including affordability of premiums for the broadest range of consumers, and fair but not excessive returns for insurers[66].

Where general insurers or other entities underwrite statutory insurance, the 'file and write' system is the model of price supervision that best achieves these regulatory goals, with minimal government intervention. This system gives underwriters some flexibility in the pricing of policies, and government the capacity to reject prices that may be too low to properly fund the liabilities being underwritten by the insurer, or too high in terms of affordability and fair returns.

Premiums should be determined on the basis of the risk a claim against the employer. Essentially three broad factors can be taken into account:

- past performance (an experience rating); that is, the claims history and/or safety record of the employer,
- current workplace safety ratings (an analysis of workplace safety programs in place and their likely effect), and
- expected future claims.

Premiums that do not consider these factors and are not risk based are restricted by either price controls, cross-subsidisation or a combination of both.

6.2.1 Small, medium and large businesses

There are differing risk properties of small and large firms and insurers treat each differently and reflective of their profile.

[65] For further background information on risk-based premiums, see: "Government proposals on employers' liability insurance to help business", Department of Work and Pensions (DWP), Press Release dated 3 June 2003: http://www.dwp.gov.uk/mediacentre/pressreleases/2003/june/emp0306-elci.htm

[66] For example, the objects of *Motor Accidents Compensation Act 1999 (NSW)* (section 5) include affordable premiums in recognition of the compulsory nature of the insurance, as well as ensuring that insurers charge premiums that fully fund their anticipated liability.

A large corporate, that is a major employer either within or between jurisdictions, has, among other things, a significantly different risk profile to an individual small business. This is because as a large employer their workers compensation risk is, in effect, pooled and therefore more stable and predictable over time. A claim against a large employer is also mitigated by the opportunity to recoup premium revenues.

Conversely, it is often necessary to "pool" small business risks, such that the premium level reflects a category based on some common element, such as size or industry. As individual employers, each represents a significant risk to an insurer. The probability of a claim, although perhaps low, could result in a payout far in excess of any expected premium income. If a small employer were individually risk rated, a one-in-ten year claim would have an enormous effect on its future premium levels. Hence insurers collect these risks and price premiums according to the industry or group. This has clear mutual benefits, as the bigger the pool, the less the volatility for both the insurer and the insured.

For small businesses, the prime factor is the risk of the industry, whilst for the large employers, it is their individual (corporate) risk. Within the ambit of medium sized businesses, it is a combination of claims based and industry experience. It holds that the smaller the business is, the greater weight is placed upon industry, rather than individual experience, and vice-versa for larger employers.

6.2.2 Pricing restrictions

In some jurisdictions in Australia, full and open risk-based pricing is either not permitted or retarded[67]. These distortions of the price mechanism retard the economic incentives and rewards that otherwise operate in an environment where premiums reflect actual risk and demonstrated safety performance. As an employer with a poor workplace practices will not be subject to the increases in premium that a risk-based approach would allow, the economic incentives to improve safety management are lost, as are the penalties for non-compliance.

Equally affected are those, who despite their good record for workplace safety, have to pay more for insurance either due to a price floor or cross-subsidising arrangement. In a risk-based premium setting environment, employers with a good safety record and a progressive approach to continued management would be rewarded with lower premiums.

APRA recently observed that insurers face difficulties if States and Territories exercise uncommercial price control or otherwise interfere in underwriting. Uncommercial regulation by States and Territories has the potential to erode the capacity to price risk and therefore threaten the solvency of insurers. APRA called for

> "maximum clarity and minimum overlap in respective regulatory roles of the Commonwealth and the States/Territories. In particular, this would mean the States/Territories avoid duplicating APRA's prudential regulation of an entity providing a statutory class of business such as CTP, and keeping price regulation of such business within commercially sound bounds based on independent actuarial advice"[68].

[67] Victoria, New South Wales, Queensland and South Australia all have price controls built into their schemes. In Tasmania, Western Australia, the Northern Territory and the ACT there are no set premium rates, though rates are monitored by an independent agency.
[68] APRA, Submission to the HIH Royal Commission Future policy directions for the regulation and prudential supervision of the general insurance industry, p 58, September 2002.

The HIH Royal Commission stated that:

> "any price controls imposed by states and territories on statutory insurance underwritten by private insurers should take account of the full cost of providing that insurance, including the cost of complying with APRA's prudential standards".

Recommendation 53 specifically recommended that "states and territories consider allowing greater price flexibility in their statutory schemes"[69]. ICA strongly supports this recommendation.

6.2.3 US results support the ICA position

A recent US study revealed that price regulation (price capping as it was) of workers compensation in many US states actually lead to increased costs and potentially greater levels of work related injuries as well[70].

The problems faced in the US were not unfamiliar. In the 1980's and early 1990's there was a rapid rise in workers compensation costs and deteriorating financial results for insurers. The government response was to protect businesses from excessive insurance premiums and restrict insurers from increasing rates commensurate with increasing costs.

The study found that to the extent that regulation constrained experience-rating employers had reduced incentives to minimise injuries or claims, or to demand similar efforts of employees. The suppression of experience ratings and premiums below competitive levels also had the effect of subsidising the activities of high-risk firms and industries, at least partly at the expense of higher costs to other firms.

A key implication of the study's findings was that systems of insurance regulation that suppress premium rates have the undesirable and potentially self-defeating side effect of increasing growth in expected claim costs. By breaking the link between risk and premiums, costs of work related injuries increased, precisely the opposite effect as was intended by the intervention in the first place. As such regulatory suppression of rates and the subsidisation of higher risk employers and activities have significant social costs attached to it.

Recent reforms to move towards higher market rates has reduced the costs of claims, however in some states significant cross subsidies remain.

In the US the workers compensation insurance market is structurally competitive, hence price controls are not required to curtail market power or prevent excessive rates. The experience with price regulation strengthens the case for allowing workers compensation rates to be determined by competition and according to risk criterion.

6.2.4 Consistency in premium setting

There are valid reasons to retain the ability to incorporate jurisdictional or industry considerations, into the premium calculation, in addition to the abovementioned experience criteria.

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[69] The HIH Royal Commission, April 2003, The failure of HIH Insurance, Volume 1 A corporate collapse and its lessons, p 269.
[70] Danzon, Patricia, M. and Harrington, Mark, (1997), Rate Regulation of Workers Compensation Insurance, American Enterprise Institute Press, Washington.

Blanket consistency in premium setting across and within jurisdictions is undesirable, as the greater the consistency, the more likely the existence of price controls and subsidies. These would blur the price signals and lead to the problems mentioned in section 6.1.3 of this submission.

However alternatives to enhance consistency, particularly within the price regulated jurisdictions, do exist and should be explored, such as the use of a single formula or model to set premiums but with sufficient flexibility to take account of:

- common law differences, such as access to common law and awards at common law
- experience and performance ratings (this could either be a loading, or a discount)
- the different industry profile of the jurisdictions and
- the different claims history of the jurisdictions.

Such measures would have the advantage of introducing greater transparency and accountability into the pricing mechanism, particularly in the price regulated regimes in New South Wales, South Australia and Victoria.

6.3 Benefits structures

Recommendation: A process to encourage greater consistency and predictability of benefits should be established which would include:

- benefits that promote early return to work, while recognizing the need to protect those who are genuinely unable to do so
- careful design and use of lump sum payments
- the use of structured settlements where appropriate and where possible
- limited damages for gratuitous services
- either restricting or abolishing interest on awards, especially damages for non-economic loss
- applying a consistent discount rate on future payments.

Benefits structures should ideally be an integrated system incorporating such aspects as periodic payments (no fault), lump sum awards (no fault) and common law damages (fault). It is essential to strike the correct balance between these three components as if one of them is perceived as being more generous in application, then the incentive exists for claimants to switch between the alternatives and hence lead to a cost blowout.

Of all areas of workers compensation insurance, the greatest inconsistencies between the various jurisdictions exist with regard to benefits structures. The status quo is a veritable melee of standards, which invariably gives rise to:

- inequitable outcomes in which workers in one jurisdiction are recompensed completely different to workers in another jurisdiction for what is substantially the same injury.

- inconsistent outcomes whereby employees under the same national award could be subject to different coverage depending on which jurisdiction they are in, for example journey claims are covered in some jurisdiction, yet excluded in others.

- forum shopping, where complainants are able to pick and choose between jurisdictions according to which one offers them the greatest potential financial payment. Often this decision is made on the basis of access to common law damages.

Of primary concern is the need for consistency in the approach to benefits structures, such as the factors that should be taken account of, the calculations, and access to common law. This view is supported by the House of Representatives Standing Committee report which states that "[i]t is important that the coverage and benefits available to injured workers in Australia should not differ significantly depending on the state or territory in which the injury occurs"[71].

The role of the insurance industry is not to determine what the benefits structures should be, but to the extent they can be made consistent, transparent and predictable, they can be priced with confidence and many of the problems currently faced can be overcome.

In Tasmania and Western Australia reforms were initiated during 1999/2000 to address cost blowouts occurring under common law. Similar reforms have also occurred within NSW for CTP insurance. The impacts of those reforms are now starting to take effect and the market is responding with reductions in premiums[72]. If reform of the costs occurs, the market has shown that the premiums will follow.

6.3.1 A focus on outcomes

Rather than specify the criterion that should be used to determine benefit structures as a general principle, the focus should be placed upon outcomes. The essential question to be asked is "what is it that we want this compensation to achieve?"

For many it is due compensation for a once off injury and the suffering caused as a result. For some it is compensation that reflects a diminished quality of life. However, in the most serious cases it is essential financial support to ensure quality of life and care, for as long as is needed.

It is clear, therefore, that there needs to be a benefits structure that can take account of these different needs, while meeting the overall aim of the scheme.

ICA supports:

- Moves to encourage consistency and predictability of benefits. At the state/territory level this may include some form of a template formula for the calculation of benefits. The formula itself would be essentially consistent, though the variables (average weekly earnings, for example) would differ between jurisdictions.

- Benefits that promote early return to work, while recognizing the need to protect those who are genuinely unable to do so.

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[71] The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, "Back on the job: Report into aspects of Australian workers' compensation schemes", June 2003, Canberra, p. xix.
[72] See, for example, the Press Release by The Hon John Kobelke, MLA, WA Minister for Consumer and Employment Protection, 30 May 2003.

- Careful design and use of lump sum payments, as the presence of easily obtainable lump sum payments operate as a major disincentive to return to work outcomes.

- The use of structured settlements where appropriate and where possible (though the current tax relief arrangements do not apply to workers compensation). Structured settlements could be used to great effect in the ongoing care of persons suffering from severe work related injuries. It is anomalous that such payments are available under CTP but not workers compensation and there is no basis, either theoretical or practical, for this differing treatment.

  ICA notes and endorses the recent House of Representatives Standing Committee report, "Back on the job: Report into aspects of Australian workers' compensation schemes", which recommended (Recommendation 7) "that the Commonwealth Government urgently investigate the extent to which current taxation legislation is inhibiting initiatives of workers' compensation schemes which may benefit injured workers, such as structured settlements"[73].

- Limited damages for gratuitous services based on a "Griffiths v Kerkemeyer" model and also that losses of this type be capped to prevent use as an alternative to damages for non-economic loss,

- Either restricting or abolishing interest on awards, especially damages for non-economic loss.

- Applying a consistent discount rate on future payments across and between all jurisdictions.

6.4 Common law damages

Recommendation	The use of common law should be is limited to cases of genuine negligence, serious or catastrophic injuries.

The use of common law as a means through which restitution can be sought is appropriate so long as its access is limited to:

- cases of genuine negligence on the part of the employer which has led to serious injury being suffered by the employee and

- serious or catastrophic injuries, so that access to common law is excluded to those who suffer less serious, but who subsequently 'add on' injuries, such as stress or depression, to get over the minimum hurdle.

Greater uniformity in access to common law should also be sought. If there is to be a threshold test, it is preferable that the method for calculation be consistent. As noted above, this is a major source of forum shopping, both between jurisdictions and within jurisdictions where alternative courses of action may be available.

[73] Recommendation The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, June 2003, "Back on the job: Report into aspects of Australian workers' compensation schemes, Canberra, p. xvii.

It is important to acknowledge that while retaining access to common law damages is appropriate in circumstances such as those above, it does have one major disadvantage that should be acknowledged.

As a result of the possibility of a (large) lump sum payment, common law can act as a fundamental disincentive to effective injury management and early return to work, which is, of course, the fundamental aim of workers compensation. Further, where access to common law exists, it has been suggested that workers may even be encouraged to act in a manner that would maximise any lump sum payment[74]. For these reasons, it is essential that access to common law as a means through which restitution is sought, be limited to the seriously injured in cases of genuine employer negligence.

There is an equity case for common law access to those suffering catastrophic or severe injuries, or whose injuries are as a result of employer negligence. However, there is a fundamental tension between maximising damages and return to work than cannot be ignored. These principles hold true regardless of whether the workers compensation scheme is public, private or a hybrid scheme. In all cases the design of the benefits structure needs to be integrated and balanced, with a reasonable degree of stability over time.

For these reasons, the ICA also recommends that Government's continue to monitor trends over time to ensure that the benefits structures (including access to common law remedies) remain relevant and that their performance is in keeping with the philosophy of the regime, which is maximising return to work outcomes.

6.5 Definitions in workers compensation

Recommendation	Consistent definitions should be developed between workers compensation schemes that reflect contemporary work practices.

The schemes referred to above all seek to achieve the same broad outcome – the provision of assistance to employees who suffer injury arising out of, or in the course of, their employment. In spite of this central tenet, there are differences in their definitions of employee, workplace and work related injury and illness across the jurisdictions.

For example, for most jurisdictions a 'worker' is defined as being a person for whom there is a 'contract of service'. Yet, for Western Australia, Queensland and the Northern Territory there are either caveats or additions to this.

Similarly, there is little consistency as to what a workplace is and whether cover extends to it. Journeys to and from work and recess claims are either covered, covered with restrictions or excluded.

All jurisdictions in Australia cover physical injury and disease arising out of employment, where employment was at least a significant or material factor (often for disease only), and the acceleration and aggravation of injuries. However, mental illness is excluded from some jurisdictions.

[74] The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, "Back on the job: Report into aspects of Australian workers' compensation schemes, June 2003, Canberra, p. xxvii.

The costs of these inconsistencies are borne by all parties, be they employees, employers, insurers, governments' or the community generally. Given that there is so much common ground, both in terms of essential principles and practical application, it seems superfluous to retain these nuances.

There are also gaps in definitions. For example, there are persons who, through their individual arrangements, are in a work type setting but are not covered under either existing definitions applied in either workers compensation or public liability. This is a consequence of the growth in "new" workplace arrangements such as labour hire or independent contractors, situations not common when the existing definitions were settled.

Consequently, there is a need to not only harmonise between jurisdictions the key definitions of the various workers compensation schemes, but also to update the definitions in line with contemporary work practices. The solution to the latter scenario may require, in some jurisdictions, a review of public liability insurance in addition to workers compensation.

This is consistent with recommendation 153 of the Royal Commission into the Building and Construction Industry[75] that advocated consistent definitions between jurisdictions for various workers compensation systems, particularly the definition of 'worker'.

More recently, Recommendation 1 of "Back on the job" was that:

> "the Minister for Employment and Workplace Relations request that the Workplace Relations Ministers' Council conduct a study to identify the extent to which workers are currently not covered by any workers compensation system, with a view to adopting a national standard that covers the widest possible number of workers"[76].

ICA supports both the recommendations of the Royal Commission and the House of Representatives Standing Committee report and further recommends that the review requested by the latter be extended to include all definitions of relevance to workers compensation and not just the scope of the definition of 'worker'.

6.6 Workplace injury management

Recommendations	A consistent national approach to early notification and injury management be developed, with a focus on early reporting and effective medical intervention. Evidence based treatment should be integrated into the injury management process.

6.6.1 Proactive safety management

ICA is supportive of initiatives that are designed to reduce the likelihood of workplace injury and/or the impacts of workplace injury.

Scheme administrators should be active in promoting workplace safety, perhaps through increased use of random audits or other enforcement measures. Insurer experience suggests that there is a strong correlation between organisational attitudes towards workplace safety and the occurrence of

[75] Final Report of the Royal Commission into the Building and Construction Industry, Volume 9 Reform – National Issues Part 3, Chapter 23, Workers' Entitlements and Working Arrangements, February 2003, p. 273.
[76] House of Representatives Standing Committee on Employment and Workplace Relations, 2003, p. xv.

accidents (workers compensation claims). While some employers have effective safety management programs, others appear somewhat indifferent and it is in promoting increased compliance in the latter group that the greatest gains could be made and where efforts should be targeted.

6.6.2 Integrated injury management

The best workplace injury management programs are proactive with a focus on risk management and the avoidance of injury.

However, as it is inevitable that injuries will occur it is essential that an integrated injury management plan be in place. Effective injury management is a continuum and has several steps including:

- prevention
- immediate care of an injured worker and retrieval from the workplace
- evidence based remedial medical care and rehabilitation
- return to work and, where necessary
- ongoing attendant care and support.

When injuries do occur, early intervention through effective evidence based medical treatment has the greatest potential of reducing the costs of workplace injuries to all parties, by maximising the likelihood of return to work.

Injury management recognises employers and injured workers as the primary stakeholders in the workers compensation system. An essential element of an effective injury management regime is the degree of cooperation between employers and employees in facilitating return to work where medically appropriate and, if required, with restricted or amended duties. Rehabilitation plays a vital role in this process, however, it is not a substitute for returning to work, though "some employees seem to perceive rehabilitation as an end it itself"[77].

The injury management process should aim to be transparent, cost-efficient and effective.

In 1998, WorkCover Western Australia commissioned a report into injury management, "Management Practices, Medical Interventions and Return to Work"[78]. The report concluded that the "involvement of an employer, employee and treating medical practitioner in managing injury is fundamental and when undertaken has the potential to achieve positive outcomes in terms of cost containment and return to work"[79]. Specifically the report found that in cases where the attending medical practitioner had liaised closely with the employer and rehabilitation provider in discussing the patients medical treatment and return to work options, that not only were better return to work options secured, but claims costs were reduced by an average of $8,282 per claim[80].

[77] House of Representatives Standing Committee on Employment and Workplace Relations, 2003, p. xxii.
[78] Workers' Compensation and Rehabilitation Commission [Western Australia], 1998, Management Practices, Medical Interventions And Return to Work.
[79] Ibid., p. viii.
[80] Ibid., p. xvii.

6.6.3 Early notification and intervention

Early intervention and proactive management are critical in achieving return-to-work goals. The success of a workplace-based injury management system is dependent on a number of factors. It is in the best interests of all involved if the injured worker returns to fullest capacity for employment.[81]

In Australia each jurisdiction has its own requirements for reporting and response in the event of workplace injuries. For example, depending on the jurisdiction, the notification of injuries could be required 'as soon as possible'[82], 'within 24 hours'[83] or in an unspecified time frame. Similarly, there is no standardised approach towards medical assessment and intervention.

The evidence suggests that early notification and intervention is vital in reducing the costs of workers compensation claims and improving return to work outcomes. A recent Tasmanian report found that:

- claims forwarded by employers in the second and third weeks cost approximately 13% more than those forwarded in the first week
- claims forwarded in the fourth to sixth weeks cost approximately 25% more than those forwarded in the first week
- claims forwarded in the seventh to twelfth weeks cost approximately 34% more than those forwarded in the first week and
- claims forwarded after three months cost approximately 91% more than those forwarded in the first week[84].

The report concluded that there "is strong evidence from the Victorian and Tasmanian experience of [a] strong direct correlation between claims costs and lag times in claims reporting"[85]. Among the recommendations of the report was one to encourage greater compliance with the statutory reporting obligations (5 days)[86].

In light of these results and inconsistencies, it is recommended that a consistent national approach be proposed, with a focus on early reporting and effective medical intervention. This should both reduce the costs of injury management and increase the prospects of an early return to work.

6.6.4 Evidence based treatment

Evidence based treatment can be defined as treatment based on reliable scientific research into the remedial effects of that treatment. Evidence based treatment places the focus upon results and for that reason is an essential component of any effective and efficient injury management program.

Anecdotal evidence suggests that where treatment is covered under a workers compensation award, there is often an overprovision of health services that have no discernible impact on the outcome to

[81] See: http://www.workcover.tas.gov.au
[82] Comparison of Workers Compensation Arrangements in Australia and New Zealand, p. 33., document available at: www.workcover.vic.gov.au, see also: http://www.workcover.qld.gov.au/worker/public/pdfobject/quick_guide_worker.pdf , and http://www.workcover.vic.gov.au/vwa/home.nsf/pages/Injuries
[83] See: http://www.workcover.com/ftp/documents/rtwUderstdgClaimProcEmpWor.pdf
[84] Workplace Standards Tasmania for the WorkCover Tasmania Board, 27 August 2002, "Timeliness of Claims Reporting", p. 1, report downloaded from http://www.workcover.tas.gov.au/attach/timelinessof.pdf on 10 June 2003.
[85] Ibid., p. 11.
[86] Ibid., p. 11.

the injured worker. Where this does occur, it is at a significant cost to both employers and the community who, depending on the jurisdiction, either pay more through higher premiums or increased taxes. The House of Representatives Standing Committee[87] recently noted that as the various workers' compensation schemes move to implement evidence based medical treatment and other strategies, that the problems identified should become significantly less prevalent.

For these reasons it is essential to integrate evidence based treatment into the injury management process. Evidence based treatment not only provides the best medical outcomes for the worker, including the greatest chance of return to work, it is also the most effective and cost efficient form of ongoing medical attention.

ICA recommends that in moving towards a national approach to workers compensation, evidence based treatment be integrated into the injury management processes of the various jurisdictions.

Some excellent examples of evidence-based treatment are the approach taken by the Australian Physiotherapy Association[88] and the New Zealand Accident Compensation Commission[89].

6.7 Dispute resolution

Recommendation: Standard dispute resolution procedures should be introduced into the State and Territory schemes, with consideration given to the following:

- a rule based and codified system that is based on 'no fault' principles
- a clear set of rules for resolving disputes, with an emphasis on alternative forms of dispute resolution
- the use of independent medical experts to provide a binding determination with respect to physical/mental injuries in the event of any dispute
- avoiding unnecessary litigation.

The Australian landscape is dominated by conflicting approaches to dispute resolution. These differences are a catalyst for increased disparities in outcomes between jurisdictions and consequently also lead to attempts at 'forum shopping'[90].

ICA believes that it is essential for all insurers (including self-insurers) to have in place their own internal dispute resolution processes. ICA also supports the position that, in the event of any dispute, benefits continue to be paid to the injured worker, until such time as the dispute is settled.

Standard dispute resolution procedures should be developed and introduced into the State and Territory schemes, with consideration given to the following:

[87] The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment and Workplace Relations, June 2003, "Back on the job: Report into aspects of Australian workers' compensation schemes", Canberra.
[88] The "APA position statement on the efficacy of physiotherapy for the treatment of shoulder disorders", PowerPoint presentation available at: http://www.workcover.com/ftp/documents/sww2002ShoulderDisorders.pdf
[89] "New Zealand Acute Low Back Pain Guide", May 1999 Edition, prepared by the National Advisory Committee on Health and Disability – Ministry of Health, and the Accident Compensation Corporation.
[90] For a summary of the existing dispute resolution regimes of the states and territories, please refer to Appendix 2 – Comparative Table: Workers Compensation Schemes of the States and Territories.

- ***A rule based and codified system that is based on 'no fault' principles***. So long as the injury in question was obtained in the course of employment, then it will be compensated according to the relevant workers compensation schedule. A 'no fault' scheme does not seek to apportion any blame for injuries and is, in broad terms, a non-adversarial method of dispute resolution.

- ***A clear set of rules for resolving disputes, with an emphasis on alternative forms of dispute resolution***. This would include mandating mediation and conciliation as first steps, before any consideration of arbitration and litigation. Rather than create new systems it may be possible to draw upon existing procedures, such as those of the Institute of Arbitrators and Mediators Australia (IAMA)[91].

- ***The use of independent medical experts to provide a binding determination*** with respect to physical/mental injuries in the event of any dispute.

- ***Avoiding unnecessary litigation***. ICA does not believe that litigation is a preferable method for the making of an assessment of claims for compensation.

A system which incorporates these considerations would create greater certainty in the decision making process with reduced scope for review. It emphasises cooperative forms of dispute resolution, increases consistency between jurisdictions and deters those who seek to take advantage of existing differences.

It is inevitable, however, that disputes will occur. Fairness and justice requires that an effective and efficient dispute resolution process exist. However, such a process should only ever deal with genuine disputes and should not be used as an administrative process for making claims. Courts and tribunals, therefore, should only be involved in extreme cases of disputation.

6.8 An alternative national framework for self insureds

Recommendation	A national workers compensation insurance scheme for self-insureds should be established. The scheme should be voluntary (ie. on an "opt-in" basis), subject to certain prudential and regulatory criteria. Participation in the scheme would be recognised by all State and Territory regimes, thus removing the need for such employers to be subject to multiple jurisdictions.

6.8.1 Objectives of a national scheme

In addition to greater consistency between the State and Territory regimes, there is also an opportunity to provide a national alternative which would initially enable certain authorised companies to act as self-insurers on a national basis.

The creation of a national scheme would provide a real alternative to the existing State and Territory regimes and drive greater competition. The scheme would not replace the State and Territory schemes but allow an alternative institutional arrangement that provides a solution to employers who are currently marginalised by the State/Territory schemes.

[91] For further information, refer to http://www.iama.org.au/index.html

The benefits of the scheme to employers and employee groups would be:

- possible cost savings (no more cross subsidisation between employers who are "good" risks and those who are "bad" risks)
- administrative simplicity (one employer, one scheme) and
- a reduction in forum shopping.

It should be noted, however that any national scheme would be redundant if the State and Territory regimes embraced consistency across several key elements of workers compensation. However, until such time as this occurs, it may be necessary to drive consistency through a national approach, such as outlined here.

6.8.2 How the Scheme could work

The basic entry criteria for potential self-insureds would be compliance with existing APRA prudential requirements. These requirements could either be met directly by the corporation, via the purchase of reinsurance with an APRA licensed and regulated general insurer, or a combination of both.

In respect of the workers compensation arrangements, a national framework would need to be determined. There are several alternatives for how this could occur.

The prudential and licensing arrangements are discussed further in section 6.8.8.

Definitions

The national scheme would have to adopt definitions of worker, workplace, workplace injury and employer that are:

- consistent with those already existing in the state/territory regimes, such that all workers covered under those schemes were included in the national scheme and
- relevant to current workplace practices, for example, through consideration of the use of contract and "out" workers.

Benefits structures

Just as with the State/Territory jurisdictions, the benefit structure for any new or extended national scheme should be performance based and focus on outcomes. Therefore, it should ideally:

- be an integrated benefits structure system
- focus on getting employees back to work
- be sufficiently flexible to allow for structured and lump sum payments, where appropriate and
- be consistent, transparent and predictable.

Premium setting

To create appropriate incentives (and rewards) for the provision of safe working environments, premiums should ideally be risk-based, with a minimal cross-subsidisation and price controls.

Qualifying employers would have access to a competitive market so that licensed insurers should be free to set their own premium levels. However, the use of a national workers compensation framework would simplify the administration and calculation of the risks and costs of insurance.

Dispute resolution

It is essential for all self-insurers to have their own internal dispute resolution processes.

We recommend that any national self-insurance scheme incorporate a dispute resolution process that is consistent with the following broad principles as identified in section 7.7.

Injury management

Incorporated into the scheme would be an integrated injury management program. As previously discussed (see Section 7.6) it would be a cooperative approach between employers and employees, which emphasises preventative measures and early intervention. The focus would be on outcomes via evidence-based treatment and return to work.

6.8.3 Regulation and licensing of self-insurers in under this scheme

Regardless of what licensing regime is selected, to ensure the scheme's integrity and provide adequate protection and assurance to employees, prudential standards should be applied.

To the extent of their estimated liabilities, those employers seeking cover under this national scheme will be required to meet the prudential requirements set by APRA for general insurers.

It is possible that some employers may choose to self insure under a national regime but retain zero (or reduced) risk through reinsurance. In such cases, they should be free to choose the provider of that reinsurance, so long as it is placed with an APRA licensed and regulated insurance entity.

6.8.4 Alternative regulatory models

In its issues paper, the Productivity Commission listed several alternatives for a national workers compensation model. In addition to a brief description, the advantages and disadvantages of each of these are summarised below. While this discussion is in the context of a national self-insurance scheme, many of the points made below are also salient in the context of a privately underwritten (national) scheme.

a) **A cooperative model for workers' compensation along the lines of the current national approach to OHS.** The Commonwealth and States could establish a national body to develop national standards or codes and carry out other functions relating to workers' compensation, but the States would retain responsibility for implementation. Such an approach currently applies to the regulation of road transport and food safety.

Advantages

- Increased clarity for all parties (employees, employers and insurers).
- The ability to centralise certain activity (such as IT services, data collection and analysis) and increase skills in the approach to workers compensation and OH&S (through the ability to specialise).
- Economies of scale would arise from a national approach.
- It would be a scheme that is compatible with increased labour force mobility.
- There would be a reduced likelihood of anomalous/inconsistent results between jurisdictions.
- There would be reduced political resistance, through cooperation at the State/Territory level.

Disadvantages

- Difficulties in reconciling the differences that already exist between the schemes, especially states and territories at the "lower" level.
- The potential for the worst to emerge (in seeking a national approach), not the best.
- Retaining some flexibility at the State/Territory level to account, for example, for different industry or labour force demographics.

b) **A mutual recognition model.** Multi-state employers could be permitted to self-insure or pay premiums to one scheme (say where it has its head office) that is recognised by all other jurisdictions. Similarly, in OHS, multi-state employers could be permitted to choose which OHS arrangements to operate under with this being recognised in all jurisdictions.

Advantages

- There is possibility that one group to benefit (at the others expense) through the choice of jurisdiction (see comment below on forum shopping).

Disadvantages

- Forum shopping, through the prospect that an employer will tend towards the jurisdiction that best suits their commercial needs (regardless of whether it is determined on for example, location of head office, most number of employees, etc).
- Discrimination and equity; workers may find themselves entitled to compensation that is incompatible with their circumstances or inconsistent to that which those with similar injuries, but a different employer, receive.
- This option does not allow flexibility to take account of local conditions.
- It would be difficult to reconcile the premiums between the managed fund and underwritten jurisdictions. Employers with higher premiums may seek cover in a managed fund jurisdiction, hence avoiding any move towards the risk-based premium that they would face in the underwritten schemes.

- There would be employee / union resistance to change, arising from existing disparities in entitlements.
- This option does not address the fundamental issue of inconsistency.

c) **An expanded Comcare model.** The Commonwealth could permit employers to self-insure with (or pay premiums to) Comcare and comply with its OHS provisions — existing legislation provides for corporations to be licensed to self-insure under Comcare where they are former Commonwealth authorities or are in competition with Commonwealth authorities or former authorities. For firms to be included under Commonwealth OHS legislation, this would need to operate in a similar way to the mutual recognition model.

Advantages

- The template exists, but would require refinement.

Disadvantages

- There would need to be some amendments to the benefits structure, which at present provides disincentives to the return to work.
- The model was designed for a particular purpose and a particular workplace (largely white collar). As such, it is therefore unlikely to be suitable for all circumstances.
- It is possible that the Comcare licensing arrangement could be used as a template (with modifications), however, the real challenge would be getting employers and employees to opt in (out) of the scheme.
- If the model were to be expanded, the prudential regulatory obligations would need to be carefully defined and allocated to an appropriate agency.

d) **A uniform template legislation model.** The Commonwealth and States could pass mirror legislation to ensure uniformity for all core aspects of workers' compensation and OHS. Alternatively, such legislation could seek partial uniformity, e.g. covering only certain areas, with States deciding on other areas such as common law, premiums and rehabilitation and return to work.

Advantages

- It would enhance consistency, but retain flexibility.

Disadvantages

- The option does not address the fundamental need for consistency across all areas and could be construed as a patch job.
- Political and bureaucratic realities

e) **An extended financial sector regulation model.** Existing Commonwealth legislation — viz, the *Insurance Act* and the *Corporations Act* — could be extended to all workers' compensation insurers. All public and private insurers in workers' compensation schemes would be subject to uniform prudential and consumer/investor protection regulation by APRA and ASIC, respectively.

Advantages

- The national framework / institutions already exist and are well qualified.
- The opportunity for a truly national approach to remove the existing inconsistencies.
- It would be consistent with FSR Act provisions for regulating the provision of other financial services to small business, via ASIC.

Disadvantages

- Resistance could be expected from the States and Territories.

f) **A new national regime.** The Commonwealth could establish a national workers' compensation scheme and national OHS legislation via the exercise of its existing constitutional powers (e.g. corporations power and referred power from the States).

Advantages

- If it could be achieved, it would be a truly national scheme.

Disadvantages

- Given the experience of the past, doubts would exist as to whether it is a viable option in terms of political reality.
- There would likely be significant political and bureaucratic resistance to such a move.

The need for a truly national scheme

It is possible that a national approach to certain latent diseases arising out of employment is needed. Examples of the types of illness would be Asbestosis, Anthrax, plus any new form of "industrial" cancer that may emerge in years to come (for instance, as a result of mobile phone use). Such diseases are, by their nature, trans-jurisdictional and trans-employer related. These extreme diseases must be capable of being managed in a better way than the present multi-jurisdictional approach and a solution would be to establish a national no-fault national program, which offered those suffering from these conditions a consolidated avenue of compensation. Also, workers' compensation has a major exposure to terrorism events and an integrated national response is highly desirable.

6.8.5 Implementation issues

Legislative reform would be required to implement this scheme.

It is important to consider that while there exists numerous regimes in this country, there is a large degree of similarity between those schemes. The implementation of a national framework would necessarily require that those areas of commonality be both drawn upon and extended.

The scheme would require an Act of (Commonwealth) Parliament to either:

- extend and modify the existing Comcare scheme; or

- establish an alternative scheme, complete with the elements of definitions, premiums, benefits, and so on.

At the State and Territory level, the legislative amendments need only require the provision of workers' compensation insurance either under the existing State/Territory scheme or under the (new or extended) National Workers Compensation Scheme (it would be one or the other).

For the scheme to be successful, participation in it by an employer would be subject to co-operation between employers and employee groups.

6.9 Cost sharing and cost shifting

6.9.1 Cost shifting between individual employers and society

ICA supports any move away from the current arrangements in which many of the financial costs of workplace injuries are borne either by persons or groups, other than those responsible. This issue is intimately related to the issues of premium setting and workplace management as it strikes at the heart of the incentives to provide a safe workplace.

An ideal market outcome is where the cost of workplace injuries would not be socialised (through Medicare for example), but borne by individual employers. Social costs are those costs borne by society as a result of the actions of firms. In the context of workers compensation and occupational health and safety, these costs could include the additional expenses incurred via the health system. The problem with such an approach to cost management is that it fails to create an incentive upon the firm to improve its workplace practices.

Accordingly, to the extent permissible, it is important that those responsible for workplace accidents are held responsible for their actions and to give effect to this would be through the increased use of a risk based approach to premium setting.

6.9.2 Cost shifting between workers compensation and public liability

There is a disturbing trend emerging whereby cost shifting from workers compensation to public liability is occurring in certain jurisdictions. The cause of this appears to be the alternative benefits structures of these different types of claim and the rise of what could rightly be termed "remedy shopping". Simply put, remedy shopping occurs whereby a potential claimant under a workers compensation policy, instead opts to pursue their claim under an alternative insurance line, such as public liability. The motivation for doing this is the ability to gain access to financial recompense that he/she would not have had access to, or only limited access to, under the workers compensation policy, such as common law damages.

This cost shifting is becoming evident within Western Australia. Under the WA workers compensation scheme, common law access to restitution has been limited. In response to this, recent experience shows that claimants are opting to pursue public liability claims (and hence common law damages) where their particular circumstances permit.

In South Australia, section 54 of the Workers Rehabilitation and Compensation Act (1986) provides the ability for the WorkCover Corporation to recover from any contributory party other than the

employer 100% of the costs regardless of the extent of their contributory negligence. The effect of this has been that there has been a crossover to the public liability cover for business and householders, in particular, users of participants in group traineeship programs, labour hire workers and contractors whose premiums and excesses have increased exponentially, where they have been able to obtain cover.

This is an important issue for referral to the Ministerial Forum on Insurance Issues, as the solutions appear to be major reforms such as:

- making all personal injuries subject to the same benefits structure (unlikely, as public liability does not yet provide no-fault compensation), or
- legislating to ensure that claims arising from workplace injury or disease are only handled within the workers' compensation system.

6.9.3 Workers compensation and social security

There are cases where the initial injury occurs in the workplace and subsequently gives rise to compensation payments, often ongoing in the case of some permanent incapacity. Over time, the effects of age and "wear and tear" will invariably exacerbate the effects of the injury.

There is a need for a mechanism to recognise this trend as it emerges. Workers compensation should and does exist to provide appropriate support as a result of injuries or illness suffered in the course of employment but it should not, over time, be a substitute for the normal responsibility of the social security system.

Similarly, workers' compensation should not be treated as unemployment insurance. If an injured worker has the capacity to return to work but no work is available, the workers needs should be met from the employment support process rather than the workers' compensation system.

Appendix 1 – General Insurers as underwriters/agents for workers compensation schemes - 2002

Jurisdiction	Workers compensation insurance
NSW	Managing "insurers": Allianz Australia Workers' Compensation (NSW) Ltd, CGU Workers Compensation (NSW) Ltd, Employers' Mutual Indemnity (Workers Compensation) Ltd, GIO Workers Compensation (NSW) Ltd, NRMA Workers Compensation (NSW) Pty Ltd, NRMA Workers Compensation (NSW) (No 2) Pty Limited, QBE Workers Compensation (NSW) Ltd, Royal & Sun Alliance Workers Compensation (NSW) Ltd, Zurich Australian Workers Compensation Ltd. Specialist insurers: Guild, CCI.
Victoria	Authorised agents: Allianz Australia Workers Compensation Victoria Ltd, CGU Workers Compensation Victoria, JLTA Workers Compensation Services Pty Ltd, NRMA Workers Compensation Ltd, QBE Mercantile Mutual Workers Compensation
Queensland	[Government scheme]
South Australia	Claims agents: QBE Mercantile Mutual, Allianz Australia Insurance, CGU Insurance, Royal Sun Alliance, NRMA Insurance
Western Australia	Underwriters: Allianz Australia Insurance Ltd, Catholic Church Insurances Ltd, CGU Insurance Ltd, GIO General Ltd, Guild Insurance Ltd, Insurance Commission of WA, IAG t/a SGIO Insurance, QBE Insurance Australia, Royal and Sun Alliance Insurance Australia, Wesfarmers Federation Insurance Ltd, Zurich Australian Insurance Ltd
Tasmania	Underwriters: Allianz Aust General Insurance Ltd, CGU Insurance, Zurich Aust Insurance Ltd, Guild Insurance Ltd, QBE Insurance Ltd, NRMA Insurance, Royal & Sun Alliance Aust Ltd, Catholic Church Insurances (Specialised Licence), GIO General Limited
ACT	Underwriters: Allianz Aust Insurance Ltd, CGU Insurance Ltd, Catholic Church Insurances Ltd, GIO General Limited, Guild Insurance Ltd, NRMA Insurance, QBE/Mercantile Mutual Insurance, Royal & Sun Alliance, VACC Insurance, Zurich Australian Insurance Ltd
Northern Territory	Underwriters: Allianz Australia Insurance Ltd, CGU Insurance Ltd, NRMA Insurance, QBE Insurance (Australia) Ltd, Territory Insurance Office

Appendix 2 – Comparative Table of Workers Compensation Schemes of the States and Territories

	VICTORIA	NEW SOUTH WALES	QUEENSLAND	SOUTH AUSTRALIA	WESTERN AUSTRALIA	TASMANIA	ACT	NORTHERN TERRITORY
Scheme regulator	WorkCover	WorkCover NSW	WorkCover Queensland	WorkCover Corporation	WorkCover WA	Workplace Safety Board of Tasmania	ACT WorkCover	Work Health Authority
Fund type	Central fund – agents issue and administer policies and claims on behalf of WorkCover.	Managed fund – licensed insurers issue and administer policies and claims on behalf of WorkCover, and act as trustees of the Statutory fund. However, insurers do not underwrite policies.	Central fund	Central fund – agents manage claims on behalf of WorkCover	Approved insurers – privately underwritten (limited loading on set premium and full discounting allowed)	Approved insurers – privately underwritten (no set premium rates)	Approved insurers – privately underwritten (no set premium rates)	Approved insurers – privately underwritten (no set premium rates)
Price regulation	Government specifies methods to calculate premiums (usually based on previous year, adjusted for recent experience).	Insurance Premium Order made on an annual basis by the Governor on behalf of WorkCover. Premiums adjusted according to claims history.	WorkCover, subject to the direction of the Minister, sets premiums. Determined on an industry basis, with bonus option for 'good' employers.	WorkCover sets levy applicable for each class of industry. Percentage must nod exceed 7.5%, except in certain circumstances. Also linked to safety.	Recommended premium rates set by committee, independent from WorkCover. Limited loading and discounting on set premium allowed. May vary by +/- 50%.	No set premium rates. Rates reviewed and monitored by Workplace Safety Board.	No set rates. Rates recommended by the Insurance Council of Australia.	No set premium rates. Rates are monitored by Scheme Monitoring Committee.
Key governing legislation	Accident Compensation Act 1985 Accident Compensation (WorkCover Insurance) Act 1993	Workers Compensation Act 1987 Workplace Injury Management and Workers Compensation Act 1998 Workers Compensation Legislation Amendment 2001 Act (No 2) [not yet commenced]	WorkCover Queensland Act 1996	Workers Rehabilitation and Compensation Act 1986	Workers' Compensation and Rehabilitation Act 1981	Workers Rehabilitation and Compensation Act 1988	Workers Compensation Act 1951 Workers Compensation Amendment Act 2001 [not yet commenced]	Work Health Act 1986
Benefits	75-95% of AWE depending on duration. Weekly benefits can be discontinued after two years. Limited medical and hospital benefits. Limited lump sum	80-100% of AWE depending on duration. Weekly benefits can be stopped after two years. Limited medical and hospital benefits. Lump sums available for	Various benefits available up until five years depending on wage, award or agreement. Limited hospital benefits.	80-100% of AWE depending on duration and degree of incapacity. Unlimited medical and hospital benefits. Lump sums available.	Cap on weekly payments for all claims 85-100% of AWE (plus bonuses) depending on duration and award. Limited medical and hospital benefits.	70-100% of weekly payments depending on duration. Payments cease after 10 years. Unlimited medical and hospital benefits.	Weekly earnings for six months or less, with indexed compensation level after 26 weeks. Unlimited medical and hospital benefits. Lump sums available.	75-100% of weekly earnings (or fixed compensation level) depending on duration.

	VICTORIA	NEW SOUTH WALES	QUEENSLAND	SOUTH AUSTRALIA	WESTERN AUSTRALIA	TASMANIA	ACT	NORTHERN TERRITORY
	payments.	permanent impairment.	Unlimited medical benefits. Lump sums available.		Lump sums available.	Lump sums available.		
Dispute resolution	Medical panels Common law access at 30% threshold whole of body impairment Appeal on matter of law to the Supreme Court	Workers Compensation Commission Common law access at 15% threshold whole of body impairment	Internal and formal review Unlimited appeal to common law, with no maximum amount of damages Medical issues – Medical Assessment Tribunal	Conciliation Arbitration Judicial review Full bench appeal Appeal to the Supreme Court No common law access allowed against employer	Medical Assessment Panel Conciliation Review Common law access at 16% whole of body permanent impairment Magistrate's Court	Workers' Rehabilitation and Compensation Tribunal (conciliation/hearing) Common law access at 30% threshold whole of body impairment	Internal resolution Unlimited common law access ACT Magistrates Court	Mediation Work Health Court No common law access

Appendix 3 – Summary of Workers Compensation Insurance[92]

New South Wales[93]

The workers compensation scheme in NSW is a no fault scheme with the option for a seriously injured person to make a common law claim for damages.[94]
The NSW WorkCover Authority (WorkCover) is the statutory authority responsible for oversight and regulation of the workers compensation scheme, and occupational health and safety legislation in NSW.

The scheme in NSW is referred to as the Managed Fund (the Fund). This means that, while insurers do not underwrite the scheme[95], the assets of the Fund are held by the insurers in trust in a statutory fund[96]. Licensed insurers are paid management fees out of the Fund for administering the scheme on behalf of WorkCover.

WorkCover and the scheme in NSW are primarily governed by the Workers Compensation Act 1987 (WC Act), the Workplace Injury Management and Workers Compensation Act 1998 (WIM Act),[97] and the Workers Compensation Legislation Amendment Act 2001 (No 2), which commenced on 1 January 2002.
WorkCover has a Board of Directors and a General Manager, which are both subject to the control and direction of the Minister in the exercise of their functions, except in relation to the contents of any advice, report or recommendation given to the Minister.
Objectives of the workers compensation system of NSW are set out in section 3 of the WIM Act, and include fairness, affordability and financial viability.
The WIM Act was enacted in 1998 in part to enable private sector underwriting from 1 October 1999. However, the NSW Government has enacted legislation to delay private underwriting now to a date to be determined by the Government.[98]

There are four types of insurance arrangements for workers compensation in NSW.

The Managed Fund is the main provider of workers compensation insurance in NSW. Nine licences are currently issued to eight insurers[99] to issue and administer policies, collect premiums, manage claims, and manage the assets of the Fund on behalf of WorkCover.[100]

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[92] For a detailed comparison of the workers compensation schemes in Australia and New Zealand, see Heads of Workers' Compensation Authorities, Comparison of Workers' Compensation Arrangements in Australian Jurisdictions, July 2000, at www.hwca.org.au
[93] For a recent history of workers compensation insurance in NSW to 1997, see RJ Grellman, *Inquiry into Workers' Compensation System in NSW*, Final Report, September 1997, pp 15-22.
[94] For more detail, see Commission of Inquiry into Workers Compensation Common Law Matters (Sheahan Inquiry), *Issues Paper*, 4 July 2001, pp 6-12.
[95] The question as to who underwrites the NSW workers compensation scheme was considered by the Grellman Inquiry which found that: 'no sector of the workers' compensation system is legally and financially responsible for the statutory funds', RJ Grellman, *Inquiry into Workers' Compensation System in NSW*, Final Report, September 1997, p 36.
[96] See sections 193-209, *Workers Compensation Act 1987* (NSW)
[97] Note that Chapter 5 of the WIM Act, which sets out provisions dealing with workers compensation insurance (sections 143-230), does not commence operation until private underwriting of the scheme commences.
[98] See Second Reading Speech to the Workplace Injury Management and Workers Compensation Amendment (Private Insurance) Bill 2000, the Hon John Della Bosca MLC, Special Minister of State, *NSW Parliamentary Debates* (Legislative Council), 20 June 2000.
[99] NRMA Insurance Ltd holds 2 licences.
[100] For more detail, see WorkCover NSW Annual Report 1999/2000, pp 29-30.

Employers or groups of companies with a certain number of employees, and that meet prudential requirements are allowed to self-insure.[101] Self-insurance means that the employer carries its own underwriting risk and controls its own claims administration.

Specialised insurers have a restricted licence to underwrite workers compensation risks specific to a particular industry or class of business or employer.[102]

The Treasury Managed Fund provides workers compensation coverage for NSW government sector employees.[103]

The scheme's benefits apply equally to injured workers in NSW, irrespective of the insurance arrangements of their employer.[104]

In relation to the Managed Fund, WorkCover is responsible for licensing insurers, each of which operate as trustees for the statutory fund. WorkCover is also responsible for licensing self-insurers and specialised industry insurers. In this regard, WorkCover has various powers and functions, some of which relate to the regulation of premiums and oversight of the finances of licensed insurers, and which are outlined below.

Companies licensed by WorkCover to manage workers compensation business in NSW are usually formed specifically for that purpose, and do not undertake any other insurance activities. These companies are not subject to the regulatory oversight of the Australian Prudential Regulation Authority.

The estimated deficit in the NSW workers compensation scheme at 30 June 2002 is $2,801 million[105]. The scheme's funding ratio at 30 June 2002 was 67% compared to 70% at 30 June 2001[106], and 76% at 31 December 2000[107].

Price regulation

The primary mechanism for the setting of premiums for employers insured under the Managed Fund is the Insurance Premiums Order, made normally on an annual basis by the Governor on behalf of WorkCover (section 168, WC Act).[108]

The premium to be paid by a particular employer is determined in accordance with the WorkCover Industry Classification System (WIC) comprising 529 industry classes arranged into 17 broad industry divisions. This system is based on the Australian and New Zealand Standard Industrial Classification System (ANZSIC), and was implemented on 30 June 2001 to replace the previous system that only

[101] See sections 210-216, *Workers Compensation Act 1987* (NSW)
[102] See section 176, *Workers Compensation Act 1987* (NSW). For more detail, refer to the Licensing Policies for self-insurance and specialised insurance which are available on the WorkCover website: www.workcover.nsw.gov.au
[103] See section 211B, Workers Compensation Act 1987 (NSW)
[104] WorkCover NSW, Submission to Commission of Inquiry into Workers Compensation Common Law Matters, July 2001, pp 3-4.
[105] WorkCover New South Wales, Annual Report 2001/2002, p. 88.
[106] Ibid., p. 88.
[107] WorkCover NSW, Actuarial Review of the Outstanding Liabilities of the WorkCover Scheme Statutory Funds as at 30 June 2001, Volume 1, 26 September 2001, as prepared by Tillinghast – Towers Perrin, p 6 (Summary of results). This Report was tabled on 17 October 2001before the General Purpose Standing Committee No 1 (NSW Legislative Council) as part of its Inquiry – Review and Monitoring of the NSW Workers Compensation Scheme.
[108] See Insurance Premiums Order 2001-2002, *Gov Gaz* 99 (Part 1), 22 June 2001, pp 3799-4244, which includes the WorkCover Industry Classification System.

provided for 110 classes. Industry premium rates are determined for each class based on previous claims experience, and are expressed as a percentage of the employer's wage.[109.]

Under the Insurance Premiums Order, employers are classified into Category A (larger employers whose basic premium exceeds $3,000) or B (all other employers) for the purpose of determining whether an experience adjustment is required in the calculation of their premium. Category A employers with at least 2 years claims experience have an adjustment made to their basic premium based on their past claims experience. All other employers are charged the basic premium.

Financial regulation

Most employers in NSW hold a workers compensation policy issued by a licensed insurer in NSW and they are covered by the Managed Fund. However, the role of insurers for the Managed Fund in the NSW workers compensation scheme is significantly different than the role they have within the NSW CTP scheme. In the workers compensation scheme, the financial position of the insurer is not exposed to the potential profit or loss of the Managed Fund.

Nevertheless, WorkCover has a range of powers and functions under the WC Act that allow it to monitor or oversight the financial position of a licensed insurer. This enables WorkCover to ensure, among other things, that a licensed insurer is fit to issue policies, manage claims, and manage the assets of the Fund. These powers and functions include the following.

- In determining an application for a licence, WorkCover may take into consideration a range of factors including the paid up share capital of the applicant (section 178).
- A licence granted to an insurer is subject to certain conditions, including such conditions as may be imposed by WorkCover (section 181).
- WorkCover may cancel or suspend a licence for any reason it thinks fit, and is not required to give reasons for its decision (section 183).
- WorkCover may require a licensed insurer to disclose information concerning the business or financial position of the insurer or any related corporation (section 189).
- An insurer is required to notify WorkCover of certain events such as default in the payment of principal or interest under any debenture, the appointment of a liquidator, receiver or manager of property of the insurer, or resolution by the insurer that it be wound up voluntarily or by a court (section 190).
- While the assets of the statutory fund maintained by the insurer may be invested in such manner as the insurer thinks fit, WorkCover may direct the insurer to invest or not invest in specified securities, or to invest a specified percentage of the assets of the statutory fund in specified securities (section 198).
- WorkCover may apply to the Supreme Court to declare invalid a transaction entered into by an insurer in contravention of the requirement that the statutory fund of the insurer shall not be mortgaged etc (section 199).

[109] WorkCover NSW, Outline of the NSW Workers Compensation Premium Scheme 2001/2002, How workers compensation premiums are calculated in NSW, 2001/2002 Edition, pp 3-5.

- A licensed insurer must keep certain accounting records relating to the business or financial position of the insurer, including records relating to the statutory fund of the insurer, and must lodge with WorkCover returns in relation to the same (section 201).

- WorkCover may appoint a qualified person to audit or inspect the accounting and other records relating to the business or financial position of a licensed insurer (section 202).

- WorkCover directs, controls and manages a Premium Adjustments Fund, which can be applied to deal with deficits in the statutory fund of a licensed insurer. Each licensed insurer pays contributions to WorkCover for payment into this fund (sections 203-209).

- WorkCover holds money deposited by a self-insurer as security on trust for the payment and satisfaction of all claims, judgments or awards against the self-insurer not otherwise paid or satisfied. A bank guarantee may be provided as an alternative to a security deposit (sections 213-216).

Further, the Uninsured Liability and Indemnity Scheme[110] is established under the WC Act and administered by WorkCover to provide further security to the operation of the overall Scheme. This fund is financed in part by contributions from the statutory fund managed by the licensed insurers.

The Uninsured Liability and Indemnity Scheme provides compensation to an injured person if the relevant employer is uninsured or has inadequate workers compensation insurance to properly meet the person's claim. It also provides compensation if the injured person has been unable to identify the relevant employer.

Victoria[111]

The workers compensation scheme in Victoria is a no fault scheme with the option for a seriously injured person to make a common law claim for damages.
The Victorian WorkCover Authority ('WorkCover') is the statutory authority responsible for managing the workers compensation scheme, and occupational health and safety legislation in Victoria.

WorkCover on behalf of the Victorian Government underwrites the scheme in Victoria. Authorised agents issue policies, collect premiums, and administer compensation claims on behalf of WorkCover (section 23, AC Act).

WorkCover and the scheme in Victoria are primarily governed by the *Accident Compensation Act 1985* (AC Act) and the *Accident Compensation (WorkCover Insurance) Act 1993* (ACWI Act).

The objects of the AC Act (section 3) include the maintenance of a fully-funded scheme. The objectives of WorkCover include the management of the scheme as effectively, efficiently and economically as possibly (section 19, AC Act). The functions of WorkCover include:

- the administration of the 'WorkCover Authority Fund' (see section 32, AC Act);

- the payment of compensation to entitled persons;

[110] See sections 138-148A, Workers Compensation Act 1987.
[111] For an overview of the legislative history of workplace accident compensation arrangements in Victoria from prior to 1914 to 2000, see Report to the Victorian Department of Treasury and Finance, prepared by Price Waterhouse Coopers and Minter Ellison, National Competition Policy Review of Victorian Workplace Accident Compensation, 20 December 2000, pp 40-44.

- the regulation of self-insurers;
- ensuring that the scheme is competitive and fully-funded; and
- determining, collecting and recovering premiums payable for WorkCover insurance policies.

In doing so, WorkCover must ensure the financial viability and efficient operation of the workers compensation arrangements (section 20, AC Act).

WorkCover has the power to do all things necessary or convenient in connection with the performance of its functions, including carrying on the business of providing accident insurance for the purposes of the AC Act and the ACWI Act (section 20A, AC Act).

There are two types of insurance arrangements for workers compensation in Victoria.

WorkCover insurance policies provide workers compensation insurance for most employers in Victoria. An employer must pay any premium directly to WorkCover, or where appropriate to an authorised agent (section 42, ACWI Act).

Certain employers that meet prescribed minimum requirements as to financial strength and viability may apply for approval as a self-insurer (see Part 5 of the AC Act). Self-insurance means that the employer carries its own underwriting risk and is responsible for its own claims administration.

Price regulation[112]

Section 15 of the ACWI Act provides that the Government on the recommendation of WorkCover may make a premiums order specifying the methods to be used in calculating premiums payable by an employer for a WorkCover insurance policy.

A premiums order may, among other things, apply differently according to various factors, and specify different methods of calculation (section 16, ACWI Act). Premiums are to be calculated in accordance with the premium order, and the premium payable by an employer for a policy must be calculated in accordance with the methods specified in the relevant premiums order (section 17, ACWI Act).

The website for WorkCover notes that each year, WorkCover sets an 'average premium rate' which is used as a base to set premium rates for each industry group and workplaces. A different method of calculating premium for small employers (payroll of less than $1 million) and large employers is used.[113]

Financial regulation

As in NSW, the companies authorised to act as agents of WorkCover are specifically formed for that purpose, and are not subject to regulatory oversight by the Australian Prudential Regulation Authority.

In relation to authorised agents under the Scheme, WorkCover has the power to require the production of, and audit and inspect the accounting records of the insurer (section 23, AC Act).

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[112] For a more detailed description of premium setting for the workers compensation scheme in Victoria and alternatives to the current method, see Report to the Victorian Department of Treasury and Finance, prepared by Price Waterhouse Coopers and Minter Ellison, National Competition Policy Review of Victorian Workplace Accident Compensation, 20 December 2000, pp 101-114.

[113] See www.workcover.vic.gov.au (Employers section, About Premium 2001). For more detail, see Victorian WorkCover Authority Annual Report 2000-2001, pp 28-29.

WorkCover itself must, as soon as possible after 31 December (but not later than 28 February) submit to the Minister an operating and financial report. WorkCover must ensure that this report is publicly available within 14 days after it is submitted to the Minister (section 34A, AC Act).

The June 2001 Report of the Victorian Auditor-General found that during the 6-month period to 31 December 2000, the Victorian WorkCover Authority incurred an operating loss of $651 million, bringing the accumulated losses to almost $1.1 billion.[114]

The funding ratio of WorkCover was 88% at 30 June 2001, an improvement from 81% at December 2000.[115] The Report also noted that WorkCover's unfunded liabilities reduced by $391 million to $683 million during the six months from December 2000 to June 2001 and that WorkCover is expected to reach full funding by June 2004. [116]

However, as at 30 June 2002, the Victorian workers compensation scheme had a funding ratio of 87% and unfunded liabilities of $781 million.[117]

Queensland

The workers compensation scheme in Queensland is a no fault scheme, with rights to make a common law claim where the employer is at fault in causing the injury. The scheme and Queensland WorkCover (WorkCover) are governed by the *WorkCover Queensland Act 1996* (WQ Act).

WorkCover is the statutory authority responsible for providing workers compensation insurance for employers in Queensland as a government monopoly[118], although certain employers may be self-insurers (see below). The liabilities of the WorkCover scheme are guaranteed by the Queensland Government.[119] Private insurers have no involvement, either as underwriters or agents, with the WorkCover scheme.

In May 2000, the commercial and regulatory functions of WorkCover were separated with the establishment of 'Q-Comp' as the regulator of the scheme.

Section 5 of the WQ Act provides that it is intended that the scheme be fully funded and that it meets insurance industry solvency standards. The scheme is taken to be fully funded if WorkCover is able to meet its liabilities for compensation and damages payable from its funds and accounts, and maintains minimum solvency or capital adequacy standards under the *Insurance Act 1973* (Cth) and solvency required under a regulation.[120] At the end of each financial year, WorkCover must give the Minister a report stating the extent to which the scheme is fully funded, and must seek the advice of a qualified actuary in preparing the report (section 418, WQ Act).

For the majority of employers, WorkCover sets the premium payable under a policy assessed in accordance with the method and the rate specified by WorkCover in a notice in the industrial gazette. WorkCover must first notify the Minister of the proposed specification of method or rate which is then subject to direction of the Minister (section 58, WQ Act).

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[114] Victorian Auditor-General, Report on Ministerial Portfolios June 2001, para 3.8.15 at www.audit.vic.gov.au/mp2001
[115] Victorian WorkCover Authority Annual Report 2000-2001, p 42
[116] Ibid., p 42.
[117] Victorian WorkCover Annual Report 2002, p. 39.
[118] See sections 333-335 and 338, WQ Act.
[119] Section 332 of the WQ Act provides that WorkCover represents the State, and that the government of the State guarantees every WorkCover policy or other insurance contract with WorkCover.
[120] For more detail, see WorkCover Queensland Annual Report 2000-2001, p 21.

However, certain employers may apply to be self-insurers, which allows the licensed employer to provide their own accident insurance for their workers instead of insuring with WorkCover. A self-insurer has all the liabilities that WorkCover would otherwise have for injuries sustained by their employees (section 98, WQ Act).

WorkCover may licence an employer (group or single) as a self-insurer if the employer meets certain criteria, including:

- the number of fulltime workers employed in Queensland by the employer is at least 2000;
- the net tangible assets of the employer are at least $100m;
- the employer's occupational health and safety performance is satisfactory;
- the licence will cover all workers employed in Queensland;
- the employer has given WorkCover the unconditional bank guarantee or cash deposit required under the Act; and
- the employer has reinsurance cover required under the Act; and
- the employer is fit and proper to be a self-insurer (sections 101, 102, WQ Act).

In considering whether an employer is fit and proper, WorkCover may consider any relevant matter, and must consider certain matters relating to the financial position of the employer such as its capacity to meet its liabilities, and its long-term financial viability (section 105, WQ Act). WorkCover may carry out an audit of an applicant for self-insurance or a licensed self-insurer (section 106, WQ Act).[121]

There are currently 24 self-insurers in Queensland.[122]

[121] For further provisions concerning the regulation by WorkCover of self-insurers, including conditions of licence, security and reinsurance, see sections 107-123, WQ Act.
[122] WorkCover Queensland, Annual Report 2001-2002, p 2.

South Australia

The workers compensation scheme in South Australia is a no fault scheme only, with no rights to make a common law claim.

The scheme is governed by the *Workers Rehabilitation and Compensation Act 1986* (WRC Act). The authority responsible for the administration of the scheme and occupational health and safety legislation is the South Australian WorkCover Corporation (WorkCover) governed by the *WorkCover Corporation Act 1994* (WC Act).

The objects of the WRC Act include the establishment and efficient administration of the workers rehabilitation and compensation scheme, and ensuring that the scheme is fully funded on a fair basis (section 2, WRC Act).

Functions of WorkCover include the management of funds under its control, including ensuring the financial viability of such funds (section 13, WC Act). WorkCover must keep proper accounts of its financial affairs (section 18, WC Act).

WorkCover is responsible for maintaining the Compensation Fund into which workers compensation premiums (levies) are paid, and which is applied towards the payment of compensation that WorkCover is liable to make under the WRC Act (section 64, WRC Act).

WorkCover provides workers compensation insurance for employers in South Australia as a government monopoly, although certain employers may be self-insurers.

While WorkCover provides the insurance cover for employers in South Australia, employers have the right to choose an insurance company to manage workers compensation claims. Insurers therefore operate as claims agents in South Australia, but do not play any role in the setting of premiums (levies) or the collection or investment of funds.

An employer (apart from an 'exempt employer' or self insurer) must pay a levy to WorkCover in accordance with percentages applicable to various classes of industry fixed and published by WorkCover (section 66, WRC Act). Such a percentage must not exceed 7.5% (except in certain circumstances). In fixing the percentage, WorkCover must have regard to the need to maintain the sufficient funds to satisfy the Corporation's current and future liabilities for compensation, as well as the need to make up any insufficiency in the Compensation Fund resulting from previous liabilities or from a reassessment of future liabilities (section 66, WRC Act).

Employers may apply to WorkCover for registration as an 'exempt employer' or self-insurer, so that the employer manages and is liable for its own claims[123]. In deciding whether to grant registration, WorkCover may have regard to a range of matters including whether the employer is able to meet its liabilities (section 60, WRC Act).

The WorkCover Corporation of South Australia announced, in its 2002 Annual Report, a jump in unfunded liabilities from $55 million in 2001 to $192 million in 2002[124]. Over the corresponding period, the funding ratio of the Corporation fell from 93.5% to 79.7%[125]. The situation in South

[123] See www.workcover.sa.gov.au/employers
[124] WorkCover Corporation of South Australia, Annual Report 2001-02, p. 11
[125] Ibid., p. 11.

Australia has deteriorated further. In a press release dated 12 May 2003, the WorkCover Corporation announced that unfounded liabilities had jumped and as at 31 December 2002 were $350 million[126].

If there are insufficient funds in the Compensation Fund to meet the liabilities of the Fund, the Treasurer may as required, lend money to WorkCover on such terms and conditions as the Treasurer may determine (section 64, WRC Act).

Western Australia, Tasmania, Australian Capital Territory and the Northern Territory

Approved private insurers underwrite all the workers compensation schemes in these jurisdictions. In each jurisdiction, there is a regulatory agency responsible for the oversight of the insurers and for the monitoring of the workers compensation scheme.

Western Australia[128]

The workers compensation scheme in Western Australia is a no fault scheme, and seriously injured workers may make a common law claim. The scheme and the Workers Compensation and Rehabilitation Commission (known as WorkCover WA) are governed by the *Workers Compensation and Rehabilitation Act 1981* (WCR Act).

WorkCover administers the workers compensation scheme in WA and is responsible for regulating and monitoring the performance of approved insurers under the WCR Act. WorkCover has the specific function of obtaining from all insurers and self-insurers information and returns necessary for the better administration of the scheme (section 100, WCR Act).

An insurer may be approved by WorkCover to issue workers compensation policies if it is carrying on business in the State under the *Insurance Act 1973* (Cth). Insurers are therefore subject to regulatory oversight by the Australian Prudential Regulation Authority. An insurer must also meet certain requirements such as having sufficient financial resources (section 161, WCR Act). Approved insurers must provide WorkCover with certain information in relation to policies issued on a monthly basis (section 171, WCR Act).

Recommended premium rates are set and reviewed annually by the Premium Rates Committee, which operates independently from WorkCover (see sections 147, 151 and 151A, WCR Act).[129]

Insurers may load a recommended premium up to a set percentage and full discounting is allowed. WorkCover may approve a loading in excess of the set percentage (see sections 152-153A, WCR Act).[130] Insurers will determine adjustments to recommended premiums based on the claims experience and the risk factor of the individual employer.[131]

[126] "No bail out necessary for WorkCover", Media release dated 12 May 2003, see: www.workcover.com
[127] WorkCover Corporation, Annual Report 1999-2000, p 3 at www.workcover.sa.gov.au
[128] A comprehensive review of the workers compensation scheme in WA has been recently undertaken at the request of the current WA Minister for Labour Relations. For the full text of the Guthrie Report 2001, *Evaluation of Workers' Compensation in WA*, see www.workcover.wa.gov.au
[129] See WorkCover Annual Report 2000-2001, p 54.
[130] See Heads of Workers' Compensation Authorities, Comparison or Workers' Compensation Arrangements in Australian Jurisdictions, July 2000, at www.hwca.org.au, p 7.
[131] For more detail, see www.workcover.wa.gov.au/SchemeInfo/faq.htm

Tasmania

The workers compensation scheme in Tasmania is a no fault scheme with common law rights.

The WorkCover Board of Tasmania (WCB) is responsible for the administration of the scheme under the *Workers Rehabilitation and Compensation Act 1988* (WRC Act).

The WCB has the specific functions of reviewing the performance of licensed insurers and self-insurers, and the review and monitoring of premium rates charged by licensed insurers (section 10, WRC Act).[132] The WCB may do all things necessary and convenient in connection with the performance of its functions under the Act (section 11, WRC Act).

The WCB may only license an insurer to issue workers compensation policies if it is satisfied, among other things, that the insurer will set premiums which reflect the claims experience of an employer, and if the insurer is financially viable (section 101, WRC Act). A licence is subject to conditions imposed by the WCB (section 102, WRC Act).

'Insurer' is defined under the WRC Act to mean a body corporate authorised under the *Insurance Act 1973* (Cth) to carry on insurance business, and licensed insurers under the scheme are therefore subject to oversight by the Australian Prudential Regulation Authority.

The WCB may direct an insurer making an application for a licence, a licensed insurer, or self-insurer to provide it with such information it thinks fit in relation to the granting or renewal of licences (section 109, WRC Act). Every licensed insurer and self-insurer must provide the WSB with returns as prescribed by the regulations (section 114, WRC Act).

The WCB may by notice in writing require any person to provide it with information reasonably required to enable it to carry out its functions (section 152A, WRC Act).

Northern Territory

The workers compensation scheme in the Northern Territory is a no fault scheme only.

The Work Health Authority (WHA) is responsible for the administration of the scheme under the *Work Health Act* (WH Act).

The WHA has such powers as are necessary to enable it to perform its functions under the Act (section 11, WH Act). The WHA has the specific function of approving insurers to provide workers compensation insurance in the Northern Territory (section 10, WH Act).

An 'insurer' is defined under the WH Act as a body corporate authorised under the *Insurance Act 1973* (Cth) to carry on insurance business, or the Territory Insurance Office (section 3, WH Act). Insurers authorised under the *Insurance Act* are subject to regulatory oversight by the Australian Prudential Regulation Authority.

The WHA may approve an insurer under the Act, and in doing so must take into consideration certain matters including the insurer's ability to provide the insurance service, and the financial viability of the

[132] For detail concerning premium rates and licensed insurer profitability, see the Scheme Operation and Performance Report in the WSB Annual Report 1999-2000 at www.wsa.tas.gov.au/wsa/annual/1999_00

insurer (section 119, WH Act). An employer may apply for approval to self-insure (section 120, WH Act).

The WHA may direct an insurer or employer who has made an application under sections 119 or 120, or an approved insurer or self-insurer to provide it with such information relevant to approvals (section 122, WH Act).

The WHA may, by notice in writing, require a person to provide information necessary for the performance of its functions under the Act (section 14, WH Act).

The Scheme Monitoring Committee (section 141, WH Act) is required under the Act to perform certain functions in relation to the scheme, including:

- monitoring the viability and performance of the scheme;
- monitoring premium rates offered for workers compensation in the Territory;
- receiving submissions from persons relating to premium rates charged for workers compensation insurance policies in the Territory or elsewhere;
- monitoring and publishing data on overall underwriting results; and
- advising the Minister on the basis of its consideration of information obtained by it (section 145, WH Act).

The Committee may, by notice in writing require a person to furnish it with information reasonably required to enable it to carry out its functions (section 147, WH Act).

Australian Capital Territory

The workers compensation scheme in the Australian Capital Territory is a no fault scheme, with unlimited common law rights

ACT WorkCover (WorkCover) is responsible for the administration of the scheme under the *Workers' Compensation Act 1951* (WC Act).

The Minister has the power to approve insurers to provide workers compensation insurance under the Act (section 17, WC Act).

The Minister may exempt an employer from the requirement to take out an insurance policy with an approved insurer if the Minister is satisfied on reasonable grounds that the employer is able to meet from the employer's own resources any liability under the Act (section 17C, WC Act).

The Minister may by notice in writing require an insurer or an exempt employer to furnish the Minister with such particulars relating to the operation of the Act, as are specified in the notice (section 18A, WC Act).

The *Workers' Compensation Supplementation Fund Act 1980* (ACT) provides for a Fund to be used for payment of compensation in the event that an insurer is unable to provide the indemnity required

under the relevant policy issued. Employers must pay a prescribed surcharge in addition to the basic premium, which goes towards the Fund.[133]

The *Workers Compensation Act 2001* (ACT) was enacted in response to a comprehensive review of the scheme by the Workers' Compensation Monitoring Committee of March 2000 and a report of the Legislative Assembly's Steering Committee on Workers' Compensation of September 2000 (with significant stakeholder consultation).

[133] For more detail, see the Annual Report 2000-2001 of ACT WorkCover at www.workcover.act.gov.au