22 January 2004

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Mr Mike Woods
Presiding Commissioner
Productivity Commission
Locked Bag 2, Collins Street East
MELBOURNE VIC 8003

Dear Mr Woods

Subject: WorkCover Queensland response to Productivity Commission Interim Report

Thank you once again for the opportunity to review the Productivity Commission's Interim Report on National Workers' Compensation and Occupational Health and Safety Frameworks. As promised, I have attached WorkCover Queensland's detailed response to the Interim Report.

WorkCover Queensland strongly supports a consistent approach to the management of workers' compensation benefits and premiums in general. Equally however, WorkCover Queensland prides itself as being the only fully funded workers' compensation insurer in Australia that satisfies any and all government prudential requirements. As such, WorkCover Queensland would not wish to see its hard won position eroded by any iniquitous imposition of a national workers' compensation scheme.

WorkCover Queensland prides itself on a successful system run by excellent people. We hope that this detailed submission will provide valuable feedback for the Commission as it prepares its final report.

If you have any queries, please do not hesitate to contact me directly.

Yours sincePely

Ian Brusasco AM
Chairman

Cc Hon. Gordon Nuttall, MP
Minister for Industrial Relations

WorkCover QUEENSLAND

WorkCover Queensland Response

Productivity Commission Interim Report
National Workers' Compensation and Occupational Health and Safety Frameworks

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Executive Summary

WorkCover Queensland is not a profit-driven insurer. Put simply, its philosophy is the maintenance of low premiums for employers coupled with the best possible benefits for injured workers. WorkCover Queensland has achieved this goal while maintaining a fully-funded scheme.

In 2002-2003 there was a 13% average increase in workers' compensation premiums across Australia (AON Risk Management Survey, 2002-2003). WorkCover Queensland is proud not to have contributed in any way to this increase. Queensland employers continue to enjoy an average premium rate that is the lowest of any Australian state, having reduced from 2.145% in 1998 to a rate of 1.55%. This reduction in the average premium rate has been maintained since 2000. At the same time, statutory claim and common law component benefits to injured workers increased. For example, statutory maximum limits have been increased, injury management initiatives have improved rehabilitation for common law claimants, and single injury assessments have been introduced to simplify access to common law.

When comparing the Queensland average premium rate to other states which include the 9% superannuation guarantee levy in definition of wages, the WorkCover Queensland average net premium rate equates to 1.44%. While the Comcare advertised average rate of 1.13% is lower than the Queensland rate, this rate does not include any heavy industry or the Australian Defence Forces.

Before any changes are proposed to the current workers' compensation systems in Australia, the Federal Government and the Productivity Commission should seriously consider those aspects of the Queensland system which have proven effective and workable. WorkCover Queensland has successfully achieved a balance between the needs of injured workers and employers, while still maintaining an extremely viable insurance business. This fully-funded, commercially focussed State Government organisation should be preserved at all costs.

At this stage, each Australian workers' compensation scheme is at a significantly different stage of evolution, ranging from fully managed in-house (Queensland) to a hybrid, internally underwritten and externally claim managed scheme (New South Wales, South Australia and Victoria), to a fully privately underwritten scheme (Tasmania, the Northern Territory and Western Australia). It is difficult to see how a national framework can be suggested until each of these jurisdictions are able to independently maintain a fully-funded 'level playing field' (McKinsey Review of NSW Workers' Compensation scheme in Interim Report, page 241). When all jurisdictions are operating on a level playing field, fairness and equity between states becomes less of an issue.

Overall, WorkCover Queensland supports the need for consistency and a number of the Commission's recommendations in relation to fundamentals of a workers' compensation scheme. Despite this support, we are strongly opposed to many of the recommendations made, in particular the recommendation to remove common law access, recommendations regarding cross-subsidisation, and recommendations for the Commonwealth development of a national workers' compensation scheme to operate in conjunction with existing state and territory schemes. WorkCover Queensland believes that the introduction of this additional layer of regulation is flawed, does not balance the needs of all stakeholders, will substantially impact on the viability of the Queensland scheme, and is not in the best interests of the public. The problems faced by workers' compensation schemes would be far better overcome by sharing 'best practice' and experience of existing schemes through a formalised version of the current Heads of Workers' Compensation Authorities (HWCA).

There is no doubting the need for consistency in workers' compensation fundamentals such as definition of worker, definition of wages base, definition of injury, premium assessment, statutory entitlements, access to common law and rights of review. Implementing a framework to provide this consistency will be difficult, so expertise and best practice from existing schemes must be utilised in order to balance benefits for injured workers and employers alike.

The benefits of consistency across jurisdictions include but are not limited to:

- common understanding by all external service providers (medical, allied health, legal) and other stakeholders
- greater efficiencies and lower costs for employers
- certainty and a level playing field for injured workers.

It would appear that the benefits of consistency apply equally to Occupational Health and Safety (OHS) issues. However, OHS is not within the domain of WorkCover Queensland and hence we leave such comments to the appropriate OHS authorities.

There are several aspects of the recommendations that WorkCover Queensland supports, based on the information provided. These include consistency of access and coverage, injury management, statutory benefits structures and dispute resolution. When more in-depth information is provided, WorkCover Queensland believes these recommendations should be subject to further analysis and discussion.

Pleasingly, WorkCover Queensland is already demonstrating success in these areas. Best practice initiatives such as Experience Based Rating (EBR) premium calculation

methods, definition of worker results test, new interstate worker legislation and return to work programs have already earned praise from key stakeholder groups. WorkCover Queensland has worked hard over the past six years to achieve success and expertise in these areas. During this time, we have consistently maintained full funding, stable premiums and stable benefits. We would not wish to see our hardearned industry leader status eroded through implementation of some of the Commission's proposed recommendations.

Notwithstanding our support for consistency across jurisdictions, WorkCover Queensland believes that many of the recommendations made in the report are flawed. Far too many unanswered questions remain for us to have any confidence that implementation of the current recommendations will result in workable and acceptable outcomes for all stakeholders.

The recommendations for self-insurance fail to:

- quantify the relevant thresholds of entry and exit at steps one, two and three
- define the medium and long-term periods
- identify the relevant prudential, claims management, OHS and other requirements at each step.

The introduction of the proposed model will only add an unnecessary layer of regulation to insurance schemes that need to be as close to their customers as possible to be successful.

It would appear that the fundamental premise of the recommendations is that of employer 'choice', with little regard to the injured worker, who would appear to be subject to the whim of employer decisions. **While choice is admirable and important in promoting competition, surely the most important aspect of a good workers' compensation scheme is balancing the needs of injured workers and employers.** WorkCover Queensland believes that the Commission's suggested scheme is not viable in its current form, and that 'choices' made by organisations opting into the scheme may not necessarily be for the long-term benefit of their injured workers.

WorkCover Queensland can appreciate the desire of larger national companies to self-insure (nominally step one in the Interim Report), and through the Queensland scheme such companies already have the ability to do so. However, a substantial exit of employers from any scheme will detrimentally impact the financial viability of the scheme they have left.

Since 1998, WorkCover Queensland has seen the exit of 24 employers to self-insurance. These employers represented 15% of premium and claims costs.

Downsizing and centralisation of regional office functions has been necessary to cope with the financial impact of lost economies of scale. If it had not been for this loss of business, WorkCover Queensland would have been able to deliver even lower premium rates for employers and more improved service delivery and benefits for injured workers.

To further erode the premium pool potentially jeopardises the medium and long-term viability of the scheme. Despite assertions to the contrary by the Commission, this is made abundantly clear in the actuarial advice of Taylor Fry.

The first area affected by any further loss of business to self-insurance is likely to be WorkCover Queensland's regional presence. WorkCover Queensland maintains regional presence in 24 locations throughout Queensland - something unsurpassed by any other workers' compensation jurisdiction in Australia. WorkCover Queensland continues to enhance the local knowledge acquired in regional areas. We have fostered a regional workforce of skilled people in the areas of premium, claims and case management. Our regional success has been strongly endorsed by external customer surveys of injured workers and employers in remote areas.

There is a limit to the amount of fixed infrastructure that can be eliminated from a commercially driven insurance operation when a significant amount of business exits. WorkCover Queensland's infrastructure provides services in regional offices as well as the Brisbane metropolitan area, and cannot be easily further downsized. Economies of scale and scope will also be lost with a smaller premium pool. The end result will inevitably be increased claims management costs given that WorkCover Queensland is not prepared to diminish its service levels to injured workers and employers. These increased costs will ultimately need to be passed on to employers through premium increases.

There is a perception that private external claims managers deliver a better service than a publicly funded insurer. This is incongruous with the profit-driven requirement of a private company compared to the cost recovery basis of a public entity. The results of the National Return to Work Survey (Campbells, 2003, page 44) prove that WorkCover Queensland is on par with or better than those states that outsource claims management and underwriting.

WorkCover Queensland believes that its service provision on claims management to injured workers is unsurpassed and accordingly has no intention of outsourcing this fundamental and successful component of its business.

The extension to this is the issue of privatised insurance underwriting. In his 1997 Review of New South Wales WorkCover Scheme, Grellman mentioned concerns that

privatisation would encourage cross-subsidisation with other insurance products, resulting in "reckless competition among licensed insurers" (Grellman, 1997, page 69). There is a continued risk that private underwriters will utilise workers' compensation insurance on a loss leader basis to acquire other, more viable business from their customers. WorkCover Queensland prides itself on providing only workers' compensation insurance to its customers. Our people are therefore free to concentrate on providing the best possible service to employers and injured workers, instead of on pushing other product lines.

The Interim Report also recommends that there should be no cross-subsidisation of premiums. This is an unrealistic goal. There will always be some element of cross-subsidisation in any risk-based underwritten insurance scheme. Cross-subsidisation exists in order to protect businesses, particularly small and medium enterprises (SME's) from the effect on their business of unusually high cost claims. While larger businesses pay premiums that closely reflect their claims costs, WorkCover Queensland protects small businesses from massive premium fluctuations through the use of a sizing factor. There are various arguments for and against cross-subsidisation, which exists in most public utilities. For example, to post a letter from Cairns to Kalgoorlie costs 50 cents, the same as the cost of a letter posted from one side of Brisbane to the other. Philosophically, WorkCover Queensland believes there is a social responsibility to ensure that workers' compensation is managed so that costs and benefits are borne equitably by all participating parties.

All schemes provide weekly statutory benefit entitlements. In some jurisdictions, these benefits continue for the balance of a working life. Over the years, respective governments in Queensland have maintained the provision of common law access for severely injured workers where the provision of statutory benefits is inadequate to compensate the needs of long-term, seriously injured workers.

WorkCover Queensland continues to maintain the view that genuinely, seriously injured workers should retain the right to common law benefits. If access to common law was removed from workers' compensation environments, it would not preclude those genuinely injured workers from seeking similar common law access through public liability forums. This would cause cost shifting and potential increases to already massive public liability premiums.

WorkCover Queensland agrees that consistency is a major problem for Australia's current workers' compensation system. The Interim Report successfully identifies this problem, but fails to evaluate possible solutions before making recommendations. WorkCover Queensland believes that the problem of consistency across jurisdictions could be addressed through the formation of a small, professional committee to address such issues. The nucleus of this committee could emanate from the Heads of Workers' Compensation Authorities (HWCA) or the Workplace Relations Ministers.

Ideally, legislation could be enacted to formalise HWCA, which currently has neither the formal mandate nor the power to make recommendations and implement. Clearly this committee would need fair representation from each state, and should not be driven solely out of the New South Wales or Victorian arenas.

In summary, WorkCover Queensland reiterates that there are far too many unknowns and unanswered questions to rely on many of the recommendations in this Interim Report, in particular unilateral movement to a national workers' compensation framework. WorkCover Queensland would defy any other Australian workers' compensation jurisdiction, private underwriter or claims manager to categorically and quantifiably demonstrate delivery of better service to all of its stakeholders by way of premium and claims management - all while maintaining a level of solvency that satisfies all prudent financial requirements.

The following pages contain more detailed responses to the Commission's Interim Report by chapter.

Response to Chapter 4: National frameworks for workers' compensation

Any national system of workers' compensation should incorporate the best possible benefits for workers at an affordable price for employers. WorkCover Queensland supports a system of workers' compensation where there is more consistency amongst jurisdictions or schemes in key principles and definitions. A more formal system of cooperation amongst the jurisdictions is necessary to achieve the best outcomes for injured workers and their employers.

Some examples of areas that WorkCover Queensland believes need to be more consistent across states include:

- definition of worker/subcontractor and employer/employee
- determination of cross-border entitlements
- definition of wages base
- assessment of premium
- causal link between injury and work
- access to common law
- statutory entitlements
- rights of review

Whilst WorkCover Queensland supports increased consistency and cooperation amongst jurisdictions, we do not support the introduction of the three-step model proposed by the Commission. Although the Interim Report successfully identifies consistency as the major problem in Australia's current workers' compensation systems, it ignores evaluation of possible alternative solutions before making these unfounded recommendations.

WorkCover Queensland believes that the individual states and territories should be allowed to administer the relevant workers' compensation system under the guise of a more consistent set of principles and definitions. There is potential for WorkCover schemes in other states to benefit from the Queensland experience, and for WorkCover Queensland to benefit from best practice initiatives being implemented in other states.

The problem of consistency across jurisdictions would be far better addressed through the formation of a small, professional committee. The nucleus of this committee could emanate from the Heads of Workers' Compensation Authorities (HWCA) or the Workplace Relations Ministers. Ideally, legislation could be enacted to formalise HWCA, which currently has neither the formal mandate nor the power to make and implement recommendations. Clearly, this committee would need fair representation from each state, and should not be driven solely out of the New South Wales or Victorian arenas.

It would appear that the fundamental premise of the recommendations is that of employer 'choice', with little regard to the injured worker who would appear to be subject to the whim of employer decisions. **While choice is admirable and important in promoting competition, surely the important aspect of a good workers' compensation scheme is balancing the needs of injured workers and employers alike.** WorkCover Queensland believes that the Commission's suggested scheme is not viable in its current form, and that 'choices' made by organisations opting into the scheme may not necessarily be for the long-term benefit of their injured workers.

The report does not:

- quantify the relevant thresholds of entry and exit at steps one, two and three
- identify the relevant prudential, claims management, OHS and other requirements at the various steps one, two and three
- define the medium and long-term periods
- quantify or substantiate purported potential savings, benefits and efficiencies
- demonstrate how relevant cost efficiencies will be achieved.

While the Interim Report successfully identifies consistency as one of the major problems facing Australia's current workers' compensation system, the Commission fails to evaluate the pros and cons of possible solutions before making recommendations.

The following pages will discuss some of the concerns that WorkCover Queensland has with the suggested three-step system, including:

- impact on WorkCover Queensland
- impact on workers
- impact on employers
- other issues

These issues will be discussed on the following pages.

Impact on WorkCover Queensland

WorkCover Queensland believes that introduction of the Commission's proposals will adversely impact its premium pool and associated economies of scale, jeopardise provider relationships, cause confusion over transfer of claims between insurers, and increase potential risks to the Queensland scheme.

Potential impact on premium pool and economies of scale

The Commission's proposed changes will have a significant impact on the WorkCover Queensland premium pool. WorkCover Queensland premiums are calculated based on the estimated fixed and variable costs to be incurred during the year. The rates set represent the percentage of scheme wages needed to fund the scheme, while maintaining solvency ratios.

Since 1998, WorkCover Queensland has been impacted by the progressive exit of 24 self-insuring employers. These employers represented 15% of premium and claims costs, so downsizing and centralisation of regional office functions was necessary to cope with the financial impact of lost economies of scale. If it had not been for this loss of business, WorkCover Queensland would have been able to deliver even lower premium rates for employers and more improved service delivery and benefits for injured workers. To further erode the premium pool potentially jeopardises the medium and long-term viability of the scheme. Despite assertions to the contrary by the Commission, this is made abundantly clear in the actuarial advice of Taylor Fry.

The first area affected by any further loss of business to self-insurance is likely to be WorkCover Queensland's regional presence. WorkCover Queensland maintains regional presence in 24 locations throughout Queensland - something unsurpassed by any other workers' compensation jurisdiction in Australia. Over the last six years, WorkCover Queensland continues to enhance the local knowledge acquired in regional areas. We have fostered a regional workforce of skilled people in the areas of premium, claims and case management. Our regional success has been strongly endorsed by external customer surveys of injured workers and employers in remote areas.

There is a limit to the amount of fixed infrastructure that can be eliminated from a commercially-driven insurance operation when a significant amount of business exits. WorkCover Queensland's infrastructure, which includes the provision of services in regional offices as well as the Brisbane metropolitan area, would be extremely difficult to downsize further. Economies of scale and scope will also be lost with a smaller premium pool. The end result will inevitably be increased claims management costs given that WorkCover Queensland is not prepared to compromise or diminish its service levels to injured workers and employers. These increased costs will ultimately need to be passed on to employers through premium increases.

Overall, if the Commission's recommendations are implemented, there will be a substantial impact on the WorkCover Queensland premium pool. This will force

further regional downsizing and potentially increase premiums in order to maintain the excellent service offered to injured workers and employers.

Potential impact on provider relationships

Implementation of the Commission's proposals would see greater numbers of insurers in a more open marketplace. Increased numbers of insurers attempting to build relationships with doctors and allied health professionals may destroy the goodwill that WorkCover Queensland has created with these parties. WorkCover Queensland currently uses its market leader status to influence rehabilitation, medical and legal provider service levels and quality. Any changes to this market leader status will potentially result in less access to these providers, and subsequently lower service levels to injured workers.

Confusion over transfer of claims between insurers

Implementation of the Commission's recommendations will be potentially confusing for both injured workers and insurers. Injured workers will be unsure who to lodge a claim with, and insurers will potentially be unable to allocate responsibility for claim tails and any funding deficiencies.

Robust systems will need to be in place to manage transfers of claims between insurers so that:

- workers know who is insuring them
- responsibility can be allocated for the claim tail
- responsibility can be allocated for any funding deficiencies.

Potential risks to the Queensland scheme

WorkCover Queensland believes that the expansion of self-insurance will increase potential risks to the Queensland scheme. Prudential and other requirements must be met by self-insured employers at the entry level and on an ongoing basis to minimise exposure in the case of a licence cancellation or revocation, or any other event that may cause financial failure. Recent collapses of major companies such as Ansett Australia, HIH and OneTel are a timely reminder of the potential dangers in this area. Our response to Chapter 11 Self-Insurance also deals with this issue, and gives examples of cases where WorkCover Queensland has taken on the burden of a self-insurer's claim tails.

Impact on workers

WorkCover Queensland believes that implementation of the Commission's suggested recommendations will result in a number of issues, including:

- loss of benefits for injured workers
- lower levels of service for injured workers
- an imbalance between the interests of injured workers and employers
- loss of regional representation.

Loss of benefits for injured workers

WorkCover Queensland believes that the creation of a level playing field for statutory benefits comes at the expense of common law rights in the models proposed. This issue is discussed in more detail in our response to chapter 7 common law access.

Lower levels of service for injured workers

We believe that an increased number of insurers in any national marketplace would result in lower levels of service to injured workers. No insurer wants to be liable for a condition that has previously been accepted by another insurer. WorkCover Queensland is currently the insurer for 85% of Queensland's marketplace. Because of this, crosschecking before liability can be accepted and payments made is predominantly internal. This means fast turnaround for workers who are often depending on acceptance of their claim to meet financial commitments after an injury. The opening up of the workers' compensation insurance marketplace as recommended by the Commission will create the need for an additional layer of checks, reducing turnaround times and decreasing service levels offered to injured workers.

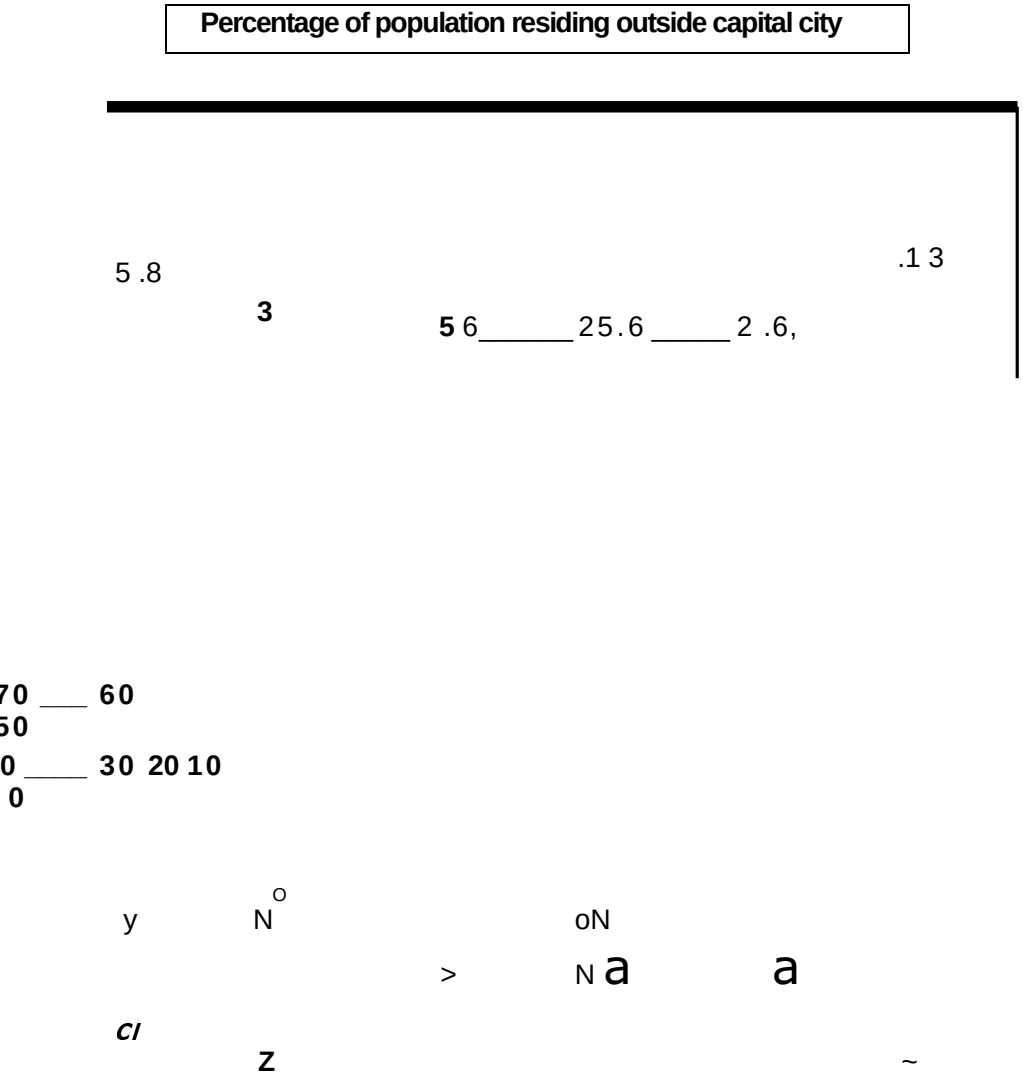
Independent survey results demonstrate WorkCover Queensland's commitment to excellent service and customer satisfaction. In fact, WorkCover Queensland had the highest results of any Australian workers' compensation jurisdiction for six out of eight customer satisfaction categories - response to enquiries, provision of accurate information, helpfulness, understanding the situation, communication, and advice about claim. (Campbell Research & Consulting Pty Ltd, 2003, page 44). Colmar Brunton survey results show that WorkCover Queensland has been extremely successful in achieving a balance between the satisfaction of employers and injured workers.

Imbalance between the interests of injured workers and employers

Overall, implementation of the Commission's recommendations will create an imbalance between the interests of injured workers and employers. Lower costs for large national employers are being purported at the expense of slower claims turnaround, loss of common law rights and reduced service levels. This represents a breakdown in the fundamental premise of WorkCover schemes across Australia - to balance the needs of employers and injured workers.

Loss of regional representation for employers and workers

The Queensland Government's August submission to the Productivity Commission demonstrated that a substantial proportion of Queensland's workforce resides outside a capital city:



(Adapted from ABS Labour Force Survey, in Queensland Government Submission to the Productivity Commission August 2003, page 11).

In 2002-2003, WorkCover Queensland received a total of 72,864 claims, of which almost 30% were in regional areas outside South East Queensland. (WorkCover Queensland Annual Report, 2003, page 29). These claims were effectively serviced by WorkCover Queensland's strong network of 24 regional offices. This network provides accessible services and information to both injured workers and employers, as well as providing local employment, access to local knowledge and a local skills base.

If the Commission's recommendations were to be implemented, the result would be a less accessible service for injured workers and employers. Private insurers would not have the necessary infrastructure to cope with service provision in regional areas.

Impact on employers

WorkCover Queensland believes that introduction of the Commission's proposals will adversely impact employers in a number of areas. These areas include affordability, consistency for unincorporated employers and loss of regional representation.

Affordability

Despite purported potential savings for large, national employers, WorkCover Queensland believes that the scheme described by the Commission will be unaffordable without massive premium increases. Based on the New South Wales experience detailed in the Grellman Report, over time statutory claims costs will increase. Without the availability of common law to reduce claim tails, these increased costs will become unaffordable without massive increases in premium for those employers who have opted to be part of the Comcare scheme.

WorkCover Queensland acknowledges the concern of the Commission with Queensland's limited statutory benefits structure, however "available data indicates very few injured workers actually reach the maximum benefits available". (Queensland Government Submission to the Productivity Commission August 2003, page 19). The Queensland Government's submission also stated that:

> *Current scheme wide statistics (WorkCover and self-insurers) indicate that the majority of claims are finalised within the first 26 weeks... Only 3% of claims have more than a year off work and very few claims (58 claims in 2000-2001 and 120 claims in 2001-2002) exceed 2 years' duration... trend analysis indicates that 3% to 4% of WorkCover Queensland claims progress to common law.*
> *(Queensland Government Submission to the Productivity Commission August 2003, page 19).*

An integral design feature of the well-run and fully-funded Queensland scheme is that benefits are underwritten for a defined period. Claimants who would otherwise be on lifetime statutory benefits are able to finalise their claims and obtain a personalised assessment of loss through a common law claim. These features allow the scheme to be costed and for reasonable and affordable premium rates to be set. WorkCover

Queensland believes that for any new scheme to be affordable for Australian businesses there must be an end point for benefit entitlements.

The recommendations of the Commission will also potentially increase premiums for Queensland employers, in particular small to medium sized businesses. As stated earlier, WorkCover Queensland premiums are currently the lowest on average in Australia, with the average net premium rate set to continue at 1.55% for the fourth consecutive year in 2003-2004. According to the ABS, more than 96.5% of Queensland businesses are small businesses, accounting for more than 50% of Queensland's total employment. (ABS Small Business Survey 1321.0, 2003, page 11).

Lack of consistency for unincorporated entities

Implementation of the Commission's recommendations using the corporations approach may also create consistency issues for unincorporated entities who would choose to be covered under the Comcare scheme.

Loss of regional representation

As mentioned above, if the Commission's recommendations were implemented, the reduced economies of scale and inability of potential national insurers to service rural areas would result in a loss of regional representation not only for injured workers, but also for employers.

Other issues

Other potential issues include:

- downsides of privatisation
- agenda of the Commission
- direct modelling on the Comcare system
- impact on Comcare rates when 'heavy industries' enter the scheme
- cost and funding methodology
- medium to long-term viability of the national scheme
- potential cost-shifting to public liability insurers
- latent onset injuries
- loss of best practice

Downsides of privatisation

WorkCover Queensland believe there could be a number of drawbacks to privatisation of the workers' compensation insurance market. These include:

- loss-leader and cost-subsidisation strategies that may be employed by private insurers in an effort to gain product, industry or regional market share
- price-setting or 'cartel-like' operations once market dominance is achieved
- profit-taking by commercial insurance companies, adding around 15% to existing prices
- multiplier effect, as private insurance companies outsource claims management and rehabilitation to other private providers, who also take a 15% profit margin
- additional supervision required to monitor and regulate privatised insurers will result in additional costs being passed on to employers.

Agenda of the Commission

The political agenda of the Commission seems to have been more far-reaching than uniformity across workers' compensation systems in Australia. It would appear the recommendations are primarily aimed at 'choice' for large national employers, with little regard to injured workers and small and medium-sized businesses who remain in the state-based schemes. WorkCover Queensland believes that the opinions of all stakeholders should be given equal consideration and an unbiased model developed using elements of best practice and the experience of the current state-based schemes.

Direct modelling on the Comcare system

WorkCover Queensland questions direct modelling on the Comcare system following recent adverse public commentary on increased claims costs and premium. The Commission's proposals will only introduce another layer of regulations for stakeholders. WorkCover Queensland's system has many positive attributes and is obviously operating successfully. We question any new system that has not been modelled on 'best practice' from existing state-based schemes or a scheme that has been proven effective. This is particularly imperative in light of Comcare's proven cost blow-out and premium-setting issues.

Impact on Comcare rates when 'heavy industries' enter the scheme

Comcare currently insures only Commonwealth employees, including members of the Australian Defence Force and some private sector organisations. Defence force

premium rates are not included in calculation of Comcare's advertised 'average premium rate' of 1.13%. WorkCover Queensland questions Comcare's ability to seamlessly administer a change that would see them covering 'heavy' industries such as the mining, and building and construction industries. Workers in these industries are more likely to suffer work-related injuries than the majority of Comcare's insured white-collar office workers. Employers who join a national system of workers' compensation run by Comcare are likely to suffer premium rate rises as Comcare struggles to deal with these changes.

Cost and funding methodology

As mentioned earlier, further clarification is needed on the Commission's proposed cost and funding methodology.

Medium to long-term viability of the national scheme

WorkCover Queensland industry experts question whether commercial underwriters will be willing to underwrite a scheme with potentially unlimited 'tail' costs. The New South Wales experience has proven that this type of scheme is not commercially viable. This may leave the Commonwealth 'holding the ball' when the scheme fails, and national employers under the new scheme being given premium increases instead of the promised reductions.

Potential cost shifting to public liability insurers

The proposal to reduce or eliminate common law access has the potential to cause cost shifting to other general insurance, in particular public liability insurers. In turn, this will increase public liability costs, an area where the federal government has been working hard to instigate reforms. This will be discussed in greater detail in our response to chapter 7.

Latent onset injuries

The Commission appears to have assumed that all injuries are the same. There is no consideration in the Interim Report as to who will be responsible for latent onset injuries in the new scheme. In recent years, incidences of mesothelioma and asbestos-related diseases have contributed to significant claims costs for the scheme. Further clarification of the proposed management of claim tails in any new national scheme is vital.

Loss of best practice

The national scheme being suggested by the Commission does not take into account the best practice initiatives happening in existing state-based workers' compensation schemes all over Australia. If the commission intends to take the major step of redesigning our national workers' compensation framework, then this design should incorporate all of the knowledge, expertise and experience of WorkCover authorities in the state-based systems.

Overall, WorkCover Queensland does not believe that the Commission's suggested three-step system, modelled on the Comcare system, is the best solution for the problems that exist in the current workers' compensation system. For the recommendations of any review to be fair and unbiased, all options must be evaluated, and appropriate weight needs to be given to the opinions and expertise of all stakeholders involved.

Response to Chapter 5: Defining access and coverage

WorkCover Queensland agrees with many of the consistency issues raised in this chapter, including:

- worker definition issues
- determination of work-relatedness and contribution of employment issues
- changing work arrangements
- consistency with other relevant legislation.

Worker definition issues

WorkCover Queensland agrees with the issues raised regarding the need for a consistent worker definition, and acknowledges that it is difficult to achieve consistent and workable outcomes. The Commission makes a number of recommendations regarding the definition of a worker:

> *The Commission recommends the following as principles to use when defining an employee, to determine coverage under compulsory workers' compensation schemes:*
>
> - *employer control, recognising that the common law "contract of service" provides a solid basis for defining an employee in most situations;*
> - *certainty and clarity, as coverage under workers' compensation should be clear to both worker and employer at the commencement of the work relationship. For certain groups of workers and types of work relationships, deeming may be necessary;*
> - *administrative simplicity, to reduce the costs of administration and enforcement;*
> - *consistency with other legislation, to capture significant informational benefits and cost savings; and*
> - *durability and flexibility, to deal with a wide variety of, and changing, work arrangements.*
>
> *(Interim Report, page 125)*

WorkCover Queensland believes that the results test model is an effective means of achieving the recommendations of the Commission. Practical application of the results test has created certainty for employers and workers regarding their rights and obligations.

The results test circumvents the traditional ‘contract of service’ test. An individual who would traditionally be considered a worker because he or she is engaged under a contract of service would fail the results test, making them a worker under the Queensland model. In addition to incorporating traditional workers, the results test also responds to the changing dynamics of employment arrangements by broadening the group of individuals entitled to workers’ compensation. The test identifies people who are not workers, giving all other individuals an entitlement to compensation. This reduces the need for multiple provisions deeming specific individuals to be workers, as well as reduces employer administration and compliance costs.

WorkCover Queensland has found that staff can understand and apply the results test with more ease than applying the common law ’Contract of Service’ tests. The results test is based on concepts used by the Australian Taxation Office (ATO).

A HWCA working party is currently exploring options to achieve worker definition consistency, and at this stage will model their recommendations on the Queensland definition. A joint project is also underway to achieve consistency of remuneration base.

Work-relatedness and contribution of employment

It is often difficult to determine the contribution of employment to a particular disease or injury. WorkCover Queensland agrees with the issues raised in the section on Diseases with a number of contributing factors (Interim Report, page 130-131). WorkCover Queensland also agrees with the issues raised in the section on Contribution of employment (Interim Report, page 131-133).

Journey claims are acknowledged as a ’grey area’ of coverage. The Commission states that:

> *"Coverage for journeys to and from work should not be provided, on the basis of lack of employer control, availability of alternative cover and the ability to be dealt with by enterprise bargaining;"*
> *(Interim Report, page 137)*

The Queensland scheme covers journey claims, however they do not impact an employer’s premium. We recognise the lack of employer control by excluding journey claims from the Experience Based Rating calculation (EBR). The costs of these claims are spread over the scheme.

Queensland’s ’at-fault, compulsory third party’ (CTP) scheme alone would not provide cover for all work-related journey claims, opening up the potential for cost

shifting to Centrelink if journey claims are removed from workers' compensation schemes. In cases where a CTP insurer accepts liability, WorkCover Queensland will recover funds from that insurer.

Recess breaks are also acknowledged as a grey area of coverage. On page 138 of the Interim Report, the Commission recommends that:

> *Coverage for recess breaks and work-related events should be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events.*
> *(Interim Report, page 138)*

Queensland also recognises the lack of employer control in this area, but retained worker entitlements to coverage during these breaks. As in the case of journey claims, the claims costs do not impact on the employer's premium. Queensland also limits exposure in that workers cannot put themselves at abnormal risk of injury during the recess.

By removing the impact of journey and recess claims from an employer's premium, the Queensland scheme retains worker rights without adversely impacting employers.

Changing work arrangements

If traditional approaches to entitlement are not adapted to rapidly changing and evolving work arrangements, the proportion of individuals who are covered by workers' compensation will be reduced. WorkCover Queensland has been responsive to ongoing developments and changes to traditional work arrangements. The results test is better adapted to deal with contemporary arrangements than contract of service criteria. WorkCover Queensland endeavours to protect worker entitlements by providing coverage for anybody who is a 'worker', even if the employer has not complied with their obligation to have a policy.

> *The lack of formal coverage of some workers can result in a large proportion of the costs of fatality, injury or illness affecting these workers being shifted onto Commonwealth government programs, such as Medicare and social security. The Department of Family and Community Services noted:*
>
> > *Although State compensation schemes are responsible for supporting injured workers from the time of injury, where an individual is unable to attribute responsibility for an accident*

> *or illness, the social security system effectively becomes a de facto compensation scheme. Definitional exclusion of many persons from the workers' compensation system and the changing nature and form of workplace relations are resulting in a significant number of workers falling outside the scope and coverage of the traditional workers' compensation systems. The self-employed are, in most cases, excluded from coverage and left to make their own personal accident compensation insurance arrangements. For those that fail to take up a personal insurance policy, or for those that fall through the cracks of the workers' compensation system for a number of other reasons, the income support system is often the only recourse. (sub. 167, p. 3)*
>
> *(Interim Report, page 118)*

WorkCover Queensland cannot comment about the necessity of self-employed persons to be required to take out personal income protection insurance. WorkCover Queensland currently provides optional statutory compensation for 'eligible persons'. These 'eligible persons' may elect to pay premium for workers' compensation benefits in the case of a work-related *injury. Many individuals want to 'work* for themselves' *and do not* wish *to* be covered, or *opt* for *private insurance.* This is a *matter* of *choice.*

Consistency with other relevant legislation

WorkCover Queensland *strongly supports consistency* of *worker* definition *with other legislation and other* jurisdictions. *The Interim Report details the experiences* of New *South Wales and South Australia in attaining consistency with other relevant legislation:*

> *As part of the reviews of their schemes, some jurisdictions have reviewed their definitions of coverage. In New South Wales, Le Couteur and Warren (2002) recommended that there should be an alignment between the recipient of any payment or benefit defined as wages for pay-roll tax and workers' compensation purposes is to be treated as a worker/employee. However, this would narrow the coverage and thus they included contractors who have relationships which are more like that of employer-employee. In addition, they recommended deeming to deal with special cases. They also spoke favourably about a longer term goal of national alignment with the income tax definition.*

> *In South Australia, Stanley et al. (2002) recommended that the definition of workers to be compulsorily covered by their WorkCover scheme should have a better alignment with South Australian industrial relations law. It is based on a new definition for contract of employment which presumes that contracts to supply labour involve employees, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker. As with New South Wales, criteria are recommended to determine this. They also recommend including provisions to clarify labour hire arrangements - that is, the labour hire agency is deemed to be the employer, except where there is a direct contract between the worker and the client.*
>
> *(Interim Report, page 120)*

WorkCover Queensland has considered the issue of consistency with other relevant legislation, most notably with the implementation of the results test, which is adapted from current taxation principles.

Overall, WorkCover Queensland believes our worker definition, determinations of work-relatedness and contribution of employment have successfully adapted to changing work conditions. We strongly agree with the need for consistency across jurisdictions, and are working closely with other schemes to utilise best practice initiatives and ensure that the best possible outcomes are achieved for all stakeholders.

Response to Chapter 6: Injury management

WorkCover Queensland's in-house case management model, while not identical to other jurisdictional models, implements the principles of durable return to work recommended by the Commission:

> - *"early intervention, including the early notification of claims and the provisional assignment of liability;*
> - *workplace-based rehabilitation where possible, at the pre-injury workplace; and*
> - *return to work programs developed and implemented by a committed partnership of the employer, employee, treating doctor and rehabilitation provider (where required).*
>
> *(Interim Report, page 158).*

The WorkCover Queensland system provides timely rehabilitation and intervention through fast determination of liability and claim turnaround.

There is limited evidence that a system with the provisional assignment of liability as a standard entitlement for injured workers would appropriately balance the long-term interests of workers, employers or scheme insurers. The return to work performance and financial viability of this sort of scheme cannot be properly assessed until claim tails have developed many years later.

WorkCover Queensland advocates that faster determination of liability is a more appropriate approach. It addresses worker concerns while acknowledging the interests of both the employer and the long-term financial viability of the scheme. The current WorkCover Queensland model results in 70% of all claim liability decisions being made within seven working days of receipt of a claim.

There is no doubt that workers, employers and the scheme all benefit from timely submission of claims following an injury. However, theories that promote immediate, proactive rehabilitation intervention are yet to deliver long-term, proven and positive results in real insurance scenarios with developed claim tails.

The majority of workplace injuries require a short, initial period of acute treatment and/or recovery time. During this time, it is generally not possible for the injured worker to return to work. Mandatory application of early intervention is therefore questionable on a cost/benefit basis. In WorkCover Queensland's experience, most workers return to work within two weeks of paid incapacity - irrespective of the involvement of 'early intervention' or 'rehabilitation' resources.

As a consequence of WorkCover Queensland's experience of return to work timeframes, a differential case management model has been developed. This model uses in-house case managers to coordinate workplace-based rehabilitation in partnership with the employer, employee, treating doctor and external rehabilitation provider (where required). The in-house case management model allows WorkCover Queensland to provide very high levels of rehabilitation case management at an affordable cost, as well as develop good relationships with all stakeholders.

WorkCover Queensland's rehabilitation model uses quality, in-house staff to communicate consistently and effectively with all stakeholders in order to deliver an appropriate return to work outcome for both the injured worker and employer. The model also relies heavily on regular communication with the treating doctor(s) and any other clinical health providers involved in the treatment of the injured worker. In WorkCover Queensland's experience, it is better to have one person liaising and coordinating all aspects of the worker's injury and rehabilitation. This person then understands all aspects of the claim rather than only one component. WorkCover Queensland survey results and the financial viability of the scheme support our assertion that this method is extremely effective.

One other important feature of the WorkCover Queensland in-house case management model is the statewide 'Host Employment' program. This has been made possible by the strong relationships WorkCover Queensland has with Queensland employers. The program enables injured workers unable to return to their previous occupation or employer (for suitable duties programs or permanently), to be placed with new employers for the purposes of work hardening or gaining permanent employment. What is unique about the Queensland program is that it is a statewide program, with a network of employers established across the state that can be accessed by any WorkCover Queensland in-house case manager. Results are very good, which is evidenced in the Australia New Zealand Return to Work Monitor 2002/2003.

WorkCover Queensland also provides injury management services for common law claimants to ensure highly effective rehabilitation and return to work outcomes. WorkCover Queensland's Injury Advisory Unit coordinates injury management and rehabilitation by providing quality advice and support to common law claims managers.

Amendments to WorkCover Queensland's legislation in July 2001 placed an increased emphasis on rehabilitation in the common law pre-proceedings process. In particular, the *Act* (s275a) now includes a specific reference to rehabilitation, and an obligation for WorkCover to fund reasonable and appropriate rehabilitation during the pre-proceedings process, prior to or subsequent to an admission of liability.

The goals of injury management intervention at a common law level include:

- to provide quality injury management advice to common law claims managers
- to work closely with WorkCover's statutory claims division to manage our claims proactively and cost-effectively by facilitating early and appropriate rehabilitation and return-to-work
- where appropriate, to assist injured workers with return to work programs and rehabilitation at the common law stage
- to achieve positive outcomes for all stakeholders through the provision of reasonable and appropriate rehabilitation to injured workers, utilising appropriate rehabilitation providers in consultation with treating medical practitioners and the employer to ensure maximum function for the injured worker at minimal cost to the employer.

The effectiveness of both WorkCover Queensland's in-house case management model and the Injury Advisory Unit is supported by:

- WorkCover Queensland's fully-funded, financially viable scheme
- strong independent survey results in the areas of worker and employer satisfaction with WorkCover Queensland service provision
- high worker satisfaction with rehabilitation and its effectiveness (Australia New Zealand Return to Work Monitor, 2002/2003)

Overall, WorkCover Queensland believes its in-house case management model ensures that Queensland workers are offered first-class rehabilitation and injury management initiatives. Our high levels of customer satisfaction, fully-funded and well-managed scheme, and successful return to work outcomes are proof of this.

Response to Chapter 7: Common law access

The Queensland scheme, including common law remedies, is the pre-eminent workers' compensation scheme in Australia. It is affordable, fully funded and maintains the traditional common law rights of injured workers to seek individual compensation assessments that recognise the specific circumstances brought to each case by the individual claimant.

WorkCover Queensland wishes to make a number of points in relation to the Interim Recommendations made by the Commission in this chapter. The Commission recommends that common law should not be included in a national framework for workers' compensation on the basis that it:

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

(Interim Report, page 183-184)

WorkCover Queensland believes that a scheme involving appropriate common law avenues can provide:

- incentives for accident reduction
- assurance of long-term scheme viability
- adequate compensation for seriously injured workers
- effective rehabilitation and return to work outcomes
- timely outcomes for seriously injured workers
- alleviation of adversarial approaches through pre-proceedings

Incentives for accident reduction

WorkCover Queensland believes that a scheme involving common law can offer incentives for accident reduction on par with a no-fault, statutory scheme.

The incentive for employers to reduce workplace risk under common law schemes occurs in premium rate reductions. As a general rule, people who are forced to bear costs have an incentive to reduce them. Premium calculations that take into account an employer's claims costs are therefore an incentive for employers to become more proactive in reducing accidents in their workplaces. The impact of common law injuries on premium rate is also going to be dependent on the effectiveness of any premium calculation method.

An employer's and an employee's duty of care is the fundamental underpinning of workplace safety. Common law liability is therefore a necessary overarching principle that will, in conjunction with a no-fault scheme, achieve proper, balanced outcomes. The basis of common law theory is the allocation of personal responsibility. Common law access has functioned historically as a powerful deterrent to negligent employers. The case for common law as a deterrent may be strongest in situations where accidents can be prevented by the actions of both employers and employees.

WorkCover Queensland disagrees that a rule of strict liability "may provide better incentives for harm reduction than a rule of negligence" (Interim Report, page 173). Strict liability places an unfair burden on employers and does not strive for balanced responsibility between employer and worker. It limits the ability to seek contributions from liable third parties, and does not take contributory negligence of claimants into account. A system involving a rule of strict liability will not ensure long-term scheme viability. Ultimately, there must be a balance between the rights and obligations of both injured workers and employers to ensure that all parties are responsible for the consequences of their actions or inactions.

Assurance of long-term scheme viability

WorkCover Queensland believes that common law offsets a no-fault statutory scheme, effectively keeping costs to a manageable level and ensuring long-term scheme viability. On page 165 of the Interim Report, the Commission states that common law "runs counter to the basic principle of a no-fault scheme" (Interim Report, page 165). The current no-fault scheme still has a fault-based component - seeking recovery from 'liable third parties'. Any statutory, no-fault system will need a recovery system to ensure scheme sustainability. This will lead to increased administrative costs, as far more claims will need to be investigated at the statutory

claim level to determine recovery options. These recovery options will have to be based on fault.

The Commission also argues that access to common law should be removed as it "is a more expensive compensation mechanism than statutory workers' compensation." (Interim Report, page 184). A significant increase in costs will follow from a move to a no-fault statutory system. Costs for administering a 'life-long' pension for injuries will be far greater than the one-off perceived expense of a common law claim.

In New Zealand, the national accident scheme (mentioned on page 164 as an example of a country where common law actions are disallowed) has resulted in a state 'social security scheme'. The ongoing costs of the scheme are difficult to predict and control. The scheme has also been criticised for failing to adequately compensate seriously injured people.

In Queensland, statutory claims are limited to a maximum of five years, and common law claims are available to seriously injured workers. This allows costs to be forecast, and premiums set to cover those costs, and has been proven to be an extremely effective method of sustaining an affordable scheme.

Adequate compensation for seriously injured workers

WorkCover Queensland also believes a no-fault scheme is no guarantee of adequate compensation for an injured worker. Both statutory and common law compensation can sit together, as in Queensland. By its very nature, a no-fault scheme needs to be framed around the minimum compensation requirements to cover the field for all workers so the scheme remains affordable and sustainable. Seriously injured workers are better compensated under a fault-based scheme.

On page 183, the Commission recommends the removal of common law from any new system on the grounds that it "may over-compensate less seriously injured workers who, in the normal course of events, could be expected to be rehabilitated and return to work" (Interim Report, page 183). This 'disadvantage' is offset by the advantage to those seriously injured workers who, through common law, can have an individualised assessment of damages on a case-by-case basis. There are some cases for which statutory benefits are too inflexible, for example cases involving disfigurement injuries. Common law provides workers with the ability to claim compensation that is directly related to the degree of impact the injury has on their lives. It is fair to say that there is potential for under and over-compensation of some workers. However, we argue that the potential risk is higher under a statutory-only scheme.

On page 178-179, the Commission states that:

> *Some view common law damages as unfairly distributed. Victims with relatively minor injuries can be over-compensated if insurance companies settle rather than subject themselves to the costs of litigation while, at the other extreme, injury victims with catastrophic injuries receive lump sum payments which can prove to be insufficient to meet their longer-term needs.*
>
> *(Interim Report, page 178-179)*

WorkCover Queensland replies that the same argument has been advanced against statutory-only schemes - they do not adequately compensate seriously injured people.

WorkCover Queensland believes that rulings on dissipation of compensation for severely injured common law claimants who would otherwise be on lifetime statutory benefits (Interim Report, page 166, 179), are paternalistic. It is not the place of a workers' compensation scheme to educate and facilitate financial responsibility in the community. Having said this, there are already legislative avenues for structured settlements and the availability of trustees to manage lump sums. Perhaps if changes were made to current tax legislation payment of an annuity might become more viable.

Effective rehabilitation and return to work outcomes

The Commission also recommends the removal of common law from any new system on the basis that it "delays rehabilitation and return to work" (Interim Report, page 183), and states that "...if there are psychological benefits to be derived from receiving a lump sum, this could be obtained through statutory benefits" (Interim Report, page 183).

WorkCover Queensland has demonstrated that rehabilitation can be successfully offered during the common law process as occurs in Queensland. Any delay in return to work is generally the result of the individual seeking to maximise payments, and this can occur under any scheme. WorkCover Queensland believes that long-term statutory claims are a quasi-social security scheme which do not encourage workers to return to work or rehabilitate. The disincentive created by working life pensions is not present where once and for all common law awards are made.

Periodic payments do not encourage disabled workers to become self-reliant. Instead, they create dependency and can cause an individual to lose all

motivation to improve their status. Such payments do not allow closure but continue to reinforce the accident process. In contrast, WorkCover Queensland believes that the award of a common law lump sum provides "finality for both the injured worker and the workers' compensation insurer" (Interim Report, page 178).

Timely outcomes for injured workers

On page 165 of the Interim Report, the Commission states that common law "can be slow, denying the victim access to timely compensation". WorkCover Queensland disagrees. Slow turnaround times are not evidenced in the Queensland scheme. The average time taken to settle a claim is 13 months from receipt of Notice of Claim. The average time from injury to settlement is approximately three and a half years.

Alleviation of adversarial approaches through pre-proceedings

WorkCover Queensland disagrees that common law "is inimical to rehabilitation and return to work because it promotes confrontation between the employer and employee" (Interim Report, page 165). The inadequacy of compensation in itself can cause problems between employer and worker. The better approach to dealing with the tension is to have the insurer working with both the employer and the employee during the course of statutory and common law claims to encourage rehabilitation and cooperation. This benefits both the employer, and the employee.

The Queensland pre-proceedings process was introduced to alleviate the problems of a purely adversarial approach. This process has been very successful in maintaining good employer-worker relationships. WorkCover Queensland believes that a "fundamental tension between maximising damages and return to work" (Interim Report, page 177) would be found in either scheme option. This is because the level of compensation will always be determined by the level of injury severity and level of loss. Legislation has provisions to reduce settlements where the worker has failed to mitigate loss, although this is a basic common law principle.

In reply to views expressed by Woolworths (Interim Reports, page 177), WorkCover Queensland believes that in a self-insurance environment, some of the adversarial nature of the transaction is due to the lack of control perceived by the worker rather than the compensation being sought.

As well as recommending the removal of common law, the Commission also recommends that:

> *If common law is* to be *included in a national framework, then access should* be *restricted to:*
>
> - *the most seriously injured workers (subject to meeting a minimum impairment threshold. Impairment should be* based on a *consistent guide such* as *that published by the American Medical Association); and*
> - *non-economic loss only.*
>
> *(Interim Report, page 184).*

In WorkCover Queensland's experience, an impairment threshold has inherent problems as the common law scheme can take into account a person's disability rather than impairment. Disability is a better way to assess the impact of an injury on an individual and their own circumstances.

In regards to restriction of common law claims to non-economic loss only, WorkCover Queensland believes that common law schemes allow an individualised assessment of economic loss. Employers should be responsible for the consequences of serious work-related injuries where they are at fault - it could otherwise fall on Centrelink to meet the need.

WorkCover Queensland agrees with all arguments presented by the Commission for the retention of Common Law (Interim Report, page 167). In particular, the point that "removal of access to common law for work-related fatalities, injuries or illnesses would discriminate against those harmed in (as opposed to outside) the workplace as a result of the negligence of others". (Interim Report, page 167). WorkCover Queensland also agrees strongly with comments made by the Queensland Law Society:

> *Structures can be developed* to *contain* costs *without the arbitrary abrogation of citizens' rights as must necessarily follow from the introduction of any inhibition upon the right to bring common law claims. In addition, there is ample evidence that* access *to common law remedies facilitates rehabilitation rather than inhibiting rehabilitation in any way.*
>
> *It is the contention of this submission that the Queensland scheme, including common law remedies, is the pre-eminent workers' compensation* scheme *in Australia. It is affordable, fully funded and maintains the traditional rights of injured workers to seek individual*

compensation assessments that recognise the specific circumstances that the individual claimant brings to each case. (Interim Report, page 167)

WorkCover Queensland also agrees with comments made by the Queensland Council of Unions (Interim Report, page 168).

WorkCover Queensland also agrees that the dramatic increase in common law settlements in more recent years has been because of "a significant increase in the number of common law claims with low levels of severity (0% to 25%)" (Interim Report, page 179). This increase has coincided with lawyer 'no fee no win' advertising.

WorkCover Queensland also wishes to draw a number of points to the Commission's attention, including:

- repayment of workers' compensation after common law claims
- the US scheme's use of common law
- certainty of benefits obtained through common law
- potential cost shifting to OHS authorities.

Repayment of workers' compensation after common law claims

Repayment of workers' compensation after a common law claim is not an issue in Queensland as that compensation forms part of the damages awarded to an injured worker. These damages should cover the costs of weekly benefit repayments, as well as future costs.

The US scheme's use of common law

In terms of the United States (mentioned on page 165 as another country where common law actions are "generally disallowed"), WorkCover Queensland notes that access to the courts is available where there is a breach of contract. This system provides access to common law premised on employment contracts and without legislative regulation. The courts apply the law of contract rather than the law of negligence to determine claims.

Certainty of benefits

On page 172 of the Interim Report, the Commission states that:

> *"…common law damages are an uncertain form of compensation. Uncertainty surrounding likely outcomes from a common law action may imply that inadequate incentives are provided to employers and employees. Statutory benefits ensure certainty of compensation, and so reinforce incentives in a predictable way."*
>
> *(Interim Report, page 172)*

WorkCover Queensland believes that the common law has built up a pool of 'rules' over many years that can be relied on. It is true, however, that common law can be less certain than statutory prescribed compensation.

Potential cost shifting to OHS authorities

WorkCover Queensland believes that having OHS authorities undertake common law actions (Interim Report, page 181), simply moves the costs of the actions. Unless resources and attentions in this area are seriously increased, WorkCover Queensland believes it will have no real ability to influence employer behaviour.

In summary, WorkCover Queensland believes that common law should be included in any new scheme design because it:

- is a fundamental right - workers, like other members of society, must be granted the right to sue where negligence has caused them injury or illness
- provides incentives for accident reduction through premium incentives
- provides assurance of long-term scheme viability and affordability for employers
- is a just and adequate compensation method for seriously injured workers
- provides psychological benefits, and does not hinder effective rehabilitation and return to work outcomes
- does not hinder timely outcomes for seriously injured workers
- balances the rights and obligations of injured workers and employers.

Response to Chapter 8: Statutory benefits structures

WorkCover Queensland believes that any benefits structure should balance the needs of injured workers with affordable premiums for employers. We believe that our statutory benefits structure successfully achieves this, and the Commission's objectives. The statutory benefits structure outlined in Queensland's *Workers' Compensation and Rehabilitation Act 2003* provides incentives for injured workers to participate in rehabilitation, appropriately compensates injured workers and minimises cost shifting.

The Act provides weekly statutory benefits for a maximum of five years, or until the maximum statutory weekly benefit is reached (currently $161,340). While on statutory compensation, the injured worker or the insurer can request a permanent impairment assessment. To do this, the injured worker must have reached the point of maximum medical improvement. An injured worker's statutory compensation ceases 28 days after a permanent impairment lump sum offer has been made. Many requests for permanent impairment assessments come from injured workers or their solicitors.

The following sections will demonstrate the effectiveness of WorkCover Queensland's statutory benefits structure.

Provides incentives for injured workers to participate in rehabilitation

In Queensland's statutory benefits structure, the medical management model underpins the management of claims. This model ensures that injured workers have access to appropriate rehabilitation through their choice of medical practitioner. WorkCover Queensland's in-house case management staff also provide intensive rehabilitation for injured workers receiving statutory benefits. In combination with the differential case management model discussed in our response to chapter 6, this ensures intensive, high quality, case managed rehabilitation for those injured workers who need it the most.

Independent research has confirmed that the majority of injured workers offered a permanent impairment lump sum return to work within a short period of time after the acceptance of their offer. This confirms that the statutory benefit structure of the Queensland scheme allows injured workers to move on with their life and resume work, rather than relying on other forms of income.

Offers appropriate compensation for injured workers

The WorkCover Queensland differential in-house case management model means that our people can be proactive in allocating resources to those injured workers who

need them the most. Having one of the lowest caseloads of any workers' compensation insurer in Australia enables our case managers to ensure all benefits are paid in a timely manner. This includes weekly compensation payments, and all reasonable rehabilitation and medical expenses.

Avoids cost shifting towards workers' compensation schemes

WorkCover Queensland agrees that cost shifting towards workers' compensation schemes is difficult to quantify (Interim Report, page 203). In most Australian jurisdictions, the employer's liability for work-related aggravations only extends to the extent of the aggravation and not to the entire underlying condition. The key to minimising cost shift here is the diligent management of entitlements. WorkCover Queensland has appropriate numbers of well-trained and well-managed staff to diligently manage statutory entitlements for aggravations ensuring that only the work related component is compensated.

Avoids cost shifting away from workers' compensation schemes

Under the Queensland scheme, workers whose income is seriously affected are appropriately compensated when they receive common law damages for future economic loss. The availability of common law damages for economic loss means workers do not have to resort to long-term reliance on social security or statutory benefits. A worker who is compensated for loss of future earning capacity is prohibited from claiming any form of social security in regard to the injury. WorkCover Queensland believes this mechanism significantly limits cost shifting away from workers compensation.

Any social security or Medicare payments made to an injured worker while waiting for acceptance of a statutory claim are refunded when the statutory claim is accepted. This refund is paid directly by WorkCover Queensland. Likewise, any social security payments made to an injured worker after finalisation of their statutory claim but before the settlement of their common law claim are refunded when the common law claim is settled. This refund is also paid directly by WorkCover Queensland.

WorkCover Queensland notes that the removal of journey and recess claims from the Commission's suggested national scheme will almost certainly cause cost shifting to Commonwealth agencies.

Overall, WorkCover Queensland believes that statutory benefits structures should balance the needs of injured workers with affordable premiums for employers. We believe that our statutory benefits structure successfully achieves this, and the Commission's objectives.

Response to Chapter 9: Premium setting

While WorkCover Queensland disagrees with the Commission's Interim Recommendations on cross-subsidisation, we support the premium setting objectives outlined in this chapter. WorkCover Queensland believes that our current Experience Based Rating (EBR) premium calculation method meets these objectives for both small and large employers.

Cross-subsidisation will always be present in any risk-based insurance underwriting scheme. It exists to protect businesses (particularly SME's) from the effects of unusually high cost claims. The extent of cross-subsidisation between employers is a major issue for individual schemes. WorkCover Queensland uses the EBR system to provide incentives for businesses to improve OHS and injury management, but at the same time enable budgeting and protect businesses from costs that they may not be able to meet.

EBR has proven effective in maintaining a fully-funded scheme while remaining affordable, equitable, stable, easily understandable and creating an incentive for employers to reduce workplace injury. There are a number of reasons why the EBR system is working in Queensland:

- EBR provides a financially sustainable workers' compensation system as it provides a link between claims and premium. This has allowed WorkCover Queensland to concentrate on keeping premiums affordable.
- employers are able to see a direct financial relationship between claims experience and premium. This provides an incentive to take an active role in injury prevention.
- EBR also provides an industry-wide focus on injury prevention, as policyholders and industry groups are aware that claims experience in an industry sector will impact their own premium rate.
- stable and manageable premium costs for employers, as rates are set a year in advance.
- Companies with a claims experience trend can be identified through EBR and provided with support to assist in increasing workplace safety and decreasing claims costs.

Over the past three years, approximately 90% of policyholders have seen their premium rate remain stable or decrease. WorkCover Queensland believes that the introduction of EBR six years ago has reduced claims cost relative to wages and raised the awareness of employers regarding the benefits of good occupational health and safety practices and good claims management. WorkCover Queensland believes that the OHS focus promoted by EBR has caused a reduction in claims costs in real terms.

WorkCover Queensland maintains a fully-funded scheme and is successfully achieving a balance between the needs of injured workers and employers. At the same time, WorkCover Queensland continues to maintain an extremely viable insurance business offering Queensland employers a premium rate that is the best of any Australian state. Our philosophy is to provide the best possible benefits to injured workers at the lowest possible cost to employers.

As WorkCover Queensland is fully-funded, meets prudential requirements and is well-regulated, comments on this chapter will relate only to the sections on premiumsetting objectives, elements of premium-setting, and premium controls.

Premium setting objectives

On page 211, the Commission details premium-setting objectives. These include:

- *ensure an appropriate level of funding to meet the cost of claims;*
- *provide an incentive for employers to invest in safety in the workplace and rehabilitation;*
- *be affordable for employers;*
- *be stable; and*
- *be administratively simple to understand and apply.*

(Interim Report, page 211)

WorkCover Queensland supports and has implemented these premium setting objectives using EBR. This has resulted in the successful maintenance of a fully funded scheme with a consistent average premium rate of $1.55 per $100 for the last four consecutive years.

Particular reference is made to the section on premium stability (Interim Report, page 217). This section states that the Commission favours a measure of premium volatility in which employers bear a greater proportion of the costs of claims closer to the time they are incurred. In our experience, the greatest concern of employers in relation to workers' compensation insurance is premium volatility. As a consequence of feedback from employers, next year we will be changing the EBR assessing process to smooth out the impact of large claims whilst still maintaining full solvency requirements. WorkCover Queensland's continued focus on reducing premium volatility has obtained widespread support from employers and industry:

"I see this as a very positive change, and support it unreservedly". (Chris Latham, Price Waterhouse Coopers Actuarial Pty Ltd, in a letter to Gordon Lawson, General Manager Insurance Services, dated 14 August 2003)

The National Meat Association of Australia and Queensland and Australia Meat Holdings (AMH) argue that the EBR calculation does not meet the Commission's objective of administrative simplicity. These groups are concerned that in some cases, an employer's annual premium is higher than the total claims costs paid in a particular year. These organisations are self-insured under the Queensland scheme and have not had extensive consultation in relation to the EBR formula. Assessed premium for a particular year covers total projected costs of all claims incurred in that year, including future damages claims.

WorkCover Queensland recognises that the EBR formula is complicated. In this regard, substantial support is given to employers to help them understand EBR and enable them to predict premium variations in a timely manner. As part of our forecasting season, WorkCover Queensland people conduct over 18000 site visits and telephone interviews with employers regarding calculation of their premium. The EBR formula is subject to regular reviews with feedback from employers. All this is done at a low cost as evidenced by charging a very low premium in comparison to other jurisdictions and being fully funded.

WorkCover Queensland believes that education of employers in relation to EBR is fundamental to transparency and stability of our scheme.

Elements of premium setting

WorkCover Queensland supports the use of a remuneration basis for calculating premiums, and agrees that remuneration base should be consistent between jurisdictions. Recent legislation introduced by New South Wales and Victoria is being monitored and Queensland will consider aligning our remuneration base with these states.

WorkCover Queensland agrees with the point made regarding definition of wages base by the Institute of Actuaries Australia (Interim Report, page 220).

WorkCover Queensland also agrees with the Commission's comment that the ANZSIC system is not designed for risk rating (Interim Report, page 222). WorkCover Queensland uses a modified version of the classification system.

Experience rating is an important element in the Queensland model. Historical claims experience is the best measure available to reflect future claims costs.

The following points are made in relation to the dot points raised on page 225:

- As mentioned earlier in our response to this chapter, education of employers is a major element in increasing understanding of the link between EBR and workplace safety, claims management and rehabilitation. WorkCover Queensland has embarked on a program of interviews and onsite customer education visits in order to educate businesses in this regard. This year has seen special efforts directed towards SME's, with over 8000 businesses contacted since 1 July this year. This is an ongoing two-year project that will establish direct contact with every Queensland business.
- WorkCover Queensland believes that our EBR formula reflects claims experience, and the formula is continually reviewed and changed to reflect changing circumstances.
- The Commission states "experience rating is not able to be applied to small to medium-sized employers because they lack 'credibility'." (Interim Report, page 225). WorkCover Queensland uses a sizing factor to ensure small to medium size employers are more closely aligned to the rates of their industries whereas large employers are closely aligned to their own claims experience. In this way, both groups are encouraged to reduce and minimise claims cost and ensure injured workers return to work. For SME's, the small variation in premium rate allowed by the sizing factor is still significant enough to achieve this objective. WorkCover Queensland believes the sizing factor in Queensland's EBR formula creates a credible premium calculation method for businesses of any size.
- Workers' compensation schemes spread scheme risk over the long-term. Any evolving claims, for example mesothelioma claims or 'passive smoking', can be absorbed over time, as evidenced in the Queensland scheme. EBR allows the costs of these claims to be spread over a number of years, reducing premium volatility for employers.
- As shown earlier in the response to this chapter, EBR does create a cost incentive for employers to improve OHS. However, WorkCover Queensland agree with the conclusion of the Kennedy Inquiry that the social costs of OHS are better dealt with elsewhere. The separation of OHS and the insurance function was introduced in Queensland as a result of the Kennedy enquiry of 1996. In his report, Mr Kennedy recommended "that the proposals to amalgamate the division of Workplace Health & Safety and the Workers' Compensation Board be rejected" (Kennedy, 1996, page 184). WorkCover Queensland agrees with Kennedy's statement that:

> *"Workplace Health and Safety is of such importance to the community at large it should be retained under direct control of the Minister, and fully and adequately funded out of consolidated revenue. Apart from other problems, significant conflicts of interest would occur if the two divisions were amalgamated. The objectives, the skills, the role, the functions, the stakeholders and the administration of each division are quite different. One is primarily concerned with safety in the workplace - the other is primarily an insurance business, responsible for implementing the objectives of the Workers' Compensation Act on behalf of the government in the best interests of injured workers and employers." (Kennedy, 1996, Executive Summary page x).*

If employers understand EBR and their obligations under Workplace Health & Safety legislation, they will understand the financial as well as social cost of inadequate workplace safety.

It is true that EBR can lead to claims suppression, however, appropriate legislation and education can alleviate this deficiency. At the same time, the separation of OHS and workers' compensation insurance allows those claims that may be suppressed from an insurance perspective to be dealt with separately by OHS authorities.

Bonuses and penalties for claims experience (Interim Report, page 227) are not necessary with the proper application of Queensland's EBR system. In terms of explicit financial incentives for workplace safety and rehabilitation, both New South Wales and Victoria have introduced or are in the process of introducing a premium discount scheme. These models need further testing before comment can be made.

Premium controls

WorkCover Queensland agrees with the application of caps within the formula to reduce volatility and maintain affordability for employers.

Overall, while WorkCover Queensland believes that cross-subsidisation is a necessary element of any risk-based insurance underwriting scheme, we support the premium-setting objectives outlined in this chapter and believe that our current EBR system effectively meets the objectives for both small and large employers.

Response to Chapter 10: The role of private insurers

WorkCover Queensland acknowledges that the presence of private insurers brings choice to employers.

However, WorkCover does not believe that private insurers necessarily provide a better service delivery of workers' compensation functions compared to that of a well managed public insurer.

WorkCover Queensland is testament to a corporatised public sector organisation that has successfully managed to carry out underwriting, funds management, claims and rehabilitation management, plus premium setting while remaining in a fully funded position.

The National Competition Policy (NCP) review of the WorkCover Queensland Act 1996 recommended that the public monopoly of the Queensland workers' compensation scheme be retained. (Queensland Government submission to the Productivity Commission August 2003, page 10). The review also recommended the retention of public underwriting in Queensland, on the grounds of:

- *strong financial performance*
- *return to full solvency*
- *evidence that administrative arrangements are more important than underwriting*
- *potential premium volatility and scheme instability in competitively underwritten schemes*
- *relatively high levels of customer satisfaction with current arrangements*
- *lack of evidence to support increased efficiency with the introduction of competitive underwriting.*

(Queensland Government submission to the Productivity Commission August 2003, page 10)

At 30 June 2003, WorkCover Queensland maintained solvency levels of 20% as required by the *Workers' Compensation and Rehabilitation Act 2003,* and net assets of $444 million, all while complying with APRA liability valuation and capital adequacy standards.

WorkCover Queensland strongly believes that control of the whole insurance and claims process is the most effective model. It is interesting to note that the

outsourcing of various functions has not created any improvements in the financial situations of other WorkCover schemes.

The Commission's assertion that private insurers are more cost efficient is not supported by the performance of privatised state schemes. New South Wales, Western Australia, Tasmania and Northern Territory have average premium rates ranging from $2.61 to $3.16 *(page 55 Comparative Performance Monitoring August* 2002), whilst Queensland's average premium rate is set at $1.55. WorkCover Queensland believes that many of its efficiencies come from economies of scale, as infrastructure costs are spread over a large premium pool.

Before sweeping statements of efficiencies between the public and private sectors are made further analysis must be undertaken to ensure that these benefits are sustainable. WorkCover Queensland is proof that privatisation is not necessarily more efficient.

WorkCover Queensland agrees with the comments made in the McKinsey & Company review of the New South Wales workers' compensation system, where they recommended that ' privatisation be ruled out until the scheme achieves full funding and financial stability as well as changes to outsourcing arrangements'. (McKinsey and Company, 2003, in Interim Report, page 6).

The interim report makes no mention as to what would happen to those existing public jurisdictions that are not fully-funded in the proposed private insurer environment.

If a private insurer system were implemented, the regulator would need sufficient authority to make sure insurers maintain benefits to workers as well as service employers.

While the Commission suggests that the introduction of a scheme run by private insurers is likely to increase innovation (Interim Report, page 247), WorkCover Queensland believes it is more likely to have the opposite effect. Private insurers will be protective of intellectual property rights and unwilling to share 'best practice' and rehabilitation programs.

Response to Chapter 11: Self-Insurance

WorkCover Queensland does not support any further loss of business to a self-insurance scheme. We believe that self-insurers leaving the scheme will cause volatility and increased claims costs for those that remain in the scheme, and perceive a potential conflict of interests in this arrangement.

Volatility and increased claims costs

WorkCover Queensland believes that further loss of business from the Queensland scheme will cause volatility and potentially increase claims costs for those employers remaining in the scheme.

As discussed in our response to chapter 4, the size of the WorkCover Queensland premium pool creates stability and gives the scheme the ability to absorb large claims without fluctuating employer premiums or injections of taxpayer funds. Economies of scale and scope allow WorkCover Queensland to maintain a regional presence in 24 locations throughout Queensland. Our people have the skills and local knowledge to provide excellent service to injured workers and employers. WorkCover Queensland has already downsized and centralised regional office functions in order to maintain stable premium rates. Further loss of business to self-insurance can only mean that the costs of this fixed infrastructure result in increased premiums for those employers remaining in the scheme.

Potential conflict of interests

Self-insured employers funding and managing their own claims costs, while potentially reducing administration costs for the employer, can cause a perceived conflict of interest from the perspective of injured workers. WorkCover Queensland believes that there are some functions best managed by a public or independent authority. The emotional, high-stress environment of workers' compensation insurance makes it one of these areas.

A number of local government authorities recently returned to insure with WorkCover Queensland after being part of the Local Government Association of Queensland (LGAQ) self-insuring body. This is a vote of confidence in WorkCover Queensland, and evidence that self-insurance is not necessarily the most cost-effective solution for employers.

Before self-insurance requirements are relaxed, WorkCover Queensland believes consideration should be made to:

- regular monitoring of licence-holders
- worker confusion
- impact on those employers remaining in state-based schemes
- conflict of interest issues that may arise when an employer acts as the insurer, assessing claims and managing rehabilitation.

Response to Chapter 12: Dispute Resolution in Workers' compensation

The current system of review and appeals is successful in achieving equitable outcomes for Queensland workers, employers and insurers. Some features include:

- Non-adversarial nature
- Reasonable timeframes for review decisions
- Independent review of decisions by regulator
- Independent assessment of medical decisions (MATs)