FINAL SUBMISSION

TO THE

PRODUCTIVITY COMMISSION

NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS INQUIRY

4 February 2004

MHL:JGW:LCA1668

4 February 2004

Mr Mike Woods
Presiding Commissioner
National Workers' Compensation and
Occupational Health and Safety Frameworks Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 1616

Dear Commissioner

National Workers' Compensation and Occupational Health and Safety Frameworks Inquiry

Please find **attached** the Law Council's final submission in relation to the above inquiry. I refer to a telephone call on 20 January 2004 by our Mr James Greentree-White to the Productivity Commission, giving the Law Council an extension to make a submission to 4 February 2004. The Law Council is grateful for this extension of time.

The contact officer in the Law Council Secretariat for this matter is Mr Greentree-White (direct telephone: 02 6246 3715).

Yours sincerely

Michael Lavarch
Secretary-General

Summary

1. This is the Law Council's final submission to the Productivity Commission (the "Commission") in its National Workers' Compensation and Occupational Health and Safety Frameworks Inquiry (the "Inquiry").

2. This submission addresses the most important matters within the interest and expertise of the Law Council, following the Law Council's appearances before the Commission and the release of the Productivity Commission's *Interim Report* in this Inquiry. The submission follows on from two earlier written submissions and two appearances in person before the Commission. These representations taken together are the whole of the Law Council's comment to the Commission in this Inquiry.

3. The Law Council's views as set out in this submission are, in summary:

   (a) The Law Council recognises the continuing interest in achieving reform on a national basis in relation to workers' compensation, and sees this Inquiry as an opportunity to advance that process.

   (b) The Law Council believes that of the models proposed for workers' compensation in the *Interim Report* that "Model D" should be adopted now. That model is: that the Commonwealth, States and Territories establish a national workers' compensation body that would be charged with such functions as developing standards for implementation by individual jurisdictions.[1] These standards would be the "national frameworks" for workers' compensation.

   (c) The Law Council believes that Model D should be given time to work before any decision is made by the Commonwealth to proceed with "Models A to C" in the Productivity Commission's Interim Report.[2]

   (d) Recognising there may be concern that the cooperative approach of Model D alone will produce only slow or minimal reform, the Law Council also supports the development of mutual recognition. This would allow multi-jurisdictional employers of a minimum size to obtain workers' compensation coverage in the employer's "home"

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1 On Model D, see *Interim Report* at pages 102-106.

2 The models are: A – licensing the employers eligible for self-insurance under the *Safety, Rehabilitation and Compensation Act 1988* (the "Comcare Act"); B – an alternative national self-insurance scheme for eligible (corporate) employers; and C - an alternative national insurance scheme for corporate employers. See *Interim Report* at pages 86-92 and 101-102.

State or Territory jurisdiction for its workers located in other States or Territories. This would allow for a degree of competition between States and Territories so as to encourage best practice, within the cooperative approach of Model D.

(e) In relation to benefit structures, the checks and balances within individual schemes must be appreciated. The Law Council believes that the national frameworks for workers' compensation should not be so proscriptive as to prevent States and Territories retaining common law, either in the comprehensive form that presently exists in the ACT and Queensland, or in a more restricted form as presently in Victoria or Tasmania.

(f) That common law is a major component of a workers' compensation scheme does not necessarily prevent it from being fully funded, having low premiums, low disputation rates, or low legal costs. These outcomes depend on a range of factors, including the culture of a jurisdiction, which can be shaped by specific procedural rules and practices which can "tweak" a system so that it operates efficiently.

(g) Noting that common law does not prevent a workers' compensation scheme from being successful (in terms of the outcomes identified above), there are also strong positive arguments in favour of common law, particularly in relation to the moral and deterrent features of the common law, and the finality of the common law, which justify including common law as a key feature of workers' compensation.

(h) The Law Council believes there is greater likelihood for achieving commonality in relation to occupational health and safety ("OHS") than in relation to workers' compensation; and that commonality in OHS does not depend on commonality in workers' compensation. The Law Council would support governments exploring the Interim Report's recommendations for achieving national uniformity in OHS legislation and regulation.

4. To assist it in contributing to the Inquiry, the Law Council commissioned Bateup Actuarial + Consulting Services ("BACS") to provide a report (**attached**). BACS' report comments on the actuarial studies by the Australian Government Actuary and Taylor Fry included in the *Interim Report*, at Appendices B and D respectively. Although BACS' report should be considered in its entirety in order to make judgments about its conclusions, reference is made to the following:

> "*In my opinion, the AGA [Australian Government Actuary] Report provides a sound discussion of the nature of direct financial risks to the Commonwealth. However, no conclusions are drawn as to*

whether the risks are unreasonable or unacceptably high, as that is beyond the scope of the AGA Report.

…

As implied in the Taylor Fry Report, the results presented therein need to be interpreted with caution. I believe that a more detailed analysis is required in order to ascertain the impact of national self-insurance on State schemes."[3]

The Law Council of Australia

5. The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

6. The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Queensland Law Society; and
- the Victorian Bar.

[3] BACS report of 29 January 2004 (attached) at pages 1 and 2.

7. The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

8. The Law Council represents, through the representative Law Societies and Bar Associations, lawyers who act both for claimants, and for insurers and defendants.

Previous representations in this Inquiry

9. Representations have already been made to the Commission by the Law Council and its constituent bodies in this Inquiry as follows:

- Law Council of Australia (written submissions to the Inquiry numbers 62 and IR 194; and appearances (with the Law Society of NSW) on 24 June 2003, and on 4 December 2003);
- Law Society of NSW (appearance with the Law Council on 24 June 2003);
- Law Society of the Northern Territory (appearance on 16 June 2003);
- New South Wales Bar Association (written submissions to the Inquiry numbers 64 and IR 190); and
- Queensland Law Society (written submissions to the Inquiry numbers 97 and IR 207; and appearances on 23 June 2003 and 4 December 2003).

Workers' compensation: the Law Council's approach

10. The Law Council recognises the continuing interest in achieving reform on a national basis in relation to workers' compensation, as is indicated by the very holding of this Inquiry after previous consideration of the issue, including:

- the inquiry by the Commission's predecessor, the Industry Commission, which produced its 1994 report *Workers' Compensation in Australia*;
- the Heads of Workers' Compensation Authorities' ("HOWCA's") 1997 report *Promoting Excellence: National Consistency in*

Australian Workers' Compensation report, and subsequent discussion about that; and

- the recent House of Representatives Standing Committee on Employment and Workplace Relations' Inquiry into Aspects of Workers' Compensation, which reported in 2003.

11. The Law Council sees this Inquiry as an opportunity to advance that national process of achieving reform on a national basis in relation to workers' compensation. The Law Council believes that past experience in this area affirms that, of the models proposed for workers' compensation in the *Interim Report*, "Model D"[4] should be adopted now.

12. As the Law Council has previously stated to the Commission, the Law Council believes that Model D should be given time to work before any decision is made by the Commonwealth to proceed with "Models A to C" in the Productivity Commission's *Interim Report*.[5] In terms of fleshing out what that means, if (as a rule of thumb) changes to a compensation scheme take five years for trends to be discerned, then it would be clear within seven to eight years whether Model D was working. That may seem like a medium-long term goal, but the Law Council does not believe that it unrealistic to think in those terms, particularly given the history of consideration of this issue (see paragraph 10 above).

13. As to how Model D would work in more detail, the Law Council envisages that the national workers' compensation body that is established would be a representative body including governments and key stakeholders (such as unions, employers, and the legal profession), which would develop standards for implementation by individual jurisdictions. These standards would be the "national frameworks" for workers' compensation, and would be subject to continuous monitoring in terms of their take-up and effectiveness in individual jurisdictions.

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[4] That the Commonwealth, States and Territories establish a national workers' compensation body that would be charged with such functions as developing standards for implementation by individual jurisdictions.

[5] The models are: A – licensing the employers eligible for self-insurance under the *Safety, Rehabilitation and Compensation Act 1988* (the "Comcare Act"); B – an alternative national self-insurance scheme for eligible (corporate) employers; and C - an alternative national insurance scheme for corporate employers. See *Interim Report* at pages 86-92 and 101-102.

Comparing Models A to C with Model D: impact on smaller employers

14. The Commission's Models A to C provide a continuum of pressure upon State/Territory schemes, as initially Comcare, and then a new national scheme (which may or may not replicate Comcare's benefits structure) is developed, firstly for large (corporate) employers who can self-insure (Model B) and eventually for all corporate employers (Model C). On the other hand, Model D, which it is acknowledged could (as the Productivity Commission proposes)[6] be established in parallel with Models A to C, is not about pressure but cooperation.

15. For constitutional reasons, non-corporate employers are left out of Model C,[7] and the Law Council notes that smaller corporate employers would not be eligible to self-insure under Model B.[8] However, non-corporate and smaller corporate employers are not only a vital element of the economy. They also employ a greater proportion of employees than those employers who are eligible for Models A and B.

16. A consideration of the figures set out at table 2.1 of the *Interim Report* demonstrates this point.[9] The statement by the Commission that "[w]*hile multi-state businesses make up less than 1 per cent of businesses, they are typically large firms and account for almost 30 per cent of employment*",[10] glosses over the converse proposition: that single state employers account for over 70 per cent of employment, and make up over 99 per cent of businesses.

17. It is an important concern how non-corporate employers, and their employees, would fare if they were left in State/Territory schemes from

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6 See *Interim Report* at page xxxv.

7 See the advice of the Australian Government Solicitor at Appendix C of the *Interim Report*.

8 It is noted that in the Comcare system, 500 employees is the minimum size for self-insurers. It is also 500 in NSW, is 200 in SA, and 2,000 in Queensland. See *Interim Report* table 11.3 at page 275. Minimum size is not specified in the other States and Territories, however minimum size is in practice related to other requirements for self-insurers, such as prudential requirements. See further *Interim Report* chapter 11.

9 *Interim Report* at page 16.

10 *Interim Report* at page 16.

which the major corporate employers had departed for Model A (self-insurance under the Comcare Act), Model B (a proposed alternative national self-insurance scheme for eligible (corporate) employers) or Model C (an alternative national insurance scheme for corporate employers). This issue of the effect on State/Territory schemes is raised by Bateup Actuarial + Consulting Services ("BACS") in its attached report.

18. BACS comment on the actuarial studies by the Australian Government Actuary and Taylor Fry included in the *Interim Report* as Appendices A and D respectively. Those actuarial studies referred to financial risks to the Commonwealth (which risks particularly arise from self-insurers becoming insolvent) following from the adoption of Model A. In the Law Council's views the same issues would arise, likely on a larger scale, in relation to Models B and C.

19. BACS' entire report is attached, however the Law Council draws attention to the following conclusions:

> "*In my opinion, the AGA* [Australian Government Actuary] *Report provides a sound discussion of the nature of direct financial risks to the Commonwealth. However, no conclusions are drawn as to whether the risks are unreasonable or unacceptably high, as that is beyond the scope of the AGA Report.*
>
> *…*
>
> *As implied in the Taylor Fry Report, the results presented therein need to be interpreted with caution. I believe that a more detailed analysis is required in order to ascertain the impact of national self-insurance on State schemes.…*
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> *Particular areas which I believe should be further investigated include:*
>
> (a) *Cross subsidies*
>
> (b) *Propensity for large employers to self-insure under Comcare*
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> (c) *Impacts other than on Premium Revenue*"[11]

[11] BACS report of 29 January 2004 (attached) at pages 1 and 2.

Adding competition to cooperation: the Law Council's Model D+

20. Noting that the Law Council does not support adopting Models A to C at this time, the Law Council recognises that there may be concern that the cooperative approach of Model D alone will produce only slow or minimal reform. To address this issue the Law Council also supports (at the same time as Model D is implemented) the development of mutual recognition. This could be called "Model D+".

21. Mutual recognition would allow multi-jurisdictional employers of a minimum size (which would have to be decided upon) to obtain workers' compensation coverage in the employer's "home" State or Territory jurisdiction for its workers located in other States or Territories. This would allow for a degree of competition between States and Territories so as to encourage best practice, within the cooperative approach of Model D.

Practical problems with Models A to C

22. The *Interim Report* fails to recognise the problem of having a large number of employers in Australia under a Commonwealth workers' compensation scheme. The problem is that there are many claims where the employee has had multiple injuries. Those injuries can be suffered in the employ of a number of employers. If those employers are insured under different schemes, that is a State scheme and the Commonwealth scheme, then the employee is forced to make separate applications under each scheme.

23. In the first place, this means additional (if not double) costs for both employer and employee. In the second place, this situation can cause real injustice to either the employee or the employer. The employee is at risk of "falling between two stools", losing the claims under both schemes. Alternatively, the employee may have a windfall because he or she may succeed in both claims and receive double compensation. Similar issues apply in relation to the employer.

24. It is true that such problems already exist because of the existence of Comcare (and the similar Commonwealth mariners' scheme, Seacare) in parallel with State/Territory schemes, and in border towns in relation to

different State/Territory schemes. However, the "two schemes" problem is minor at the moment, but could be expected to become a major problem if Models A to C are adopted.

Workers' compensation: the role of common law

25. As the Law Council has previously stated, the common law of compensation has at least three objectives:

> "*The multiple aims of negligence law indicate a complex set of needs and rights which should not be lightly swept aside. The Law Council emphasises the objectives of:*
>
> (a) *fair and just recompense for injured persons;*
>
> (b) *the encouragement of the highest standards in safety and risk management; and*
>
> (c) *a just allocation among wrongdoers of responsibility for compensation.*
>
> *These three areas correspond to the three aims referred to above.*"[12]

26. As Law Council representative Mr Maurice Stack OAM stated at the Law Council's appearance on 4 December 2003:

> "*Common law is the principle that has been developed over the centuries by the judges and it's based on a simple idea, and that is that if you injure somebody you place the accident victim financially back in the position they were in had it not been for the accident. It's a notion which appeals to the ordinary sense of justice of most Australians.*"[13]

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[12] Law Council, *Submission by the Law Council of Australia to the Negligence Review Panel on the Review of the Law of Negligence 2 August 2002* at paragraph 1.38. The corresponding aims are (at paragraph 1.29 of that submission): the compensation function; the deterrent function; and the responsibility function.

[13] *Transcript of Proceedings* at page 1097. The Law Council understands Mr Stack to be referring here to injuring somebody through fault. On the basic principles of assessment of damages at common law, see further *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 especially per McHugh J at page 54

27. The Law Council would say that the common law's awarding, in relation to injuries caused through fault, damages on the basis of actual loss reflects the Australian community's expectations of a "fair go". This conclusion is also suggested by the following submissions to the Inquiry, which are made from different perspectives, but arrive at similar conclusions in relation to community standards:

> "*Access to common law damages is a fundamental element of any workers compensation system. Awards at common law can more closely reflect community standards and expectations with regard to proven employer negligence.*"[14]

> "*I have a personal view that common law damages are thought to be desirable by society in the cases of very clear negligence, whether it's by an employer or by another member of society, resulting in serious injury and serious economic and other losses to an individual. I still think that society demands that damages be available of the nature that the common law provides.*"[15]

28. The Law Council would say further that it may seem peculiar that the law would recognise, by way of negligence law, the obligations and duties of "neighbours" in a variety of economic and social settings and yet that we should attempt to exclude these obligations and duties simply because they occur in a work context. For example, it would seem anomalous that a passer by injured by a falling brick should be entitled to recover damages whereas a worker on site hit by a falling brick should not.

29. In relation to benefit structures for workers' compensation schemes, the checks and balances within individual schemes must be appreciated. The national frameworks for workers' compensation should not be so proscriptive as to prevent States and Territories retaining common law, either in the comprehensive form that presently exists in the ACT and Queensland, or in a more restricted form as presently in Victoria or Tasmania. To put that another way, the Law Council would support the national framework for workers' compensation benefits including options for "comprehensive", "restricted" and "not present" access to common law.

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14 Australian Council of Trade Unions, submission IR 186, at paragraph 68.

15 Mr Dallas Booth (Deputy Chief Executive of the Insurance Council of Australia), appearing before the Commission on 5 December 2003: *Transcript of Proceedings* at page 1277. As Mr Booth makes clear in the quotation above, that view is his own.

30. That common law is a major component of a workers' compensation scheme does not necessarily prevent the scheme from being fully funded, having low premiums, low disputation rates, or low legal costs. The clearest example of this is in relation to the Queensland workers' compensation scheme, which has:

> "[T]*he lowest average workers' compensation premiums in the nation. The average premium rate is to remain at 1.55 per cent – for the fourth consecutive year during 2003-04. It is testament to the strength of the fundamentals underpinning the fund that the scheme is fully funded and maintains full statutory solvency.*"[16]

31. It is notable that the Comcare and Seacare schemes had the highest rate of disputation (expressed as the percentage of new disputes as a proportion of new claims) of any of the workers' compensation schemes in 2001-02, whereas the Queensland scheme had the lowest (27% for Comcare and 28% for Seacare as compared with 6% for Queensland).[17] The ACT, which along with Queensland has unrestricted common law access, also compared favourably with Comcare, at 15% in 2001-02, compared with the Australian average of 14%.[18] The relatively high (although lower than previous years) rate of 23% for Tasmania, which has restricted access to common law, seems to be affected by "paper disputes" caused by legislative requirements.[19]

32. Again, legal costs as a proportion of total claims varied considerably between schemes, such that one could not simply say that a scheme without common law would necessarily have a lower legal costs proportion, for example the 2001-02 average of legal costs per dispute in Queensland was considerably lower than the national average ($6,370 compared with $10,363).[20]

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16 Queensland government, submission 154 at page 3.

17 Workplace Relations Ministers' Council, *Comparative Performance Monitoring Fifth Report* (2003) at page 55, figure 42.

18 Workplace Relations Ministers' Council, *Comparative Performance Monitoring Fifth Report* (2003) at page 55, figure 42.

19 Workplace Relations Ministers' Council, *Comparative Performance Monitoring Fifth Report* (2003) at page 55, figure 42, and at page 56.

20 Workplace Relations Ministers' Council, *Comparative Performance Monitoring Fifth Report* (2003) at page 56, figure 43.

33. Outcomes in relation to premiums, disputation rates etc depend on a range of factors, including the culture of a jurisdiction, which can be shaped by specific procedural rules and practices which can "tweak" a system so that it operates efficiently. The NSW Bar Association has referred to "*the subtleties of what may be done by Government by clever legislative action and deft administrative approaches so as to balance the interests of stakeholders*".[21] The kind of refinements contemplated include:

- mandatory early disclosure of evidence, including expert evidence;
- mandatory pre-trial conferencing;
- alternative dispute resolution; and
- cost sanctions on parties who refuse to negotiate or accept an offer of settlement.

34. The Law Council would say that the use of such mechanisms as these should be considered by the Productivity Commission in relation to individual jurisdictions where applicable.

35. Noting that common law does not prevent a workers' compensation scheme from being successful (in terms of the outcomes identified above), there are also strong positive arguments in favour of common law, particularly in relation to the moral and deterrent features of the common law, and the finality of the common law, which justify including common law as a key feature of workers' compensation schemes.

Deterrence and responsibility

36. As has been noted above, the common law has (in addition to compensation) the aims of deterring unsafe behaviour (that is encouraging of the highest standards in safety and risk management), and forcing those who are negligent to take responsibility (by way of compensation, the direct effects of which are usually mediated by insurance).

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[21] Submission IR 190 at paragraph 44. See also submission IR 190 at paragraphs 45-46.

37. The *Interim Report* has a large measure of assertion in dismissing the deterrence and responsibility arguments,[22] however the Law Council would suggest there should be further justification for those conclusions. The Law Council believes that the blunter enforcement sanction of OHS cannot wholly replace these functions of the common law. It also should be noted that fines levied for OHS breaches are not used for the compensatory benefit of injured workers.

Finality and rehabilitation

38. From the experience of legal practitioners, the Law Council can say that common law, by providing lump sum compensation, is able to empower a claimant to stop being a victim, and get on with their life. For example, using a lump sum to pay out a mortgage, or other loans, could permit a claimant to take work that is less remunerated than the claimant had previously done. The Productivity Commission has noted that finality can be achieved also by commutation, however comments in the *Interim Report* suggest unease about the presence of any relatively large lump sum payments under a statutory scheme.[23]

39. The Law Council is concerned that a ritualistic approach to rehabilitation in workers' compensation may, in some long term cases,[24] see rehabilitation continued by a claimant as part of the role of being a long-term pension recipient. The Law Council believes that a lump sum of an equivalent amount would be likely to result in an increased likelihood of employment in a less arduous occupation.

Dispute resolution in the NSW Workers' Compensation Commission

40. The Law Council is concerned at the Commission's discussion of dispute resolution conducted by the NSW Workers' Compensation Commission, at pages 289-290 of the *Interim Report*, which is introduced by the statement that: "*New South Wales has recently reformed its disputes handling procedures and initial information indicates there has been significant reductions in both the number and legal cost of disputes*".[25]

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22 See *Interim Report* at pages 171-172 and 181-182.

23 See *Interim Report* at pages 178, 197 and 207.

24 Cf with the acknowledgement at page 197 of the *Interim Report* that: "*periodic payments can weaken return to work incentives*".

25 *Interim Report* at page 289. The discussion is set out in box 12.1 at pages 289-290 of the *Interim Report*.

41. The Law Council understands that a recent review of the NSW Workers Compensation Commission, by John Hunter Management Services Pty Ltd, details concerns including communication and consultation, work structures, the IT system, staffing levels and the role of dispute assessment managers, which have resulted in the NSW Workers Compensation Commission facing a "*perceived inability to meet* [its] *legislative objectives*".

42. The review found that up to 200 applications were not being resolved each month (of 600 lodged each month about 400 were resolved) and that the "balance of files" continue to increase. There are 3,000 matters that have not been closed and 240 matters awaiting appointments with approved medical specialists. The Law Council appreciates that different constructions could be placed upon these figures, and notes the statements in response that have been made by the NSW Workers Compensation Commission. At the very least, however, and given the relatively recent establishment of the NSW Workers Compensation Commission, caution should be taken in putting that Commission forward as an exemplar of dispute resolution. It should also be remembered that the NSW Workers Compensation Commission procedures deprive the parties in dispute of access to independent judicial determination.

Corrections to the *Interim Report*

43. The Law Council wishes to draw attention to two instances in the *Interim Report* where organisations have been quoted in ways that misrepresent their views. The Law Council is confident that the Commission will wish to correct them. Although we understand that the organisations concerned have contacted, or will contact, the Commission directly, the Law Council draws these points out here.

44. At page 166 of the *Interim Report*, the Commission writes:

> "*The Institute of Actuaries Australia believes that common law is incompatible with a scheme which compensates victims irrespective of fault:*
>
> > *'… [common law] is based on the concept of fault, which does not sit comfortably with the needs-based approach of statutory benefits. In order to accommodate this needs-based ethos, it stretches the concept of fault so that it no longer has any meaning and in a way that is not compatible with the reforms underway elsewhere in common law.' (sub. 88. p. 13)*"

45. However, as the Institute of Actuaries Australia ("IAAust") has stated:

> "*A comment on page 166 of the Interim Report may be misinterpreted as implying that the IAAust believes that common law benefits should not be included in workers' compensation schemes. The IAAust does not have a stated position on the inclusion or exclusion of access to common law under workers' compensation.*"[26]

46. The second instance is in its discussion of dispute resolution, at page 293 of the *Interim Report*, where the Commission writes:

> "*Several schemes have restricted access to legal representation. Motivating this is a view that lawyers can benefit financially from prolonging disputation. This increases costs and makes ADR confrontational, rather than conciliatory. The Law Society of New South Wales has suggested that, if lawyers play too dominant a role representing their clients, they create 'a direct impediment to the mediation process' (2003, p. 14).*"

47. In context, in guidelines to legal representatives, what the Law Society said was the following:

> "***Role of Legal Advisers during Mediation***
>
> *Essentially the role of the legal adviser is:*
>
> *…*
>
> *3. To participate in a non-adversarial manner. Legal advisers are not present at mediation as advocates, or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal adviser who does not understand and observe this is a direct impediment to the mediation process.*"[27]

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[26] Institute of Actuaries of Australia, submission IR 182 at page 1.

[27] Law Society of NSW, *Mediation and Evaluation Information Kit*.

48. As can be seen from this quotation, the Law Society was not saying, as the quote in the *Interim Report* suggests, that lawyers *are* a direct impediment to the mediation process. Rather, the Law Society is enjoining lawyers not to be an impediment to the mediation process, and in fact to facilitate the process. The Law Society was not making any statement about whether lawyers are an impediment to mediation.

Occupational Health and Safety

49. The Law Council has only minimal comments to make in this submission in relation to occupational health and safety, as it has already made statements on it in earlier submissions, and this topic was not a focus of discussion at the Law Council's last appearance before the Commission.

50. Accordingly, the Law Council reiterates its views that there is greater likelihood for achieving commonality in relation to occupational health and safety than in relation to workers' compensation; and that commonality in OHS does not depend on commonality in workers' compensation. The Law Council would support governments exploring the *Interim Report's* recommendations for achieving national uniformity in OHS legislation and regulation.[28]

4 February 2004

[28] See *Interim Report* at pages xxvii-xxviii.