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

Dear Mr Woods

VICTORIAN GOVERNMENT SUBMISSION

I am pleased to make this submission, on behalf of the Victorian Government, in response to the Interim Report of the Productivity Commission Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks.

Yours sincerely

ROB HULLS MP

Minister for WorkCover

File Ref: 2002/01965

Victorian Government Final Submission

Productivity Commission Inquiry into "National Workers' Compensation and Occupational Health and Safety Frameworks"

February 2004

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This submission makes reference to the views and opinions expressed by some organisations. Use of such references should not be interpreted as implying endorsement by the Victorian Government, of any organisation cited herein, or that such organisations endorse the views and opinions of the Victorian Government.

1 Introduction

Victoria supports moves by the States and Territories towards greater consistency in workers' compensation and occupational health and safety (OHS).

Victoria does not support the national framework for workers' compensation and OHS proposed by the Productivity Commission (the Commission) because it:

- sacrifices fairness and equity;
- does not properly identify and account for cost impacts, including:
    - the indirect or flow on costs to all stakeholders; and
    - transition costs;
- threatens the stability and viability of Victoria's scheme; and
- creates another layer of complexity and additional cost in workers' compensation schemes by establishing a third workers' compensation jurisdiction in Victoria and in each other State and Territory.

Victoria will continue to work with all jurisdictions, in order to address compliance and administrative costs associated with a national approach to workers' compensation and OHS.

Victoria supports changes to workers' compensation and OHS that continue to:

- protect the rights and benefits of Victorian workers in a fair and equitable manner;
- enable flexibility and responsiveness within jurisdictions;
- streamline current workers' compensation frameworks; and
- allow the benefits of competitive federalism to be realised.

Victoria welcomes the Productivity Commission's Interim Report (PCIR) released as part of its inquiry into national workers' compensation and occupational health and safety frameworks. Victoria strongly supports moves toward a national framework that promotes greater consistency in workers' compensation and occupational health and safety (OHS). Furthermore, the Government has consistently demonstrated its ongoing commitment to nationally consistent approaches to workers' compensation and OHS through supporting the harmonisation of workers' compensation and OHS.

Principles such as equity, efficiency and affordability form the touchstone of any workers' compensation and OHS schemes. These principles are broadly reflected in some parts of the PCIR relating to the design and structure of workers' compensation, including:

- the alignment of benefit structures to broader system objectives to prevent workplace fatality, injury and illness, provide adequate financial compensation, support early intervention, rehabilitation and facilitate durable return to work (RTW) outcomes;

- technical issues regarding setting premiums - including the definition of remuneration, aspects of the premium setting methodology, the appropriate use of industry based and experience based employer rating, and the number and timing of premium assessments undertaken by employers;

- defining access and coverage;

- the role of medical panels in facilitating timely and efficient dispute resolution; and

- guiding principles for injury management based upon the Heads of Workers' Compensation Authorities (HWCA) best practice principles.

Victoria agrees with the Productivity Commission (the Commission) that greater national consistency is a desirable outcome. However, from Victoria's perspective, the PCIR has engaged in a discussion that does little to advance the practice or performance of workers' compensation and OHS schemes in Victoria or any other jurisdiction. In some instances, the PCIR has done little more than re-state the principles underpinning Victoria's own workers' compensation and OHS schemes.

The practical implementation of commonly recognised principles relating to OHS, system interfaces and benefit design, scheme underwriting arrangements, prudential regulation and self-insurance has differed across each Australian jurisdiction. Victoria recognises that further action is needed in these areas to promote greater national consistency and is committed to any initiative that will advance this goal in a timely fashion. However, Victoria does not support the Commission's recommendations for the establishment of an alternative, national self-insurance scheme or, in the longer-term, the creation of a new, national and broad-based, privately underwritten workers' compensation scheme.[1]

The Commission does not demonstrate a complete understanding of the realities of workers' compensation and OHS. This has resulted in poorly considered recommendations relating to:

- self-insurance;

- the role of private underwriters;

- prudential supervision;

- the elimination of cross-subsidisation from workers' compensation premiums; and

- national structures for the management of workers' compensation.

Often these specific recommendations are framed in such general or abstract terms that they do not provide any real operational value. An undue reliance on generalised assumptions and limited empirical evidence means that a somewhat overly simplistic approach to workers' compensation and OHS has emerged.

The Commission's recommendations attempt to deliver simplicity and clarity for multi-jurisdictional self-insurers. However, the Commission's approach would result in greater cost and complexity for workers' compensation and OHS by establishing another workers' compensation and OHS jurisdiction to operate in each State and Territory.

[1] This submission elaborates upon the original position set out in the Victorian Government August 2003 submission to the Commission's inquiry.

In developing its recommendations, the Commission has not given due emphasis to the transition costs involved in adopting its recommendations. Similarly, the Commission has not adequately addressed the downstream consequences, including the transfer of costs from multi-jurisdictional, self-insuring employers to other scheme participants such as allied health professionals, medical service providers and legal professionals. This stems from a lack of quantitative analysis in the PCIR and the Commission's focus on comparing static system costs.

The PCIR sets out a broad-reaching program for system-wide change that affects the States and Territories, the Commonwealth, employers and employees, as well as a range of scheme participants such as medical and rehabilitation service providers. By reducing the administrative costs for multi-jurisdictional self-insurers, the Commission would increase the administrative burden upon these participants that will result in greater transactional and other costs. This would occur because of the existence of a new scheme within each and every jurisdiction.

Furthermore, in advocating such substantial change, it is incumbent upon the Commission to fully address the implications of its recommended approach, particularly in terms of the economic and social impacts. This requires a full accounting of the benefits and costs across the economy, of the proposed changes. This may require a sophisticated modelling exercise. The analysis set out in the PCIR appears limited to an expert opinion provided by Taylor Fry Consulting Actuaries. This assessment should be based on an economic and policy-based analysis. The absence of such analysis means the PCIR's analysis and conclusions are unreliable.

The Commission's recommendations are aimed at reducing the cost burden for multi-jurisdictional employers to the detriment of fairness and equity in the workplace. Establishing another overlapping workers' compensation scheme will simply entrench unequal practices in the workplaces of any State or Territory by establishing an eleventh workers' compensation scheme. Under the Commission's model, employee rights and benefits would fundamentally differ depending on whether their employer remains in the Victorian workers' compensation system or moves to a Commonwealth-sponsored alternative.

The Commission's recommendations to establish a national workers' compensation and OHS scheme, to operate alongside state-based schemes, would also have different impacts on employers. The Commission's recommendations could simply heighten discriminatory and unequal outcomes among employer groups. The cost involved in transferring to a national scheme means that most small to medium sized businesses will be precluded from accessing this national scheme. Potentially adverse consequences for small to medium sized businesses may include:

- increased premiums due to the impact of adverse selection and the exit of large employers that represent a 'good risk' from State and Territory schemes, leaving state-based schemes to provide workers' compensation insurance to employers in high risk industries or employers who otherwise present a poor risk; and

- the unfair conferral of advantage to those employers who transfer to a cheaper scheme, with less benefits for workers.

Key questions relating to scheme and benefit design remain unanswered, but it is clear that the directions flagged by the Productivity Commission will result in negative impacts for the small and medium sized business sectors.

Community-based needs and preferences have shaped the design of statutory benefit structures for the provision of workers' compensation. This has meant that each State and Territory scheme has evolved in response to local needs and expectations. With the resultant localised schemes, the aim of simply defining a single 'best practice' workers' compensation scheme is not achievable as the expectations and behaviours of employers

and employees will differ between States and Territories. Indeed, the PCIR acknowledges that the perfectibility of any workers' compensation scheme is limited. As recognised by the Commission, no Australian workers' compensation or OHS system represents, in its entirety, 'best practice'. However, the federalist experience has a proven track record in stimulating innovation and learning, thereby improving the overall efficiency and effectiveness of State and Territory workers' compensation and OHS schemes.

The complexity of designing and developing statutory schemes and benefit structures and capturing 'best practice' is, implicitly, acknowledged by the Commission by its lack of any detailed recommended statutory benefit scheme that would underpin its recommendations for a national self-insurance scheme or national, privately underwritten workers' compensation scheme. It is incumbent upon the Commission, as it develops its final report, to address this issue.

It is necessary to understand workers' compensation and OHS within a broader context of industrial relations. Victoria's ongoing priority, like other States and Territories, is to best maintain the balance between employer and employee interests so as to ensure the ongoing efficiency and competitiveness of the Victorian economy. In threatening the stability and viability of state-based schemes, the Commission's recommendations also risk upsetting this balance to the detriment of employers and employees alike.

Victoria maintains that access to common law damages represents an important avenue for compensating seriously injured workers. Properly managed, this right complements a statutory benefit scheme. As set out in the Government's original submission to the Commission in August 2003, Victoria will not consider or support, any recommendations that would affect these fundamental rights.

The Commission has made a series of proposals relating to the regulation of OHS and the role of the National Occupational Health and Safety Commission (NOHSC). Victoria supports the retention of NOSHC and believes that some moderate, targeted changes are all that is needed to better position NOHSC to implement an effective national OHS infrastructure.

Victoria recommends that in developing its final recommendations, the Commission give greater consideration to the downstream consequences including the impacts on state-based workers' compensation schemes and the regulation of OHS. Furthermore, the Commission must undertake a sophisticated analysis of the cost-benefit of its recommendations.

The Commission has proposed sweeping and, in Victoria's view, unnecessary reform focussed on a small section of the Australian economy. The Commission should be better targeting the key issues underpinning the Commission's inquiry, including the high compliance burden and administrative cost imposed on multi-jurisdictional self-insuring employers. A pragmatic approach, based on achievable outcomes, would deliver real benefits to all jurisdictions.

As part of the PCIR, the Commission has identified a number of opportunities for greater harmonisation of schemes between jurisdictions. State-based schemes could meaningfully exploit these opportunities to harmonise self-insurance arrangements between States and Territories and deliver real benefits to multi-jurisdictional, self-insuring employers. Harmonisation could focus upon standardising key elements of self-insurance including access, prudential standards, reporting and monitoring. Streamlining existing arrangements would address the key drivers of the Inquiry. Concentrating these benefits upon multi-jurisdictional self-insuring employers, the Commission would minimise risks flowing from the unintended or unforeseen consequences of its recommendations. Victoria considers this to be a pragmatic response capable of delivering real benefits in the form of a reduced administrative burden upon multi-jurisdictional self-insuring employers. Equally, it will curtail transitional costs, dislocative effects, maintain premium and scheme stability. Victoria's position is that it is essential to ensure that workers' rights and benefits are maintained.

2 National frameworks for workers' compensation

2.1 National frameworks for workers' compensation

Victoria recognises that a major issue demanding action by the States and Territories is the imposition of compliance and administrative costs on multi-jurisdictional self-insuring employers.

The PCIR's recommendations, intended to simplify workers' compensation would, in reality, lead to greater complexity, confusion and duplication.

The PCIR's recommendations threaten the stability, equity, efficiency and affordability of Victoria's workers' compensation scheme.

The PCIR clearly identifies the drivers underpinning its inquiry into national frameworks for workers' compensation and OHS by stating that:

> "The most significant issue arising from the differences in the schemes is the compliance burdens and costs for multi-state employers."[2]

Victoria recognises that compliance and administrative costs imposed on employers operating in multiple jurisdictions, whether as self-insurers or otherwise, is a significant issue that should be addressed by the States and Territories. Victoria and its Victorian WorkCover Authority (VWA) have identified specific and targeted measures for harmonisation and the development of an overall framework through which such compliance costs can be minimised.

The PCIR's recommended approach to achieving national frameworks for workers' compensation is, in large part, framed in terms of achieving greater simplicity. However, the implementation of its recommendations would introduce a national regime of far greater complexity, ambiguity and confusion than any existing structure while risking the equity, efficiency and affordability of Victoria's scheme. Overall, potential cost savings would most probably be outweighed by significant net costs to the States, Territories, Commonwealth and other participants providing services to workers' compensation in each State and Territory.

[2] Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks: Interim Report*, October 2003, p. xxxi.

2.1.1 Recommendations for a national framework

The PCIR outlines a reform program designed, in the long-term, to establish an alternate national scheme to promote reform and harmonisation of state-based workers' compensation under Commonwealth guidance and direction. The recommendations are structured upon a three-step program to deliver national consistency. The first step is to:

> "immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme subject to meeting its prudential, claims management, OHS and other requirements."[3]

The second stage of the PCIR's national framework takes the form of a national self-insurance arrangement open to all employers able to meet specified prudential, claims management and OHS requirements.

The final stage of the PCIR's recommendations is to establish a new national broad-based, workers' compensation scheme privately underwritten by Australian Prudential Regulation Authority (APRA) authorised insurers.

The PCIR also sets out a fourth recommendation proposing the establishment of a national workers' compensation body, supported by the Commonwealth, States and Territories. This body would be charged with a range of functions including the development of standards for implementation by individual jurisdictions.

2.2 Costs

The PCIR's recommendations are far more extensive than required to address the issue of administrative and compliance costs for a small group of multi-jurisdictional self-insuring employers.

The Commission has also not fully addressed the social and economic implications of its recommendations.

Victoria recognises that change involves a financial cost, although reform should not be blocked for this reason alone. However, the PCIR has not identified the full costs of its recommendations. The Commission needs to consider both direct and indirect costs. These include:

- transition costs for the Commonwealth in designing, developing, implementing and administering an overall regulatory framework – including a national self-insurance scheme, a privately underwritten, national, workers' compensation scheme – as well as extend the Commonwealth regulation of OHS – including OHS compliance inspectorate, claims management, premium assessment and collection;
- the transfer of costs to other parts of workers' compensation such as medical practitioners, allied health professionals and legal professionals who need to comply with a third layer of workers' compensation regulation within one State or Territory;
- increased transaction costs arising from increased legal disputes due to uncertainty in determining whether an injured worker is covered by a state-based or Commonwealth alternative workers' compensation scheme; and

[3] Productivity Commission, p. 109.

- increased transaction costs due to a loss of uniformity between state-based agencies.

Victoria maintains that the benefits of simplicity and consistency will not be promoted by creating an eleventh workers' compensation scheme. The rights and benefits of Victorian workers will vary, depending on whether their employer is covered by the State, Territory or Commonwealth workers' compensation scheme.

Gaps in scheme coverage will result in more legal disputes and greater costs. This will prevent early intervention and positive outcomes – such as rehabilitation and durable RTW for injured or ill workers.

Victoria's workers' compensation scheme has developed relations and processes with other State, Territory and Commonwealth agencies; these benefits will be lost under the PCIR's approach.

The PCIR's recommendation for the establishment of a national workers' compensation framework represents a broad-reaching program for system-wide change. To deliver benefits to a small number of multi-jurisdictional self-insuring employers, the Commission recommends an unnecessarily broad and complex model for change. In many respects, the benefits associated with the Commission's recommendations are unknown or poorly defined. Victoria believes that the Commission has not established a persuasive case for change. The Commission has not based its recommendations on a clear demonstration that the benefits stemming from its approach would significantly outweigh the substantial transition and downstream costs associated with change.

A recent study, reported in the *Harvard Business Review*, suggests that the Productivity Commission is not unique in miscalculating, and overestimating, the potential benefits of its recommendations whilst underestimating the associated costs.[4] This study emphasised that an 'outside view' is essential to validate the Commission's approach. The experience of the different States and Territories in workers' compensation and OHS provides a valuable guide to assessing the potential implications of implementing the Commission's recommendations.

The onus is upon the Commission, as it completes its final deliberations, to consider a range of questions presented by its interim recommendations and weigh up the costs and benefits associated with its approach. Furthermore, any future recommendations by the Commission should be firmly grounded on the extensive body of experience and knowledge of workers' compensation that has evolved, over decades, at the State and Territory level.

The Commission should fully address the implications of its recommended approach particularly in terms of its economic and social impacts. This requires a full accounting of the benefits and costs, across the economy, of the proposed changes. This may require a sophisticated modelling exercise. The analysis in the PCIR appears limited to an expert opinion provided by Taylor Fry Consulting Actuaries. Victoria believes that this assessment should be based on an economic and policy-based analysis. The absence of such analysis means the PCIR's analysis and conclusions are unreliable. These weaknesses, combined with the Commission's failure to take into account a whole range of other, extremely significant impacts means that it is not possible to safely rely upon the PCIR's analysis or conclusions.

[4] Lovallo & Kahneman, "Delusions of Success", *Harvard Business Review*, July 2003, pp. 56 – 63.

2.2.1 Direct costs

Transitional costs

Victoria recognises that inevitably, reform will involve a cost. Moreover, Victoria also appreciates that significant transitional costs should not, by themselves, be an inhibitor of change where such reform delivers a net benefit. In order to accurately assess the true merits of any reform it is necessary to fully understand and assess the transitional costs associated with delivering the reform against the purported benefits.

The Commission lacks a general appreciation of the transitional costs involved in implementing its recommendations. In some instances, the PCIR does recognise, but seriously underestimates, some transitional costs.

The States, Territories and the Commonwealth would all be faced with direct costs associated with the transition to a national workers' compensation framework. Transitional costs are associated with each stage of the PCIR's recommended approach, but especially in relation to the second and third stages. The establishment of a new, national self-insurance regime would require:

- the development and implementation of a workers' compensation and OHS regulatory framework to govern the scheme; and

- the development of a Commonwealth capacity to undertake regulatory functions including inspectorate, claims management, premium assessment and collection and enforcement.

Furthermore, the PCIR does not address how this regulatory function would be structured. Does the Commission propose a Canberra-centric model, or the adoption of a federal structure? This question is important as it presents resourcing implications. The proximity of this authority to differing workplaces, its accessibility and its capacity to recognise and develop targeted responses to local issues as they emerge is also important.

It is clear that there are significant transitional costs associated with the development and implementation of the PCIR's recommendations for a national self-insurance scheme. In addition, the realisation of a new, national broad-based privately underwritten workers' compensation system would only compound these transitional costs.

The PCIR indicates that the Commonwealth will expend significant energy in the development and implementation of a new legislative framework. There are also some questions whether the development of a new, national self-insurance scheme and workers' compensation scheme, based upon the existing Comcare arrangements would be attractive to all multi-jurisdictional employers. The PCIR itself notes that:

> "there was criticism of the Comcare scheme particularly of its statutory benefit structure (including its limited access to commutations) and dispute resolution processes."

The PCIR continues by noting that:

> "A number of employers argued that the statutory benefit structure under the Comcare scheme would increase their workers' compensation costs. Telstra provided evidence that, in respect of its total incapacity payments under the Comcare scheme; there would be

> overall savings on weekly benefits of about 10 per cent or $1.4 million a year if it were to come under State and Territory schemes."[5]

This suggests that the Commonwealth will need to consider a range of scheme design issues as it moves to establish a new framework. These design issues relate to:

- the development of benefit structures with an appropriate balance between employee rights and employer demands for low premiums;
- principles for premium-setting – to ensure ongoing affordability and that the scheme is fully funded and able to meet all claims liabilities;
- the regulation of private insurers to provide workers' compensation (i.e. will this field of insurance be available to all APRA authorised insurers or be differentially limited?);
- establishing standards that define employee and employer obligations and that provides for the RTW plans; and
- the capacity and appropriateness of existing Commonwealth institutions such as the Administrative Appeals Tribunal (the AAT) which is experienced in administrative law and judicial review rather than to undertaking dispute resolution in the complex field of workers' compensation and personal injury.

Even a superficial analysis of the substantial issues needing consideration – as part of the development of a national privately underwritten workers' compensation scheme – suggests that the direct costs arising from the PCIR's long-term recommendations cannot be dismissed as minor or insignificant.

The Victorian experience of introducing a new workers' compensation scheme provides an example, on a smaller scale, of some of the challenges associated with managing the introduction of a national workers' compensation scheme. Victoria's *Accident Compensation Act 1985* took legal effect from Sunday, 1 September 1985. The policy of accounting for workers' compensation claims on a 'claims incurred' basis remained unchanged. As a consequence, many claims subsequently lodged for gradual onset injury or illness identified that the injury or illness started on or after Sunday, 1 September 1985. This led to significant financial liabilities for the newly established Victorian statutory scheme in meeting these liabilities rather than private insurers under the preceding privately underwritten scheme. The PCIR does not identify, let alone account for, such transitional impacts and their related costs.

2.2.2 Indirect costs

The PCIR gives little recognition to the direct costs associated with its medium and long-term recommendations. However, it is the broad-ranging indirect costs that are the most persuasive factors against the Commission's recommendations.

The following section examines some of the downstream consequences arising from the PCIR's recommendations.

Scheme participants

A workers' compensation scheme is a highly complex system encompassing a broad range of interactions between many different participants. The successful operation of such a broad scheme depends upon the involvement of a wide range of system actors

[5] Productivity Commission, p. 94.

external to the employer and employee relationship. Scheme participants include, but are not limited to:

- workers' compensation agencies;
- claims managers;
- medical practitioners;
- allied health professionals;
- occupational rehabilitation providers;
- accountants and insurance brokers;
- workers' compensation consultants;
- injury managers and advisors;
- risk management personnel; and
- legal professionals.

The nature of state-based workers' compensation schemes means that it has been necessary for the many participants to develop a strong understanding of the current state-based infrastructure that underpins workers' compensation. Some practitioners have also developed expertise in handling Comcare-based workers' compensation schemes. This means that many service providers that have developed a strong mastery of the statutory provisions, regulations, forms, processes and practices of one, if not two, workers' compensation schemes. The development of a new Commonwealth self-insurance scheme and a national, privately underwritten workers' compensation scheme suggests that these same practitioners would need to understand a third scheme operating within one jurisdiction, such as Victoria.

An acute burden would be imposed on many professionals who would need to acquire proficiency in the operation of a second, if not third, scheme. It is clear that this burden would be most onerous in the initial development stage when professionals would need to educate themselves as to its operation and supporting processes. However, there would still be an ongoing challenge and cost for professionals to maintain their proficiency across all relevant workers' compensation schemes. This will impose large transaction costs, both financial and social, upon all scheme participants.

The PCIR has focussed upon the potential cost savings that may arise from the adoption of its recommendations for a national self-insurance scheme and privately underwritten workers' compensation scheme. What it does not recognise is that the reduction or elimination of administrative costs in one part of the workers' compensation system will simply be transferred to other parts of the same system. This reinforces Victoria's position that the PCIR is not primarily focussed on improving efficiency but removing costs for multi-jurisdictional self-insurers.

It is clear that an appropriate accounting of these transferred costs significantly diminishes the potential net benefits identified as part of the PCIR.

Impacts on state-based systems

The PCIR recommends the establishment of an eleventh workers' compensation scheme to promote simplicity, consistency, equity and fairness. However, the Commission's approach would needlessly complicate the operation of State and Territory schemes to the detriment of equity and fairness by entrenching a third scheme within one jurisdiction, thus

establishing another group of rights and benefits that are only enjoyed by a small number of Victorian employees. It is not appropriate to liken this to the current situation where some employees, located within Victoria, are entitled to a different set of rights and benefits under the Comcare scheme. This is because the Comcare scheme occupies a unique position that reflects a broader approach establishing differential treatment for all Commonwealth organisations. The unique position of Commonwealth entities is most clearly reflected in their taxation treatment – for example such organisations have no interaction with state-based taxation authorities meaning that they enjoy privileges such as exemptions from land and payroll tax. It may also be argued that a policy to expand the coverage of Comcare is inconsistent with the broader policy approach to confer special status upon a selected number of organisations and governmental entities. Finally, these are, typically, highly sophisticated organisations that are acutely aware of their special legal status and its consequences. Commonwealth employers and employees are a clearly identifiable, and obviously different, delineated group. This will not be the case for employers who, due to the Commission's recommendations, could transfer to a national self-insurance scheme.

The PCIR's proposals will mandate duplication, confusion and complexity. For example, it is inevitable that documentation produced in the course of claims management in one workers' compensation scheme will be mistakenly directed to participants or institutions of another scheme. A further, practical example where uncertainty and ambiguity would result relates to education and marketing campaigns. It is likely that some employers may not differentiate between workers' compensation schemes and therefore, fully understand their rights and obligations. This will damage the efficacy of state-based schemes such as the VWA and its public education campaigns; even more importantly it could result in potentially severe legal consequences for a well-meaning employer.

The PCIR does not recognise the increase in costs for workers' compensation schemes and any other scheme participants as a result of confusion and ambiguity. The presence of a third workers' compensation scheme in Victorian workplaces means that the benefits of clarity and certainty are foregone. Establishing competing jurisdictions will entrench major risks for the Commonwealth and the States and Territories. For example:

- gaps in scheme coverage are an inevitable consequence, compounding risks for the inappropriate transfer of costs between State, Territory and Commonwealth workers' compensation schemes as well as the health and social welfare systems; and

- changing benefit structures at a Commonwealth, State and Territory level will, inevitably, mean that an employer transfers between the different schemes at will. This will mean that each scheme will need to develop legislation and policies to address outstanding claims legacies that will continue to reside within each scheme. Experience suggests that it is challenging enough for a state-based workers' compensation agency to manage claims incurred under a previous benefit structure; the complexity of this problem will only be compounded by the implementation of the Commission's recommended approach.

Jurisdictional issues will take on greater importance as differing workers' compensation schemes (and their public or private underwriters) engage in legal disputes to attribute liability for injured employees – to the detriment of employee interests, early intervention and durable RTW outcomes. Such jurisdictional issues will arise in situations where there is some ambiguity as to whether the workplace and the injured person are subject to the same workers' compensation scheme. Scenarios where this may arise include construction and mine sites or any other workplace where there may be a number of employers, employees, labour hire firms, government agencies, contractors and sub-contractors, some of whom would be insured in the Victorian scheme and some in the new, eleventh workers' compensation scheme.

A further issue involves the relationship between workers' compensation and other government agencies. The benefits of intra-state harmonisation, from a Victorian perspective, would be lost in a number of areas. The VWA and the Transport Accident Commission (TAC) have developed administrative processes to manage claims arising from a road accident injury that occurs during the course of employment (i.e. a full time truck driver or courier). A similar accident, involving the injury of an employee under a Commonwealth scheme is likely to result in legal disputes between Commonwealth and State or Territory agencies in an attempt to attribute liability and avoid cost. Such jurisdictional disputes have adverse consequences in terms of increased costs and also upon the capacity of a workers' compensation scheme to deliver positive outcomes, such as fostering positive employer and employee relations, early intervention, rehabilitation and durable RTW outcomes.

A possible danger, identified in Victoria's earlier submission to the Commission, is that creating a national workers' compensation framework may prejudice the degree of harmonisation and stability already achieved at an intra-state level.[6] The VWA currently works closely with a range of State and Commonwealth agencies including the TAC, the State Revenue Office (SRO), the Essential Services Commission (ESC), the Australian Tax Office (ATO) and the Health Insurance Commission (HIC). These relations may be damaged by the advent of a new layer to manage, oversee and regulate within Victoria resulting in further system costs.

2.3 Benefits

The PCIR recommends the establishment of a national, privately underwritten, workers' compensation scheme because private rather than taxpayer capital is at risk, competition in the marketplace delivers incentives for efficiency and innovation and governments can interfere in the setting of workers' compensation premiums.

Victoria does not support these recommendations, as they do not deliver these supposed benefits.

- It is employer capital at risk in a private or public workers' compensation scheme.
- The history of workers' compensation in Australia suggests that much of the innovation has occurred within public schemes.
- Processes for setting premiums in Victoria are fully transparent and independent from political interference.

The PCIR does not recognise the risks and pressures upon governments to act as a funder of last resort when private insurers fail.

Public underwriting of workers' compensation delivers real benefits. Victoria is confident that its workers' compensation scheme maximises the benefits of competition and economies of scale by outsourcing its claims and funds management responsibilities.

Victoria is the first state to use an independent economic regulator to ensure transparency and accountability in premium setting through Victoria's ESC.

[6] Victorian Government, *Submission to the Productivity Commission's Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks*, 15 August 2003, p. 8.

2.3.1 Public and private underwriting

The PCIR's long-term recommendation is for the establishment of a national, broad-based privately underwritten workers' compensation scheme. Although the PCIR comments that there are no compelling arguments as to the superiority of a publicly or privately underwritten workers' compensation scheme, it concluded that:

> "on balance, private provision is to be preferred on grounds that: it is private, rather than taxpayer, capital that is at risk; competition in the marketplace is likely to generate incentives for efficiency and innovation; and there is greater transparency of any governmental influence over premiums. Further, the risk of private insurer failure can be reduced by prudential regulation."[7]

Victoria questions whether this approach is likely to deliver real benefits, in the form of cost savings, to Australian employers and employees. Furthermore, as noted by the Commission, the Australian Industry Group maintains a similar position based on its members' experiences of privately and publicly underwritten regimes. The Institute of Actuaries has noted that a long history of public and private workers' compensation has not clearly shown any particular model to be the best.[8]

Capital risks

The PCIR suggests that in a privately underwritten scheme, it is not taxpayer capital at risk but private capital that is placed at risk. This implies that under a publicly underwritten workers' compensation scheme, it is taxpayer capital that will be used to meet the cost of any unfunded liabilities. This is a false dichotomy, not supported by evidence. Public or private, the allocation of risks ends up being the same. The majority of risk is borne by employers, whether they are located in a public or private scheme while the State or Territory remains the insurer of last resort under both a public or private underwriting structure.

Market failure, evidenced by the collapse of firms such as National Employers Mutual, Palmdale, Bishopsgate, Northumberland and Riverland and, the most recent and largest failure of the HIH Insurance Group (HIH) clearly demonstrate that it is employers who are largely affected by the failures of private underwriting. In publicly underwritten workers' compensation schemes employers were largely shielded from the fallout of the HIH collapse. However, in privately underwritten workers' compensation jurisdictions, employers were required to make good these capital losses through premium surcharges. For example:

- a five per cent surcharge was levied on workers' compensation insurance premiums in Western Australia;
- a levy of four per cent was imposed on workers' compensation insurance premiums in Tasmania;
- a three per cent surcharge was levied on workers' compensation insurance premiums in the Australian Capital Territory; and
- taxpayers support, in the form of a three million dollar contribution was necessary to make good the capital losses in the Northern Territory.

[7] Productivity Commission, pp. 247.

[8] Productivity Commission, pp. 243 – 245.

This empirical evidence shows that employer capital is at risk under a privately underwritten workers' compensation scheme as it is employers who will be required to meet the cost of increased premiums.[9] Ultimately, members of the public, in their role as consumers, will meet the cost of these unfunded liabilities as scheme costs are passed on through the cost of goods and services.

Victoria's position is that private underwriting does not provide one of the key benefits identified by the PCIR, as experience suggests that where there has been a significant market failure in privately underwritten workers' compensation schemes, there may be significant community pressure on governments to act as a financial safety net.

The role of government as an insurer of last resort is evident in the United States of America. Competitive state funds (i.e. government insurers) have been subject to intense political and community pressure to act as an insurer of last resort when there is a significant market failure – a regular phenomenon. California provides a topical and current example. The failure of many insurers including Reliance, Superior National, Paula, Fremont and HIH means that premium rates are rapidly escalating. As a result the State Compensation Insurance Fund (SCIF), has been forced into filling this void. SCIF has traditionally written about one-fifth of the total Californian workers' compensation insurance market. Having been forced to act as an insurer of last resort, its market share had increased to 28 per cent by 2001 and, with more recent events, has now reluctantly taken over more than half of the Californian workers' compensation market.

The PCIR recognises the danger for governments in being pressured to act as an insurer of last resort. However, the Commission concludes that this not an appreciable risk for the Commonwealth even though there is a clear body of evidence to suggest that employer and taxpayer capital is at greater risk under a privately underwritten workers' compensation model than its publicly underwritten equivalent.

Competition and markets

The PCIR concludes that competition in the marketplace is likely to generate incentives for efficiency and innovation. This conclusion is not supported by an examination of the current Australian landscape. Innovation in the New South Wales and Victorian workers' compensation schemes demonstrates that publicly underwritten workers' compensation schemes do support and promote innovation.

There is little evidence from a long experience of private underwriting in Australia that a private model for underwriting has brought about major innovation in workers' compensation practice. There may be a small exception in relation to some elements of creative pricing models. However, it is precisely the more cavalier aspects of such pricing innovation that were a contributing factor to the severe crisis of private workers' compensation underwriting in the early 1980s. This led, with the strong support of all major business groups, to the establishment of public underwriting, firstly, in Victoria in 1985, then South Australia in 1986 and New South Wales in 1987.

Victoria also refers the Commission to a series of reports, developed over more than three decades, which have pointed to the inability of privately underwritten insurance arrangements to provide any framework for effective system-wide service delivery (e.g. rehabilitation).

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[9] The relationship between unfunded scheme liabilities and increased premiums for employers was also emphasised as part of the 2003 review of the NSW WorkCover Scheme. *Cf*. Mckinsey & Company, *Partnerships for Recovery: Caring for injured workers and restoring financial stability to workers' compensation in NSW*, September 2003, pp. 37-38.

The 1970 Conybeare Report[10] in New South Wales was highly critical about the complete neglect of occupational rehabilitation under New South Wales' privately underwritten system. The 1984 Cooney Report[11] voiced similar criticisms of Victoria's privately underwritten workers' compensation scheme.

These reports represent only a small part of a broader public record, which clearly demonstrates that most of the significant and innovative developments within workers' compensation practice from at least 1985 have emanated from publicly underwritten schemes. These include:

- developments relating to a rehabilitation and return-to-work focused approach to injury management;
- responsive provider management;
- premium pricing methodologies; and
- the innovative use of claims data to guide effective injury and illness prevention.

Victoria maintains that the operation of a competitive, private sector delivery model, alongside the stability of public underwriting, provides incentives for innovation and quality service. This is why the scope for private participation in Victoria's workers' compensation scheme is limited to claims management and funds management. Victoria is confident that this structure offers real advantages.

The VWA is responsible for underwriting all Victorian workers' compensation; this means that it maintains full risk retention within the central fund, thus allowing the VWA to reap benefits from:

- economies of scale; and
- intermediation and the pooling of risk.

Victoria's model allows external fund management providers to realise economies of scale. However, there are few opportunities to realise similar economies from competition in claims management. This is because the most significant costs for claims management are associated with resourcing and labour – an area where it is difficult to capture such scale economies. However in claims management, competition stimulates innovation and high standards of service quality. Under Victoria's workers' compensation model, claims managers must compete in the employer market, not on the basis of price, but on service quality.

Overall, this model allows Victoria to optimise some real benefits:

- enhanced levels of service provision;
- better value per premium dollar; and
- provides employer choice in the selection of a claim agent.

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[10] *Report of the Inquiry into the Feasibility of Establishing a System for the Rehabilitation of Injured Workers in New South Wales*, 1970.

[11] *Report of the Committee of Enquiry into the Victorian Workers' Compensation System*, 1984.

The benefits of competition in an imperfect market such as workers' compensation are muted. Workers' compensation may be distinguished from the general insurance market because:

- workers' compensation insurance is compulsory for all employers;
- benefits are uniform; and
- the regulatory framework is supported by enforcement provisions.

The mandatory nature of insurance against workers' compensation risks imposes a corresponding burden upon governments to ensure that workers' compensation insurance premiums are available and affordable to all employers. This also places limitations on the role and benefits of competition. The review of Victoria's workers' compensation arrangements in 2000 under National Competition Policy found that the VWA scheme has features of a welfare scheme that are uncommon in insurance products, including the competitive products offered in other States or Territories. These features entail a significant public interest.

As a consequence of the legislated benefits in Victoria, and common law provisions, the Victorian workers' compensation scheme is not a standard insurance product, with maximum defined benefits. The availability of no fault statutory benefits under the scheme means that it is similar to a system of welfare benefits. One of the main objectives of the statutory and common law compensation provisions is to ensure that injured persons are properly compensated and that the burden of the cost of injury is met by the scheme.

The centralisation of workers' compensation under a national, privately underwritten workers' compensation scheme also places at risk, in the long-term, the viability of state-based schemes as recognised by the PCIR.

> "The opening up of a national scheme to all corporate employers would have potentially significant impacts on existing State and Territory schemes. Those public schemes with large unfunded liabilities may need to impose appropriate 'exit' arrangements. Some of the smaller schemes may ultimately become unviable on a stand-alone basis if a significant number of employers switch to the national scheme."[12]

The demise of such schemes and the establishment of a single national market will mean there is a real risk that the benefits of competition, including innovation and efficiency, will be lost due a greater complacency in the market place. Poor market performance would be detrimental to employers and employees alike. The long-term demise of state-based schemes would mean, inevitably, that the benefits of competitive federalism would be lost.

The PCIR recognises that competitive federalism has proven successful in stimulating innovation, learning and efficiency between jurisdictions.[13] This competition has been vital in encouraging best practice, allowing the organic development and "quiet borrowing between systems of features which have been shown to be demonstrably effective elsewhere."[14] The PCIR suggests that it is possible for a national scheme to look internationally for examples and insights into best practice. However, a lack of

[12] Productivity Commission, p. 102.

[13] Productivity Commission, p. 29.

[14] Heads of Workers' Compensation Authorities (HWCA), *Promoting Excellence: National Consistency in Australian Workers' Compensation,* Canberra, May 1997, p. 38 at 3.10.

comparability between Australian and international schemes means that such practice in workers' compensation and OHS regulation are not easily or quickly adapted or introduced. Moreover, a state-based structure has allowed experimentation within a small market, thus quarantining the potential effects of this innovation and allowing each State and Territory to examine and borrow different scheme features. Under a national scheme, opportunities for innovation and change will be more limited and, due to greater market size, also mean greater risks for the Commonwealth, insurers, employers and employees.

Premiums and transparency

The PCIR concludes that in a publicly underwritten workers' compensation scheme, there is a great danger that premiums will be at risk from political interference and that the assessment process lacks transparency. Victoria's current premium setting arrangements would suggest otherwise.

Premium setting arrangements in Victoria are transparent and independent from governmental influence. The calculation of premiums payable by Victorian employers is underpinned by a rigorous and sophisticated methodology. This methodology is fully detailed and made publicly available in the Premiums Order.

The PCIR recommends the appointment of an independent monitor to oversee the assessment of premiums in publicly underwritten workers' compensation schemes. Victoria has shown a strong commitment to transparency and accountability in premiums assessment and has been a leader in this area. Victoria first authorised the ESC to monitor and review premiums calculated by VWA and TAC in 2000.[15]

2.4 Equity and fairness

Workers' compensation is an important issue for government and the wider community. Its costs cannot be based on purely monetary terms. Victoria does not support the PCIR's recommendations, as they impact on equity and fairness.

The PCIR does not recognise the social costs associated with its recommendations. For example:

- the new Commonwealth scheme will require skills and experience in claims and injury management – during its early stages this will mean that some workers will suffer;
- the establishment of an eleventh workers' compensation scheme will mean that Victorian workers' will be entitled to different rights (including access to common law) and benefits depending on whether their employer is covered by the State, Territory or the Commonwealth alternative; and
- the uptake of the Commonwealth alternatives will have uneven impacts on employers depending on their size, financial strength and industry profile that may give some employers a competitive advantage.

Workers' compensation is a sensitive issue for all governments, as recognised by the PCIR. This is not simply due to the total economic cost of workplace accidents to workers, employers and the community, but also because the "pain, suffering and changed life

[15] The ESC is an independent economic regulatory authority with responsibility for the supervision of services such as gas, electricity and water. *Cf. S*ection 10B of the *Essential Services Commission Act 2001*.

circumstances of the workers and their families are immeasurable."[16] Thus, every workers' compensation system is committed to fostering the employer – employee relationship and promoting early intervention following injury to achieve positive rehabilitation and durable RTW outcomes.

The advent of a new, alternative, national self-insurance and workers' compensation scheme will have negative impacts upon the achievement of these injury management objectives. Firstly, the Commonwealth will need to acquire and develop experience in workers' compensation to realise the PCIR's medium and long-term recommendations. This will have adverse consequences for injured employees, as it is inevitable that the new system will not have the necessary day-to-day experience in claims and injury management to achieve timely rehabilitation and RTW outcomes.

Victoria has already noted that transitional issues should not be an inhibitor of change; nonetheless, this is a significant social cost that must by fully accounted for by the PCIR.

Successful claims and injury management will also be compromised, over the long-term, by the creation of a new national self-insurance and workers' compensation scheme. This is due to the confusion and lack of clarity that will result from the interaction of these newly established schemes with state-based statutory insurance schemes. Greater scope for legal disputes will compromise the ability of a system to quickly assume responsibility for injured workers. This will impose greater economic and social costs on injured workers. The PCIR has not recognised these costs.

2.4.1 Equity and fairness - employees

The PCIR is focussed upon delivering benefits to multi-jurisdictional self-insurers. However, the PCIR does not recognise the important position of employees within the context of workers' compensation and OHS, otherwise the Commission would have focused upon improving scheme performance and promoting best practice in injury and claims management as well as in OHS standards. Similarly, the PCIR does not take into account the broader social costs resulting from the establishment of a new self-insurance and workers' compensation scheme. In effect, such a scheme would fundamentally undermine the principles of equity and fairness for Victorian employees. The PCIR considers some issues relating to the inequitable treatment of rights, but makes no conclusions on whether any one Australian workers' compensation scheme best embodies these principles of equity and fairness.[17] The PCIR lightly dismisses this issue by referring to the complex nature of workers' compensation and the interaction of benefits with other elements of a scheme.

Victoria recognises the difficulty of assessing how successfully a workers' compensation scheme embodies principles such as equity and fairness. Such principles are based upon community values and needs. State-based schemes have developed in response to such values, needs and preferences. The proximity of the VWA to Victoria's workplaces, along with the Government and VWA's relationship with stakeholders such as employer, industry and employee groups, means that our state-based system is better positioned to recognise and respond to these values, needs and preferences in a timely way. Victoria believes that these are real and substantial benefits. This flexibility is lost in a national approach. The PCIR does not address this issue.

[16] Productivity Commission, p. xxii.

[17] Productivity Commission, pp. 20-21

Victoria will not support any approach that will entrench unfairness or undermine employee rights and benefits. The PCIR's recommendations would establish a new layer of workers' compensation regulation in Victorian workplaces. It is not possible to assess whether the rights and benefits created as part of this new jurisdiction would be greater or less than the current rights and benefits Victorians enjoy, as the PCIR does not answer practical questions on how this new scheme will look. However, Victoria does not see how equity or fairness would be promoted by the PCIR, as it would mean that the rights of Victorian employees would differ, on a seemingly arbitrary basis, depending on whether their employer is part of a Commonwealth sponsored or Victorian scheme.

The PCIR recommends that any national framework for workers' compensation provide no, or at most very limited, rights for injured workers' to access the common law. Victoria has proven successful in managing the re-introduction of common law rights in April 2001. This success may be measured by Victoria's success in minimising the cost of legal claims. As noted by the PCIR an important differentiator between Victoria and other common law schemes is the use of minimum impairment thresholds. Victoria sees this as an important mechanism for balancing the benefits of access to common law against the certainty of statutory benefits provided at reduced levels.

Victoria notes that the PCIR recognises the merit of Victoria's approach in upholding the rights of seriously injured workers to sue negligent employers while minimising legal costs. The re-introduction of common law rights by Victoria demonstrated a strong philosophical commitment to individual rights. The PCIR's approach threatens the rights of Victorian workers to access the common law. Accordingly, Victoria will strenuously resist any Commonwealth attempts to limit the rights of seriously injured Victorian workers to access the common law.

2.4.2 Equity and fairness - employers

The PCIR recommends expanding the existing Comcare scheme as the first part of its national program. However, member eligibility is determined primarily on the basis of history or politics rather than upon a more principled and coherent set of criteria. Eligible entities include those who:

- are about to cease to be a Commonwealth authority;
- were previously a Commonwealth authority; or
- are carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority.

The application of this legislative criteria means that membership is currently limited to a range of corporations in the banking, telecommunications, air transport, defence, broadcasting and pharmaceutical sectors. Under this approach, there is a clear group of eligible entities able to access the benefits of self-insurance under Comcare due to the affinity of their current, commercial activities to those of current or previous Commonwealth organisations. Other similarly qualified entities in terms of proven financial strength, claims management capacity, and OHS competency are denied a similar right to self-insurance.

It is true that many eligible entities could currently access the Comcare self-insurance scheme. Some organisations have questioned the benefits of the Comcare scheme (such as Telstra, Qantas and the Commonwealth Bank of Australia) and thus not applied for Comcare self-insurance. In addition, successive Commonwealth ministers have not supported the expansion of Comcare.

The second stage of the PCIR's progressive model further entrenches an element of inequality or differential treatment between corporate entities. Questions of equity and fairness are not relevant to state-based self-insurers as these employers and their employees enjoy the same obligations and benefits as any other Victorian employer. In

this second stage, differential treatment exists between those employers able to satisfy the criteria necessary for self-insurance status, and employers, who operate on a multi-jurisdictional basis but who, usually due to size, are ineligible. This will confer a clear competitive advantage on some corporations within the same industry. To reap the full benefits of the PCIR's recommendations it would be necessary for other, ineligible employers to wait for the implementation of the final series of the PCIR's recommendations for the establishment of a national workers' compensation scheme. The need to address the level of unfunded liabilities in some state-based schemes suggests that this is not a short-term goal.

2.5 System interfaces

The distribution of costs between the Commonwealth health and social security systems and state-based workers' compensation schemes is neither simple nor straightforward. Non-work related factors contribute to workplace injuries meaning that some overlap is inevitable and may be appropriate.

The PCIR focuses on the shift of costs to the Commonwealth. It does not recognise the transfer of costs to workers' compensation schemes and the injured employee or their families. More work is needed to properly understand this issue.

No State or Territory questions the principle that where injuries and illnesses are demonstrably work-related, it is appropriate that the cost be attributed to employment.[18] This is essential to ensure that the economic costs of a workplace injury or illness are reflected in the cost of the good or service. The PCIR then concludes that $9 billion of current workers' compensation costs are transferred to the general community through the Medicare and welfare systems.

Victoria questions the methodology used by the PCIR to estimate this sum.[19] As highlighted by the Department of Employment and Workplace Relations (DEWR), the recent House of Representatives Standing Committee on Employment and Workplace Relations, in its report on the inquiry into aspects of Australian workers' compensation schemes, found that the interfaces between workers' compensation and health and social welfare is not clearly known or understood.[20] Its recommendations are strongly directed to the need for quantitative study so as to determine the true extent to which the health or social welfare systems, or even the injured employee, is subsidising the costs of workers' compensation.[21] The absence of such data means that it is not possible for the PCIR to draw any firm conclusions about the distribution of costs between employees, employers or the wider community.

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[18] Productivity Commission, p. 197.

[19] The PCIR refers to the DEWR, which estimates that the total economic cost of workplace injury and illness to workers, employers and the community is in excess of $30 billion annually (Productivity Commission, p. 197). DEWR has calculated $30 billion on the basis of multiplying the direct cost of $6 billion in employer premiums by 'four'. See DEWR *Submission to Productivity Commission Inquiry*, August 2003, pp. 3- 4). However, there is no explanation of how this multiplier was chosen. Having arrived at this total figure, the PCIR then divides the costs 30-40-30 between employees and their families, employers and the community respectively. This division was premised upon earlier findings by the Industry Commission, *Inquiry into Occupational Health and Safety*, Vol. 1, Report No. 47, 11 September 1995, pp. 18-19.

[20] House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the Job: Report on the Inquiry into Aspects of Australian workers' compensation schemes*, Canberra, June 2003, p. xxv.

[21] *Cf.* Recommendations 5 and 6, House of Representatives, p. xvi.

It is clear that broader social factors, such as ageing, contribute to workplace injury and it may even be appropriate for costs to be shared between workers' compensation and taxpayer-funded health and welfare systems in some instances. Simply attributing costs to either workers' compensation or the Commonwealth is not straightforward. The PCIR does not address how this question should be resolved. It is not possible for the PCIR to make an informed conclusion relating to costs to the Commonwealth and the adequacy of benefits available under a workers' compensation scheme.[22]

It is insufficient for the PCIR to simply dismiss the equally important issue of cost shifting away from Commonwealth-funded health and welfare systems, to state-based workers' compensation. It does this on the basis that this is not primarily an issue of benefit design or the interaction between benefits and the Commonwealth's taxation, social security and health systems, and therefore that it is "impossible to quantify the extent of this form of cost-shifting."[23]

2.6 Premium setting

A national, privately underwritten, workers' compensation scheme threatens the stability and viability of Victoria's workers' compensation scheme. This is due to the likely impact of adverse selection and the pressure upon the Victorian WorkCover Authority (VWA) to act as an insurer of last resort.

Two of the most important aspects of workers' compensation insurance relate to its availability and affordability. As a result, premium stability is a key priority for governments and employers. From an employer perspective, premium stability is essential to give companies some certainty in their business planning. However, premium rates in privately underwritten schemes have been, at times, highly volatile. Western Australia and Tasmania provide recent examples.[24]

Privately underwritten insurance markets are typically characterised by fluctuating premium levels and volatile market behaviour. The nature of the 'premium cycle' is that insurers typically overshoot and undershoot the general insurance cycle of movement from hard to soft markets. This phenomenon results from private insurers attempting to gain market share through aggressive price discounting. The natural corollary is that after a number of years, such insurers may be significantly under-reserved to meet their outstanding claims. The result is a sharp upward adjustment of rates to build up their capital reserves. This issue is of particular concern to privately underwritten workers' compensation schemes as in such jurisdictions, workers' compensation insurance typically amounts to one third of all general insurance premium income. The long tail claims structure of workers' compensation further compounds this risk.

Premium stability was a major issue, across Australia in the 1980s, reaching extreme dimensions. Insurance markets experienced severe rate cutting in the mid-to-late 1970s leading to a major re-adjustment in the 1980s. This led to an Australia-wide average annual insurance premium increase – averaging 43 per cent from 1981 to 1983.

[22] Productivity Commission, p. 199.

[23] Productivity Commission, p. 203.

[24] Victoria drew the Commission's attention to the Tasmanian experience as part of its earlier submission. Victorian Government, p.26.

The PCIR does not adequately consider this risk in recommending a national, privately underwritten, workers' compensation framework. State government regulation has been necessary in the past to address this issue and it is likely that the Commonwealth would, sometime in the future, be required to intervene in a similar fashion. This is necessary to maintain affordability and availability, even though it may be reluctant to interfere in the ordinary performance of the market.

The advent of a national workers' compensation framework is also likely to have adverse consequences for the State and Territory schemes. The PCIR includes a precursory analysis of impacts on the State and Territory schemes from the departure of self-insuring employers but does not even attempt to analyse the impact of employers departing from State and Territory schemes to a national alternative.

The departure of employers from State and Territory schemes is an important issue, from a State and Territory perspective, as it is likely to lead to higher premiums. The PCIR may dismiss such concerns on the basis that state-based schemes support cross-subsidisation between large and small employers or fail to reflect the true risk of a workers' compensation claim. However, this view does not recognise that the real problem for States and Territories is that high-risk employers are likely to remain in a state-based workers' compensation premium pool. This is because there is a real danger arising from the impacts of adverse selection. It is arguable that many medium-to-large employers, representing a 'good risk', may transfer to a national model while State and Territory schemes continue to provide workers' compensation insurance to employers representing a 'bad risk' or are simply part of a high-risk industry.

The Commission's interim recommendations centre on the establishment of an alternative national scheme for self-insurance and workers' compensation. These recommendations are intended to provide net benefits to multi-jurisdictional self-insurers. However, the Commission has overlooked the potentially adverse impacts of its recommendations on small to medium employers who continue to operate within state-based workers' compensation schemes. Depending on the attractiveness of the proposed Commonwealth scheme and thus the number of employers who exit from State and Territory workers' compensation schemes, it is possible that the impact of adverse selection on State and Territory schemes would be detrimental to small to medium employers who are confronted by increased premiums. Under the current, state-based approach, workers' compensation premiums are subject to competition between the States and Territories. Accordingly, Victoria is concerned that the Commission's approach may mean that Victorian employers would no longer enjoy the second lowest average premium rate of all States and Territories – a real competitive advantage for Victoria's economy.

Victoria is committed to achieving full funding of its workers' compensation scheme by 2007. This is an important and achievable goal based on long-term modelling and analysis of workers' compensation premiums. Victoria also reminds the Commission that in working towards this goal, it uses a transparent premium setting methodology, based upon experience rating for large employers and industry class rating for small-to-medium sized employers. This means that Victorian employers benefit from the second lowest average premium rate of all States and Territories. Victoria has embraced these principles and, through the appointment of the ESC to monitor and oversight premiums, ensured transparency and accountability. Ongoing review processes are an essential feature of Victorian workers' compensation scheme. Such independent monitoring and supervision is intended to promote scheme efficiency and effectiveness. Nonetheless, cross-subsidisation remains a feature of the Victorian workers' compensation scheme.

2.7 Compliance costs and benefits

National frameworks will deliver some cost savings. The PCIR gives poor or misleading examples of some potential cost savings. Victoria requests that the Commission realistically assess these examples and conduct further analysis to calculate the real cost savings of a national framework for workers' compensation.

The PCIR conducts a limited assessment of the benefits of its three-stage approach. Victoria maintains that this assessment offers little or no value in making a meaningful comparison of the cost-benefit of its recommendations. The PCIR has not fully understood the information it uses to quantify the benefits of its recommendations. It is clear that the PCIR's recommendations will deliver benefits. However, these must be accurately quantified to ensure a realistic assessment against the net costs of a new workers' compensation framework.

Victoria refers the Commission to the following issues relating to its assessment of the costs of compliance:

- The Insurance Australia Group (IAG) estimated that the existence of multiple arrangements added $10.1 million to the (once off) cost of setting up a single national IT platform. This is a sunk cost and therefore irrelevant to the PCIR's assessment of compliance costs.

- The PCIR refers to the IAG's estimated total direct savings from a single national workers' compensation scheme of, at least, some $4 million per annum. These cost savings relate to the IAG, not as a multi-jurisdictional employer complying with multiple arrangements but in its role as a multi-state 'insurer' having to comply with these different arrangements.

- The IAG estimates that a data-driven 10 per cent improvement in scheme efficiency would over time reduce its liabilities of $5 billion by $500 million. This would be reflected in better targeting of resources and claims management strategies, better health outcomes and improved RTW rates. However, the PCIR has selected a poor example, as these savings are not related to the proposed changes. There is nothing to prevent the IAG from adopting a data driven approach under the current state-based systems to extract these cost savings. These benefits are not dependent on a national framework and, indeed the introduction of a national scheme will delay this opportunity as it will not be supported by historical data and the IAG will need to start collecting claims data from scratch. It is simply not possible for the IAG to utilise old data, collected under a previous scheme, as such data will not be useful in predicting behaviour under a new benefit structure.

- The PCIR refers to an estimate by Optus that it could save up to $2 million of its total $6 million annual workers' compensation costs if it were able to take out one self-insurance licence under the Comcare scheme. This estimate is a poor example of the cost savings available from a national self-insurance framework – as the estimate only reflects cost savings that may be extracted under the Comcare self-insurance model. This estimate gives no insight into the cost savings that may result from the establishment of an alternative Commonwealth self-insurance scheme as recommended by the PCIR. It may well be a small fraction of the $2 million cited.

- The PCIR also makes no attempt to reconcile opposing Optus and Telstra views on savings. Optus' view is that it would make cost savings under Comcare, while Telstra provided evidence to the Commission that it could make an approximate annual 10 per cent saving on the weekly benefits it currently disburses as part of its total incapacity

payments under the Comcare scheme if it were to come under the State and Territory schemes.[25]

The PCIR has made no attempt to estimate, even on a theoretical basis, the cost savings available to a company and the impact of economies of scale that will be available to differently sized employers. As noted above, Victoria recognises that a national framework will deliver some cost savings; however, these are not appropriately recognised and quantified in the PCIR. The onus is upon the Commission, as it develops its final recommendations to realistically assess the cost savings of a national workers' compensation model.

The absence of a detailed framework outlining key features of the proposed national model, including statutory benefits is a further omission. The examples given by Telstra and Optus highlight that while a self-insurer will make some administrative savings from a national scheme, these savings are generally overwhelmed by the change in benefit costs. Thus, the major factor in moving to a national scheme will depend on the benefit levels contained within the PCIR's national scheme. In general, the question for any employer will rest upon whether the national scheme is at least equal to, or lower than, the average benefit level of the States and Territories' schemes. An employer must also weight State and Territory benefit levels against the distribution of the employers' workers across jurisdictions. The PCIR does not provide any guidance on the specific principles upon which these benefits will be structured let alone detailed analysis of benefit structure and design to facilitate a meaningful assessment of the benefits and potential impacts of a new scheme.

2.8 Self-insurance and OHS

The PCIR recommends that employers should not be subject to any extraordinary OHS requirements in order to be eligible for self-insurance.

Victoria sees self-insurers as enjoying a unique position that brings certain benefits and privileges. The State delegates responsibility for maintaining workplace safety upon these employers. It is appropriate for self-insurers to demonstrate a good OHS record.

The PCIR's proposals for the establishment of a national self-insurance scheme includes a recommendation that OHS requirements should apply equally to all employers. As a result, the PCIR does not support subjecting self-insurers to OHS requirements that are additional to those applying to all other employers.[26]

Workplace safety is an important regulatory responsibility that is conferred upon governments. Failure to maintain a safe workplace can jeopardise employee safety. The unequal employer-employee relationship means that an independent monitor is essential to maintain employer accountability. The vulnerability of the employee in this relationship means that there is a real potential to abuse their safety and wellbeing. Safeguards are needed to avoid this situation.

Self-insuring employers enjoy a special position within the context of workers' compensation. In effect, the State delegates much of its responsibility for monitoring and regulating workers' compensation administration in a specific workplace to the responsible employer. This employer is then responsible for making administrative decisions, under

[25] Productivity Commission, p. 94.

[26] Productivity Commission, p. 274.

the *Accident Compensation Act 1985 (Vic)* that would otherwise be the responsibility of a claims agent. The special position of the self-insurer within a workers' compensation scheme is of concern to Victoria. For this reason, Victoria imposes restrictions upon an organisation applying for self-insurer status in Victoria and must satisfy itself that the applicant will not abuse its position in managing workers' claims and their injury. The special status of a self-insurer means that it is subject to few controls. Self-insurer status is granted cautiously, only to a few companies able to demonstrate a good claims and safety record. Whilst OHS regulation is, theoretically, distinct from workers' compensation, Victoria continues to see a company's OHS performance as one way of indicating their approach to claims and injury management and commitment to rehabilitation and achieving durable RTW outcomes.

In focussing upon the economic benefits and advantages associated with self-insurance, the Commission has not genuinely appreciated that the implications for the employees of a self-insurer are equally important. A strong emphasis must be placed on the relationship between a self-insuring employer and employee, as this relationship is at extreme risk of abuse by some employers.

Victoria maintains that it is essential for any self-insuring employer to demonstrate a strong record in observing and upholding OHS standards, and that this may mean there is a greater burden imposed on Victoria's self-insurers. It is noted that Victorian self-insurance arrangements are currently under review.

2.9 National structures – the role of HWCA

Victoria does not support the PCIR's recommendations for the establishment of a national body responsible for setting standards, monitoring and reporting workers' compensation scheme performance and being responsible to the Workplace Relations Ministers' Council (WRMC).

Victoria supports the Heads of Workers' Compensation Authorities (HWCA) as the appropriate body for promoting national consistency in workers' compensation. The Commission should examine ways of strengthening its role, responsibilities and resources.

The Commission recommends the Commonwealth, States and Territories establish a new national body, a counterpart to the National Occupational Health and Safety Commission (NOHSC), independent of and operating parallel to this framework for a national workers' compensation scheme. The body would be directly accountable to the WRMC with all jurisdictions jointly responsible for implementation and funding. The body's main functions would be to:

- develop standards for consideration by WRMC;
- collect data and undertake/coordinate analysis and research; and
- monitor and report on the performance of workers' compensation arrangements.

This is an unnecessary innovation that would duplicate existing structural arrangements and absorb much needed resources. The HWCA is an appropriate institutional body to undertake these functions. Membership of this body comprises individuals best placed, in terms of organisational responsibility, authority and expertise, to undertake functions such as developing standards, monitoring and reporting on the performance of workers' compensation arrangements.

In commenting upon the success of the HWCA, the PCIR notes that it lacks a legislative framework. However, Victoria does not see this as an obstacle that prevents it from assuming a national leadership role in promoting consistency across workers' compensation schemes. Commonwealth legislation will not influence or control the behaviour of the States and Territories and thus, would have no impact upon generating commitment amongst the States and Territories to faithfully adopt its recommendations or proposals.

Furthermore, the PCIR's recommendations are impractical. One of the greatest difficulties associated with its model is that it requires the WRMC to take a leadership role. Traditionally, the WRMC has been focussed directly upon industrial relations – while matters such as the development of consistent standards and harmonisation for workers' compensation, has been given a lower priority. This is unlikely to change.

The highly detailed, technical and complex nature of workers' compensation issues means that the WRMC is likely to view such tasks with reluctance. A national ministerial forum is not the appropriate place for managing these issues. It would be unlikely to be able to discharge its newly found duties efficiently or effectively. Rather than speeding up the process for developing national frameworks and consistent standards, it is more likely that the WRMC would be slow to address and provide leadership on these issues.

The PCIR proposes a new national body. It would be more timely and efficient to utilise existing structures. The Commission's time would be more profitably spent in examining the role and capacity of the HWCA – to identify ways in which its role and importance could be strengthened. Recommendations could focus upon practical resourcing issues while a more strategic approach could examine the role, agenda, membership and functions of the HWCA. In addition, recommendations could focus on ways to ensure that issues of importance remain on the national agenda and are addressed in a timely fashion.

Victoria has taken a leading role in HWCA for securing greater national consistency, based upon best practice principles. It will continue to pursue this role into the future. It is essential that the HWCA take national leadership in shaping the future direction of workers' compensation across Australia. The HWCA has recognised that, in the past, it has failed to fully realise some opportunities to promote national consistency. However, it has become increasingly aware of the need to grasp this opportunity. This is seen in the outcomes of the most recent HWCA meeting (24 November 2003), where there was an undertaking to resolve the issue of a common definition for 'employee' and 'worker' that applied across workers' compensation schemes and addressed differences in its use by other government instruments – including Commonwealth and State taxation authorities and OHS authorities.

In the past, the role of HWCA has been complemented by informal arrangements between jurisdictions. In 1994-1995, VWA in conjunction with the New South Wales WorkCover Authority, put into effect an arrangement governing the requirements of registration and premium paying where employers had employees working across both jurisdictions. In real terms, this arrangement has been of benefit to small employers and especially those employers operating in Albury – Wodonga, Swan Hill, Echuca and other cities and towns along the border of Victoria and New South Wales. Similarly, Victoria has joined with Queensland and New South Wales in legislating for consistent cross-border entitlement provisions. This is a measure that will provide clarity to employers in terms of determining the relevant jurisdiction in which their obligations lie. This greater certainty is also advantageous in severely restricting, if not eliminating the prospects of forum shopping.

These are further examples of the beneficial experiences of cooperative federalism. Victoria will continue to work together with other jurisdictions, informally and formally, to harmonise workers' compensation and OHS arrangements.

2.10 Victoria's position

The PCIR has proposed major change to address the potentially high administrative and compliance costs imposed on multi-jurisdictional self-insuring employers. These changes will only lead to greater costs.

Victoria recognises that self-insuring multi-jurisdictional employers are faced with significant administrative costs. Victoria has outlined an alternative proposal for jurisdictions to work together to reduce these costs through streamlining existing, state-based self-insurance schemes.

Victoria recognises that self-insuring multi-jurisdictional employers are faced with significant administrative and compliance costs. This is a matter of considerable concern, not only to the Commission, but also to Victoria.

Victoria and the VWA strongly support, and are actively working towards, a framework through which a range of costs imposed on these multi-jurisdictional employers could be standardised and harmonised. Jurisdictions, working together, could reduce these costs by streamlining existing, state-based self-insurance schemes to lower administrative and compliance costs. This initiative could focus upon streamlining:

- reporting and data collection requirements;
- OHS monitoring;
- some aspects of employer obligation (for example RTW plans);
- access and coverage (such as consistent definitions of 'employee', 'worker' and 'remuneration'); and
- prudential requirements.

The development of a viable alternative solution that will address the key driver of the PCIR, namely costs on multi-jurisdictional employers, will offer a range of benefits:

- it is a low risk solution that presents few downstream consequences in the form of unknown or hidden costs, or other disruptive impacts – while addressing the key drivers for reform;
- the ongoing stability and viability of state-based schemes will be protected;
- current workers' compensation arrangements will be streamlined and simplified rather than creating another, overlaying workers' compensation and OHS regulatory framework;
- equity and fairness will be enhanced, as it will ensure that employees working within the same State will enjoy the same level of rights and benefits;
- benefits arising from harmonisation and consistency, on an intra-state level, will be protected;
- Victoria will continue to enjoy its competitive advantage, derived from having the second-lowest average premium rates across all States and Territories;

- States and Territories will continue to enjoy flexibility and the ability to quickly respond to community needs, values and preferences; and

- the benefits of competitive federalism in stimulating innovation and learning will continue.

Victoria's recommendation may be seen within the broader context of co-operative federalism – the benefits of which are also recognised by the Commission. This proposal will treat all employers operating on a multi-jurisdictional basis on an equal footing. Moreover, this proposal could be easily implemented within the current national framework without a need to create a new, additional scheme and overlaying structures.

Victoria has long been active in introducing, participating and supporting arrangements to simplify the compliance and administrative burden on all employers operating on a multi-jurisdictional basis. Victoria encourages the Commission, as it develops its final report, to seriously consider the merits of Victoria's recommendation. The focus should be upon delivering a robust, pragmatic and realistic approach that fully recognises the costs, benefits and complexities of moving towards a national framework for workers' compensation and OHS.

3 National frameworks for OHS

3.1 National frameworks for OHS

Victoria continues to support the National Occupational Health and Safety Commission (NOHSC) in its current terms, form and role.

Victoria has demonstrated an ongoing commitment to NOSHC and its key initiatives. Accordingly, Victoria is recognised for its leadership role in this area.

Victoria does not support the PCIR's recommendations for the establishment of a uniform national regime, as this would create unnecessary confusion and lead to additional costs for employers operating solely within state borders.

Victoria continues to maintain that the following is needed:

- better funding by the Commonwealth to allow it to assume a stronger role in the development of National Standards to deal with a range of key hazards;
- better drafting of National Standards by NOHSC to enable jurisdictions to incorporate these Standards into state-based legislation and regulation; and
- a higher level of commitment by jurisdictions to adopt National Standards consistently and within a reasonable period of time.

The PCIR recommends fundamental changes to OHS across Australia. Victoria does not support these recommendations and refers the Commission to its original submission to the inquiry.[27] Victoria supports the retention of NOHSC and some moderate, targeted changes so as to better position NOHSC to implement an effective national OHS infrastructure. These changes include:

- increased funding for NOHSC by the Commonwealth – this will also allow NOHSC to assume a stronger role in the development of National Standards to address a range of major workplace hazards;
- better drafting of National Standards by NOHSC to enable easier adoption by jurisdictions; and
- a higher level of commitment, by jurisdictions, to the adoption of National Standards consistently and within reasonable timeframes.

Victoria is committed to OHS in the interest of fostering safer workplaces and harmonising relationships between Victorian employers and employees. On a national level, Victoria has demonstrated an ongoing commitment to the NOHSC and its leadership role in developing and implementing key initiatives such as the:

[27] See: Victorian Government, *Submission to the Productivity Commission Inquiry: National Workers' Compensation and Occupational Health and Safety Frameworks*, 15 August 2003.

- development of 'prevention of falls' regulations as a way of improving regulatory frameworks aimed at reducing high incidence/severity of risks;

- evaluation of Focus 100 Poor Performers Program - the development of an evaluation framework targeting compliance and enforcement projects and programs; and

- evaluation of Victoria's Industry Stakeholder Forums.

3.1.1 Recommendations

The PCIR sets out a clear reform agenda to facilitate the development of a national framework for OHS. The Commission has proposed a series of recommendations for OHS, similar to those relating to workers' compensation, that are designed to deliver broad-reaching reform of OHS to address poorly defined system and regulatory failures. The Commission has identified some intended benefits however, in many instances the benefits are at best, unsubstantiated, or at worst, illusory. The PCIR has not shown that there is a substantive difference between the States and Territories, or quantify the additional cost burden imposed on multi-jurisdictional self-insuring employers in complying with OHS standards.

The Commission's discussion of OHS demonstrates a degree of naivety regarding the practicality of its recommendations. The creation of a new, separate OHS regulatory environment would produce complexity and confusion for employees, employers and unrelated third parties. Administrative complexities in trying to align the various requirements of a new OHS jurisdictional regime from existing laws would also create or exacerbate legal ambiguities. In turn, this would increase costs related to determining the application of OHS legislative standards with respect to duty holders and unrelated third parties (such as emergency services personnel or sub-contractors).

Prima facie, the PCIR justifies a series of its recommendations for the creation of a national framework for OHS, upon a series of specific employer examples. However, in many of the given examples, the Commission is drawing upon issues or incidents that specifically relate to workers' compensation only.[28] The PCIR, along with some employer groups, has greatly underestimated the high degree of consistency that characterises OHS regulation across Australia. For example, all jurisdictions (except the ACT) have implemented priority national standards covering plant, certification of operators, manual handling and noise.[29] The performance-based nature of OHS standards and an outcome-oriented regulatory system has meant that superficial differences in the wording and structure of legislation and regulation have been mistakenly perceived as major differences between the States and Territories.

A straightforward comparison of the key features that characterise OHS across Australia include the scope and content of the duty of care, reporting requirements, the role of OHS representatives and committees, consultation requirements, enforcement and penalties demonstrates that a high level of consistency already prevails.[30] While it is possible to discern some differences in the regulation of certification, licensing and permits, it is also incumbent upon the Commission to give due recognition to the industry mix in each State or Territory.

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[28] Productivity Commission, pp. 14-15

[29] SA will adopt noise standards by the end of 2003.

[30] *Cf*: WRMC, *Comparative Performance Monitoring: Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, "Part 2", August 2002 (2nd edition) (www.workplace.gov.au)

Overall, each State and Territory Government continues to maintain a commitment to national consistency. This is evident in the adoption of most National OHS Standards' commonly agreed essential requirements across all jurisdictions.[31] Some variation in each State or Territory, designed to accommodate specific local needs, does not lessen the degree of similarity in health and safety outcomes achieved in all jurisdictions.

The PCIR overstates the degree of difference between OHS jurisdictions to advance an agenda for a national OHS framework. It proposes that national consistency be achieved through the introduction of national OHS template legislation under the aegis of a strengthened WRMC. Victoria sees template legislation as an inflexible and inefficient means of achieving consistency. Structural flaws undermine the timely introduction of template legislation. For example:

- there is no capacity to adapt an overarching legislative framework to the local conditions of the different States and Territories; and

- gaining stakeholder agreement to the detailed wording of template provisions is significantly more challenging than gaining agreement on 'common essential requirements'.

As a result, the States and Territories have not engaged in a process to support the development of national standards in the area of OHS, preferring to adopt a more pragmatic and flexible approach to the development of OHS legislation and regulation. The benefits of cooperative federalism are evident in the processes adopted by individual States and Territories in driving legislative reform to meet identified needs. Some national standards have typically resulted from regulations first introduced in Victoria, New South Wales or Queensland. For instance, regulations regarding noise, manual handling and falls from heights were first established in Victoria before they became national standards.

An undue emphasis upon national standards also means that the PCIR has not fully recognised that legislative uniformity does not guarantee standardised outcomes. The standardisation of outcomes is not guaranteed simply by legislative uniformity. It also relies upon the consistent interpretation, application and enforcement of such standards.

3.1.2 National structures

Victoria recognises that, although the current regulatory models applying in each jurisdiction are similar, with few substantive differences between subordinate instruments, there is room for improvement in ensuring consistent approaches to applying regulatory and enforcement standards across Australia. Current processes could be improved by developing national standards in such a way that they may be more easily adopted by States and without requiring substantial re-working or revision at a State or Territory level to meet local conditions and needs. Equally important is a need for jurisdictions to make a greater commitment to the adoption of agreed national standards within a more consistent timeframe. Victoria does not support the PCIR's recommendations to change the structure of NOHSC.

NOHSC has a tri-partite structure, comprising representatives of employer and employee groups – as well as government. It is responsible for reviewing and making recommendations on OHS standards, legislation and implementation. These arrangements are a central feature of post-Robens legislation adopted in all jurisdictions. The NOHSC is ideally positioned to identify key needs and assess practical implications arising from proposed reforms. It is evident that employer and employee groups are most directly affected by OHS standards, legislation and implementation. On that basis, these

[31] Only the Major Hazards Facilities National Standard and the Dangerous Goods National Standard have not been widely adopted by the jurisdictions. Victoria has adopted both of these standards.

groups are best placed to make a meaningful contribution to the development of OHS standards and their introduction to the workplace.

Victoria does not support the PCIR's recommendations to bolster the role of the WRMC through the creation of three separate committees, and revitalising the NOHSC as a technocratic body responsible for the drafting of national standards. The NOHSC, in its current role, has an important position in leading the development of national standards. This responsibility should not be assumed by the WRMC. The PCIR outlines a process whereby proposals are drafted by the NOHSC, while stakeholder consultation is undertaken though the newly established committees. This approach will mean that standards would be reworked upon consideration by the WRMC. This model compounds inefficiencies by conducting consultation following the completion of draft standards. Furthermore, it places an unworkable burden upon the WRMC, as it is unlikely that it will have the capacity, inclination or technical OHS expertise to address detailed matters relating to perceptions of risk and the real impact of OHS standards upon workplace safety. This model would deny the timely, efficient and responsive development of OHS standards demanded by the dynamic workplace environment that exists across all the States and Territories.

3.1.3 The Commonwealth OHS framework

The PCIR proposes to extend coverage of the *Occupational Health and Safety (Commonwealth Employers) Act 1991* to parallel its proposals for the expansion of Commonwealth coverage of self-insuring organisations. This would be done in the first instance under the *Safety, Rehabilitation and Compensation Act 1988* (the Comcare Act) and subsequently, pursuant to a newly established alternative Commonwealth legislative self-insurance framework.

In formulating these recommendations, the Commission has not given appropriate consideration to the consequences that would inevitably arise from the extension of a national scheme. The PCIR does not address a number of practical considerations such as:

- the impact of competition upon employers within the same industry group who are subject to potentially different scheme requirements;
- the creation of inconsistent outcomes for employers and employees arising from the application of different OHS standards; and
- determining which are the applicable OHS standards with respect to un-related third parties including emergency services personnel, contractors and sub-contractors.

The complexity of these issues is further compounded by the lack of professional knowledge and expertise in OHS at the Commonwealth level. The Commonwealth OHS function is currently limited to a small sector of the economy and is dominated by white-collar industries. In 2000-01, the Commonwealth sector, despite the low-risk nature of many of its activities experienced a higher average rate per 1000 employees of injuries resulting in five or more days compensation, than that experienced across all Victoria.[32] This suggests that the Commonwealth has not proved highly successful in undertaking its OHS function and yet, the PCIR proposes that the Commonwealth rapidly develop OHS standards to apply across a broad range of high-risk industries. Realistically, such rapid reform could endanger workplace safety. The Commonwealth would also need to quickly

[32] Victoria does acknowledge that the Commonwealth is responsible for regulating some specific high-risk sectors e.g. the armed forces, maritime safety, aviation safety etc. WRMC, *Comparative Performance Monitoring: Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand,* August 2002, (2nd edition) , pp. 62-63. (www.workplace.gov.au)

expand its inspectorate, enforcement and dispute handling capabilities (including funding) to fulfil these onerous roles and responsibilities.

3.1.4 Premiums and OHS

The PCIR identifies options to utilise workers' compensation premiums as a further means of creating financial incentives for workplace managers to improve OHS performance. However, the PCIR does not provide any real evidence to support the conclusion that premium discount schemes or self-insurance results in better OHS performance.

3.1.5 Conclusions

Victoria's practical experience in managing OHS means that it is fully aware of the challenges and difficulties associated with regulating OHS. This experience is reflected in the health and safety standards that apply to all Victorian workplaces today. Victoria's innovative management of OHS risks, including major hazards, provides an insight into future regulatory trends, with closer integration of workers' compensation and OHS at an intra-state level. This change in workplace culture is driven by a need for greater efficiency, effectiveness and improved outcomes. Moreover, this change will enable Victorian employers to adopt a wider perspective, encompassing workers' compensation and OHS, in managing workplace culture. Victoria is concerned that the expansion of the current Commonwealth OHS system would undermine this integrated management approach to workers' compensation and OHS, thereby negatively impacting upon health and safety standards in Victorian workplaces.

The PCIR sets out an unworkable reform agenda predicated on a poor understanding of OHS and a failure to recognise the inter-relationship that exists between OHS, workers' compensation and industrial relations. These recommendations would undermine the success of state-based approaches to OHS. Any individual entering a poorly supervised workplace would be at risk whilst the Commonwealth slowly developed the expertise necessary to undertake the regulation and supervision of workplace safety, and individuals' legal rights and duties.

Appendix A – Defining access and coverage

Introduction

Victoria is in general agreement with the overall approach taken by the PCIR on these matters. However, the principles that the PCIR elaborates for the delineation of coverage of 'employees'/ 'workers' are extraordinarily general in nature and largely take the form of higher-level aspirational guiding tenets. It is recommended that the Commission's final report adopt a more definite, precise and operationally attuned approach to these matters. Victoria is also in general agreement with the PCIR approach in respect to coverage of injury and illness. However, Victoria believes that in defining employment attribution it would be unfair to injured workers to extend this test from 'a significant' to 'the major contributing factor'. Furthermore, Victoria does not believe that it is necessary to restrict the coverage of recess injuries in the manner recommended in the PCIR.

Coverage of 'employees' and 'workers'

It is suggested that a general framework approach to coverage of 'employees'/ 'workers' is most usefully developed as a series of cascading principles. These are set out below.

Common law concept of employment

Although the point may be technical, it is more appropriate to formulate this starting point in terms of the common law concept of employment, rather than that of 'employer control' as in the PCIR. It is true that the 'control test' was originally the touchstone for distinguishing between 'workers' and 'independent contractors', but it was a test that became increasingly difficult to apply to more complex employment relationships (eg *Zuijs* v *Wirth Bros Pty Ltd* (1955) 93 CLR 561), leading to the current situation where 'control' is one of a number of indicia that must be considered in deciding whether a person is an employee or independent contractor. This approach was endorsed by the High Court in *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16.

Having the common law concept of employment as a starting point provides some basis for keeping the distinction between employees and independent contractors attuned to the realities of contemporary labour market arrangements. The 'balance of indicia' approach allows a court to consider the various competing considerations and arrive at a judgment as to the real nature of the work relationship before it (eg *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) AIRC 927971). While this starting point provides a general floor that will adequately serve as a basis for establishing workers' compensation coverage in the bulk of work relationships, there is a need for supplementary additional steps. The additional steps are included for technical legal reasons and to accommodate wider policy concerns.

Use of deeming provisions

The second step in the cascading principles is the resort to deeming provisions. As the PCIR itself notes (in the statement of principles that serves as its recommendations) such resort may be necessary to provide certainty and clarity as to work relationships accorded workers' compensation coverage. This is especially the case with respect to persons who,

although not employed under a 'contract of service' in the strict legal sense, should attract workers' compensation coverage.[33]

There are also situations where, for wider policy reasons, an extension of workers' compensation coverage to persons who would otherwise not qualify is considered appropriate (including volunteer fire fighters, SES volunteers). Deeming arrangements are also appropriate to overcome particular legal difficulties. For instance, jockeys may, in a strict legal sense, work for eight or more 'employers' in the course of a single working (race meeting) day.

Specific contracting provisions

The PCIR is the latest of a number of reports to draw attention to the impact of more diffuse and complex working arrangements that have characterised recent labour market development. The task is how to distinguish between genuine contracting relationships and those that amount to 'fake self-employment', where a person, formally described as an independent contractor, is actually solely or overwhelmingly working for the one business entity. The Australian Taxation Office has taken steps to clarify this situation. A similar approach, also derived from a taxation (payroll tax) source is contained in sections 9-10A of the *Accident Compensation Act 1985 (Vic)*, which Victoria commends for the attention of the Commission.

Coverage of injury and illness

The two areas of disagreement for Victoria in the PCIR concern the test of work attribution and restriction of recess injuries. It does not take issue with the other recommendations in this area.

The PCIR recommends that the test of work attribution to determine compensability should, as a minimum benchmark, be that the employment was 'a significant contributing factor', but that added clarity is required if the test adopted were in terms of the employment being 'the major contributing factor'. Victoria strongly believes the requirement that employment be 'a significant contributing factor' should constitute the only benchmark of such contribution. The original test for employment connection was that the injury 'arose out of *and* in the course of employment'. This imposed both a causal ('arising out of') and a temporal ('in the course of") element that had to be satisfied for compensability.

However, from the 1920s, jurisdictions (with the exception of Tasmania) moved to the present formulation of 'arising out of *or* in the course of employment'. The High Court, in *Kavanagh v The Commonwealth* (1960) 103 CLR 547, determined that the 'in the course of' element was purely temporal in nature and that the worker need only be engaged in an activity that was part of or incidental to his or her employment.

Introduction of the 'a significant contributing factor' test restored the need of some causal connection between the employment and the injury, but in a manner that roughly represented the balance of the original 'arising out of *and* in the course of employment' formula. Victoria believes that the 'a significant contributing factor' test does strike the right balance, and that a move to 'the major contributing factor' test would represent an unacceptable impediment for the establishment of compensability by injured workers.

The PCIR recommends that coverage for recess breaks and other work-related activities should be restricted, on the basis of the lack of employer control, to those at workplaces and at employer-sanctioned events. Victoria considers that this proposal is too restrictive in nature and believes that the correct balance of rights and responsibilities between employers and workers, in respect of recess injuries, is that which is set out in section

[33] Consider, for example, taxi drivers.

83(1)(a) of the *Accident Compensation Act 1985 (Vic)*. This provides, for a worker being temporarily absent "during any authorised recess" in which the worker does not "voluntarily subject himself or herself to any abnormal risk of injury".