SUBMISSION

From
Labor Council of NSW
To
The Productivity Commission

Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks

Labor Council of NSW
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CONTENTS

Introduction

The Labor Council of NSW represents approximately 750,000 union members in NSW.

The Labor Council welcomes the opportunity to make this submission on behalf of the 750,000 members and all of our affiliated unions.

The Council is aware that individual unions may be submitting their own submissions to this Inquiry.

The Labor Council considers that workers' compensation legislation could be improved in all jurisdictions. Recent amendments to workers' compensation legislation have not resulted in improvements considered by the Labor Council to be essential – for employees, employers and in the national interest. In its submission to the House of Representatives Standing Committee, the Council and individual unions argued the need for harmonisation of workers' compensation legislation around Australia.

The Labor Council supports the approach towards national consistency and harmonisation across workers compensation and occupational health schemes, and the greater integration of both. The Council, however, is deeply concerned that in trying to obtain national consistency there would be a move towards adopting the lowest common denominator and the weakest aspects of the State schemes and therefore, on this basis, we are extremely sceptical about any national consistency approach, which fails to utilise the strengths and advantages of the state jurisdictions.

Workers' compensation legislation was initially conceived at a time when employment was generally full-time and permanent. This employment paradigm has dramatically changed in recent years and with the changes to employment arrangements many workers are finding themselves inadequately protected at a time when they are most vulnerable, specifically when they are injured or fall ill as a result of their employment.

Workers compensation schemes must aim at providing injured workers and their families with adequate financial support, the best possible medical intervention, including early diagnosis and appropriate treatment, and returning the worker to meaningful employment. In the event that an injured worker is unable to resume any type of employment there should be proper income maintenance.

All of the workers compensation systems in Australia fail to adequately protect vulnerable injured workers in relation to strategies regarding early intervention and return to work. This is the area that requires the most attention. It is the primary cost driver in any workers compensation scheme, whether in Australia or internationally. There should be greater obligations on employers to provide meaningful suitable duties and long-term return to work options.

Workers compensation schemes should adopt a total injury management and preventation approach by coupling safer working environments with effective risk management strategies and financial incentives. There should be far more focus on research and design and employers should be encouraged to adopt safe systems via premium discount schemes and other mechanisms.

The Labor Council agrees with the Productivity Commission that occupational health and safety and workers' compensation is likely to be best managed at a state and territory level but that a national framework is essential to facilitate equity, establish best practice, accommodate the needs of a rapidly changing and increasingly mobile workforce, and to accommodate the needs of employers and employees operating across state and territory borders.

The House of Representatives Standing Committee on Employment and Workplace Relations. ***Back on the job: Report on the Inquiry into Aspects of Australian Worker's Compensation Schemes June 2003 (HORSC), found the following:***

> *Workers' compensations schemes should aim to provide workers with a meaningful and sustainable outcome following a workplace injury. The best long term prospects for an injured worker lie in a safe and timely return to work with reasonable compensation for medical costs, work time lost and for non economic loss in the event of injury. Early intervention through rehabilitation and retraining as required is the best approach to achieve a return to work appropriate to the capability of the injured worker.*
>
> *Workers compensation schemes should foster a safer working environment with effective prevention strategies to reduce and, to the extent possible, eliminate injuries. When things do go wrong, there needs to be a total injury management approach to workers compensation including prevention, compensation and rehabilitation.*

Whilst the HORSC recognised that there was a need for greater national consistency in the operation of workers compensation schemes during their Inquiry, they did not realise the complexity of running workers compensation schemes. If a scheme were to be run at a national level it would become a huge bureaucracy.

Recommendation 1
Labor Council recommends that workers compensation schemes are far better managed at a state level, having the Regulator ensure that there are checks and balances in place and that the remuneration packages for scheme administrators are appropriate and encourage the right incentives.

There is a move in NSW to look at opening up the management of workers compensation or actually unbundling claims management from premium collection to allow more competition in the scheme and even opening the door for third party service providers who may not be insurers.

One way of insuring national consistency would be to develop a code of standards signed off and agreed to by all of the states.

Inquiry into Workers Compensation Systems in NSW

The inquiry into the NSW Workers' Compensation System in 1997 by Richard Grellman identified that "the structural weakness within the system, which had reduced focus on the key system objectives, was a lack of stakeholder ownership in most aspects of the NSW Scheme particularly in areas of injury management process and formulation of legislation." Grellman also found that there was a lack of financial incentives for licensed insurers to research and implement practice.

Grellman came to this conclusion after interviewing a number of employer and employee organisations throughout the Inquiry.

Grellman recommended the formulation of a Workers' Compensation Advisory Council which model was initially adopted in New South Wales. The make up of the Council was as follows "The Council is to consist of equal employer plus employee representatives, the General Manager of WorkCover and several non-voting advisors. The non-voting advisors would be insurers, representatives from the legal and medical profession and other relevant service providers. The key responsibility of the Council was to meet regularly, discuss and negotiate changes to the Workers' Compensation Legislation.

Advisory Council responsibilities included:

- Devise new legislation and regulations;
- Oversee and implement new system;
- Recommend changes to ongoing system; and
- Provide advice to key participants in the system.

All Workers Compensation Schemes must ensure ownership, i.e. the employers and employees have a major role in setting policy, recommending ongoing changes and closely monitoring the schemes effectiveness and that it meets its objectives.

Recommendation 2
The Labor Council recommends that each of the State based jurisdictions adopt the Grellman recommendation in relation to key stakeholder involvement.

In addition, there is considerable merit in a parallel approach being adopted of the national level.

The most obvious parties would be the primary stakeholders, being employers and employees (represented by unions etc), who have a clear and dominant interest in the system. The other major party would be the State and Commonwealth Governments ("CGovt") who have a financial interest due to the interaction between any Workers Compensation and Occupational Health and Safety system and social security payments, health costs and forgone accumulation of superannuation benefits to the extent that these are not met by way of workers' compensation to injured employees.

Other interested parties with knowledge about the functioning of workers compensation systems are health & legal professionals plus administrators etc who operate and make decisions during the daily use of a particular system. Insurance companies have an historical role in this area, but their involvement is not essential, as they provide no more than an alternative funding mechanism.

Recommending changes to legislation

Through public forums, working parties and meetings, the Advisory Council will discuss and negotiate changes proposed to the workers compensation legislation. The Advisory Council should attempt to foster the standard practice that any proposals for amendment to workers compensation legislation be referred to the Advisory Council so that it becomes the sole source of amendment bills considered by the legislature.

In the context of such a standard practice, the legislature will be able to debate the amendment bill, although there is the likelihood that the bill will be assented to without significant amendment, as it will have the support of worker and employer representatives who are the key stakeholders in the system.

Source: Inquiry into Workers Compensation System: Final Report - Pages 65-69 (excerpts)

This issue is addressed hereunder at recommendation number 10.

National Frameworks

1. What are the main problems arising from having multiple jurisdiction-based regimes through Australia?

The union movement believes that the problems arising from having multiple jurisdiction-based schemes throughout Australia does not fall on the states but rather on the Federal Government for not providing sufficient national co-ordination. The Federal Government has not provided the appropriate funding and resources to the National Occupational Heath and Safety Commission, which could have sincerely undertaken this role.

The unions are of the view that multiple jurisdiction-based schemes are the best option for Australia. The USA and Canada have multiple jurisdiction-based schemes. Some of the schemes in the United States are privately underwritten where others are Government managed Funds.

It is far more practical to have state based Occupational Health and Safety and Workers Compensation schemes. This is on the basis that it is far better to manage these schemes at a micro level rather that a macro level.

Moreover, the Union movement is sceptical that the multi-jurisdictional approach is as difficult to manage as is claimed. The majority of employers are not national corporations or entities.

The majority of employers and their employees are not obviously concerned with a national system (apart from the idea of national consistency) as they are generally contained within a State/Territory jurisdiction. This includes the very significant employer of the State governments who are very significant employers.

There is no perfect or best way to set up and manage a Workers Compensation and Occupational Health and Safety – hence the differences in systems adopted by each State, which have also changed over time within a particular State. The way in which a system is maintained or changed can sometimes depend upon the ideas prevalent at that time, which also evolve in the light of the observed experience of how other systems have faired over time, considering both Australian systems and overseas systems. The political framework can influence the set up of a particular system at the time. It would be preferable to obtain consensus from the primary stakeholders to avoid unnecessary changes to the system caused by the election cycle.

A number of states have different benefit structures to NSW. Most states do not have benefits, which continue beyond two years. NSW is the only scheme that provides injured workers with some form of income replacement up to retirement age and an option of a lump sum payment. NSW has recently introduced the fifth edition of the American Association Guides for Assessing Impairment; all of the other states are using the fourth edition.

Other states have significantly reduced weekly benefits, which have led to an increase in the number of injured workers claiming Social Security. In certain circumstances, these individuals may not be entitled to claim Social Security if their partner is employed.

Recommendation 3
The Labor Council is opposed a national workers compensation scheme because of the concern of reduction in benefits and limited access to those benefits.

The HORSC Inquiry Supports Need For National Consistency Not National Scheme

The HORSC reported, "*that the implementation of a national framework need not seek to have the states refer their powers to the Commonwealth and that the primary responsibility remain with the states and territories."*

The HORSC therefore did not recommend that the Commonwealth Government introduce a federal based workers compensation scheme, but rather look at national consistency and setting benchmarks across all schemes.

Recommendation 4
The Labor Council supports the need for national consistency. The Labor Council does not support the adoption of the lowest common denominators from each of the states' Occupational Health and Safety and Workers Compensation systems. It supports selecting the best principles from all of the schemes.

The HORSC stated – *"A nationally consistent approach does not mean a national workers compensation system."*

Recommendation 5
The Labor Council of NSW supports the recommendations regarding not referring powers to the Commonwealth and the view that a national consistent approach does not mean the adoption of a national workers compensation system.

The Enquiry by HORSC on Employment and Workplace Relations "Back on the Job – Recommendation 14"

The recommendation of that enquiry was as follows

> "*The Committee recommended that the Commonwealth Government support and facilitate where possible the development of a national framework to achieve greater national consistency in all aspects of the operation of workers' compensation schemes (paragraph 8.100)"*

Problems Arising From Multiple Jurisdiction Based Regimes

One of the problems with not having national consistency across workers compensation schemes is the lack of harmonisation. Not all workers are covered by workers compensation.

There is definitely a need to have consistency particularly in the definition of a worker or employee, as there are a number of definitions in different states. As a consequence, a number of workers are not covered. The Northern Territory probably has the worst definition of "workers" or of "employee" in its legislation.

Recommendation 6
The Labor Council would totally oppose any move to water down the NSW definition of "an injured worker".

A number of employers have entered into casual arrangements with their workforces. This development and the growth of the Labour Hire Multiple Contractors industry is a direct result of employers trying to opt out (i.e. transferring the risk) of paying workers compensation premiums and other benefits. The Labour Hire industry is now experiencing significant increases in their Workers Compensation Premiums. The Labor Council understands that some Labor Hire Companies are unable to obtain workers compensation insurance, particularly those in high-risk areas, such as construction.

This has also led to a high level of premium manipulation and widespread failure to comply with OHS obligations.

Exclusion of Classes of Workers

The Labor Council will also totally oppose any exclusion from coverage of different classes; i.e. agricultural workers (who are excluded in South America), or workers in low risk occupations (Italy).

The rural sector has approximately 2 fatalities per week on Australian farms.

The House of Representatives was so concerned with the issue of worker coverage that they have recommended that a study be conducted to identify the extent to which workers are currently not covered by any workers compensation system, with a view to adopting a national standard that covers the widest possible number of workers.

The House of Representatives Standing Committee on Employment and Workplace Relations "Back on the job: Report on the Inquiry into aspects of Australian worker's compensation schemes June 2003" recommended as follows...

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

Recommendation 7
The Labor Council of New South Wales fully supports the HORSC recommendation to broaden the definition of workers to ensure coverage of workers who are not currently covered by any workers compensation system.

Recommendation 8
Labor Council supports a proposal to remove uncertainty regarding contractors/deemed workers by defining all individuals as deemed workers.

The current lack of consistency, as the House of Representatives Standing Committee and the Industry Commission inquiry both concluded, results in less than ideal outcomes including the following:

- In the absence of a commonly adopted definition of employee, many workers find themselves without the benefit of workers' compensation insurance. As noted in the Standing Committee's report, a nationally adopted definition should capture the greatest possible number of workers.

- Workers are treated differently in respect to benefits payable based solely on where they reside and work – clearly this is inequitable.

- Different approaches to benefits payable has resulted in a considerable degree of cost-shifting – to Medicare, the social security system, to workers and, in some instances, to employers.

- Unfair competition arises for those employers working across borders who are able to take advantage of lower premiums in one state to the disadvantage of employment for residents in an adjacent state.

- The lack of harmonisation, in particular that all workers are not covered by workers compensation.

The Labor Council agrees with these conclusions and also highlights the following additional issues.

- The lack of consistency and inadequacy of Workers Compensation and Occupational Health and Safety data.

- The variance in return to work strategies.

- Failure to target and assist poor performing industries such as the Agriculture Sector.

- Failure to exchange solutions, ideas and strategies between jurisdictions.

- Duplication between jurisdictions and gaps in relation to research, development of resources, marketing strategies etc.

As already discussed, each State system differs in a number of areas, such as:

Definition of injury - For example, any injury or illness suffered whilst at work, or excluding claims that occur primarily as a consequence of personal ill health (e.g. heart attack).

Benefit amounts such as what costs are covered and for how much. Systems may impose restrictions on weekly compensation by way of dollar weekly limits, by length of term or overall maximum dollar limit. Weekly compensation may be based on dollar amounts for the injured employee plus loadings for dependant spouse and children while other systems base compensation on the employees' pre-injury wage only. There can be variations on lump sum payments for permanent loss of bodily function such as amputation, loss of sight etc. There are variations on the existence of lump sum settlements by way of common law or commutation.

2. Is there a need for national frameworks to address perceived deficiencies in comprehensiveness and consistency between arrangements across Australia for workers' compensation and OHS?

There can be no doubt that the current arrangements across Australia for workers compensation and OHS are insufficiently comprehensive. The most notable area of this real deficiency concerns the collection of data relating to illness, injury and causation. These deficiencies are not merely perceived- they are actual deficiencies. However, any move towards increased consistency in the application of workers compensation and OHS arrangements across Australia must ensure that the most vulnerable categories of workers are not further placed at disadvantage.

The workforce of Australian manufacturing and service industry includes in its ranks various groups of particularly vulnerable workers. The work situation of these various groups leaves them especially open to industrial exploitation and its detrimental social consequences. These particularly vulnerable categories of workers are to be found labouring under an array of work arrangements variously described as "precarious employment "and "contingent work". Such contingent work arrangements are deliberately structured to achieve the following key result: namely, the overall commercial beneficiaries of various work processes are effectively distanced from any legal liability for the conditions under which that work actually performed by the ultimate workers – even though the

same beneficiaries may exercise real effective control over the organisation (and outcomes) of those same work processes.

Examples of such contingent work arrangements can readily be found in multi-tiered supply chain structures and other outsourcing arrangements, which are collectively characterised by relatively low pay and job insecurity among those labouring – at the end of the outsourcing chain – to actually perform the work of production (or provision of services). By contrast, the most lucrative commercial benefits of such outsourcing chain structures are often to be found at the opposite end of the chain, where the effective business controllers of these supply chain structures obtain the fruits of high quality, low cost production (or provision of services) whilst effectively avoiding legal liability for the conditions under which that work is actually performed. The legal mechanisms by which effective business controllers indeed direct the outcomes of such outsourcing structures most commonly take the form of consecutive contractual arrangements, although other legal devices such as trust arrangements and intellectual property licensing agreements are also not uncommon.

The low pay and job insecurity which characterises the lot of contingent workers operating under exploitive work arrangements directly results in an increased incidence of hazardous work practices in those fields of industry dominated by precarious employment.

Graphic instances of such exploitive work arrangements are to be found among the ranks of thousands of textile, clothing and footwear (TCF) outworkers labouring away in homes and backyards to produce low cost, high quality fashion garments to be ultimately sold for high mark ups in upmarket retail outlets. These TCF outworkers are situated at the end of a long chain of contract arrangements dominated by the oligopolistic major retailer sector, which purchases TCF products from principal manufacturers, fashion houses and other suppliers, who in turn farm out the work orders along supply chains which reach down to the outworkers and the TCF sweatshops where rates of pay are low, job security is absent and unsafe work practices are rife.

This multi–tiered TCF supply chain structure is paralleled by the structure of the long distance transport industry, where owner drivers at the base of the transport supply chains simultaneously face downward pressure upon their levels of remuneration linked to decreasing job security and unrelenting competitive pressure to endure dangerous practices on the nations' roads and highways. In relation to both the TCF industries and the long distance transport industry, the relevant supply chain structures are both dominated by the major retailer sector, which acts as the effective business controller of both groups of industries while avoiding legal liability for their OHS outcomes. Parallel situations can be found in other industries, such as contract cleaning and also the construction industry where pyramid subcontracting arrangements ensure that subcontracting workers (such as tilers) are subject to low pay and diminished job security resulting in an increased incidence of hazardous OHS practices yet at the same time commercially advantageous results for principal building contractors and developers.

For these groups of contingent workers, it is vital that their industrial relations problems - that is, their pay and conditions – are simultaneously addressed together with their OHS problems, given the interrelationship between them. Furthermore, their industrial relations and OHS problems produce work injury outcomes and workers compensation consequences. Only the State and Territory jurisdictions are capable of simultaneously addressing all three areas of industrial relations, OHS and workers compensation and rehabilitation.

Thus, the State jurisdictions are able to deem whole classes of workers to be employees for the purposes of various legal protections in all three areas of employment protection law.
Indeed, there are no constitutional legal limitations at the level of State jurisdictions that prevents them from addressing the full range of workplace problems by means of integrated policy and compliance solutions.

By contrast, at the level of the federal jurisdiction, there are considerable problems inherent in any attempt to achieve such necessary integrated responses to these complex interrelated problems of such particularly vulnerable categories of contingent workers. After all, the Australian Constitution

limits the Commonwealth in relation to what it can legislate. More specifically, the Australian constitution limits the enactment of Federal legislation to certain particular heads of power –most notably, the powers relating to the prevention and settlement of industrial disputes, interstate trade and commerce and the corporations power.

These particular heads of federal constitutional power are precisely the least likely to provide remedies in relation to the vulnerable categories of contingent workers already discussed, for a number of reasons. For example, the work arrangements of much of this contingent workforce are deliberately configured to least resemble a standard contract of employment, with many outworkers and owner-drivers and the like forced into arrangements which classify them as contractors rather that employees. Consequently, any use of the power relating to prevention and settlement of industrial disputes is best highly problematic in relation to these particular workers. In addition, the parties who directly supply work to these especially vulnerable categories of workers often do not utilise corporate structures, preferring to operate as sole traders and the like-which clearly limits the scope for effective remedy by means of the corporations power. Finally, the overwhelming majority of employers and other direct providers of work limit their commercial operation to a single State or Territorial jurisdiction, which clearly restricts any attempt to achieve workplace remedy by means of the interstate trade and commerce power.

Any attempts to rely solely upon federal jurisdiction to the displacement of state and territory jurisdictions is bound to fail the needs and the interests of the particularly vulnerable categories of workers discussed above. Rather, what is required is the implementation of a national scheme of complementary federal and state developments designed to achieve national consistency. Examples from the past of such complementary use of the various jurisdictions include the relatively successful cooperative scheme for the regulation of corporations throughout Australia.

Data Collection

One of the major areas of actual deficiency concerns the issue of data collection.

A continuing frustration with current occupational health and safety and workers' compensation schemes is the inadequacy of data collection. All three national inquiries noted that data collection is inadequate in all state and federal territory jurisdictions. Further inquiries into NSW Workers Compensation and OHS Schemes have found that there are great inadequacies in the data.

In New South Wales, the impetus to streamline reporting and investigate the possibility of establishing a Single Notification Scheme arose as a result of the widely differing reporting required under the workers' compensation legislation and occupational health and safety legislation. It is clear that there are unquantifiable levels of non-reporting of both workers' compensation claims and in respect of occupational health and safety incidents and near misses. What is also clear is that many employers are confused about reporting requirements and unaware of their dual obligations to report under both the NSW Workplace Injury Management and Workers' Compensation Act and the Occupational Health and Safety Act.

Inadequate data collection results in inadequate data on which to base research that might lead to improved occupational health and safety outcomes. It clearly makes identifying trends impossible and it is likely that many issues are simply missed. For instance, the Labor Council is aware of a number of accidents to fingers (including fingers being cut off) in the film industry in the past three years caused by removing guards when working with electric saws, none of which are reflected in WorkCover data. Many of the incidents involved sub-contractors. Whether lodgement of a workers' compensation claim was always appropriate is not known, as some were self-employed rather than employees of an incorporated company. However, all the incidents should have been reported as an occupational health and safety occurrence.

Inadequate data collection highlights a lack of compliance by employers, some of which may arise from ignorance. It also highlights a lack of enforcement.

In New South Wales the workers compensation claims data is collected by the insurance companies and provided to WorkCover on a monthly basis. The problem with this data is that there is often a number of errors i.e. incomplete and incorrect information in the coded fields by insurers and therefore poor quality data is provided. For example if the insurer is unaware of the data of birth then if they insert a default code, which is completely wrong, this leads to unreliable data. Furthermore, WorkCover collects different data for Occupational Health and Safety and Workers Compensation. The OHS database and workers compensation database are not integrated. Consequently there are a number of different statistics being produced.

This is not only common in NSW it is common across all jurisdictions.

Issues for Scheme Actuaries

The other major issue is that the Actuaries who monitor the workers compensation scheme performance need timely and accurate data. With modern technology data should be produced in real time, not months later.

The New South Wales Scheme Actuaries have recommended that there is an absolute need to improve scheme data

> *"It is absolutely essential in a scheme like this that close monitoring and information, as distinct from data, flows in a systematic and constructive way.*

And

> *"… Information and data – I think it is improving but it has been a chronic problem with New South Wales WorkCover and it probably is germane to New South Wales."*

The need for improved data systems was also identified:

> *"IT systems are a key enabler for some possible options of Scheme reform. Many observers believe that the current state of IT within the scheme is a significant barrier to entry for new agents/insurers and a significant impediment to improving the management of the Scheme by WorkCover, agents/insurers and other stakeholders.*

Information Technology and Data Management/Availability

All jurisdictions need to have high quality data in order to:

- Enable premium rates to be set correctly,
- Publish meaningful and accurate claims and injury statistics, and
- Monitor the financial viability of the WorkCover Scheme to ensure that this Scheme operates on a fully funded basis.

All jurisdictions need to be able to access adequate data systems:

- For monitoring its own performance,
- Enabling stakeholders (WorkCover, agents/insurers, doctors, etc) to target poorly performing areas or parts of the scheme,
- Setting strategies and looking at policy matters to improve scheme performance, and
- Enabling flexibility for the introduction of new initiatives.

The importance of having high quality data and advanced information technology has been highlighted during previous inquiries into the Scheme. For example, in 1997 the Grellman Report stated:

> *"Employers Associations are particularly concerned about the lack of reliable workers compensation industry statistics. Reliable and accessible industry focussed data is a valuable tool that can assist in improving many aspects of the system. Many groups seek relevant data and information to identify areas for improvement in their prevention and return to work programs. Lack of data and information is a major impediment to improving prevention performance."*

Source: Legislative Council General Purpose Standing Committee No1: NSW Workers Compensation Scheme – Third Interim Report 5.32-5.34, 5.37, 5.39 (excerpts)

The New South Wales Government is trying to streamline the accident notification system, however, this will not significantly improve data quality.

There are also great inadequacies in the workers compensation data as highlighted above. The workers compensation data, which is collected, does not include all workplace incidents. For example, if a truck driver is killed during the course of his employment this is recorded on the motor accidents database and not as a workers compensations statistic. Thus, the current data totally underestimates the number of serious accidents and fatalities.

This is not only an issue for New South Wales but for all other state based jurisdictions. There is a major problem with the current workers compensation classification codes i.e. occupation and agency. These fields need to be significantly enhanced to allow the capture of more data.

The National Occupational Health and Safety Commission conducted a number of fatality studies back in the early 90's using a number of different data sources, and the results proved the inadequacies in the current data systems. NOHSC found a great deal of differences between the data source i.e. the National Coronial database and other data sources.

Most disturbing was the finding that the workers compensation database dramatically understated the actual rate of fatalities associated with work related causes. To take only one example, the workers compensation database implied that only 17 fatalities in rural work related contexts in a particular year, where as (by contrast) NOHSC research project revealed that an average of 1 work related fatalities were being caused in rural work situations on average per week.

This is due to the fact that every workplace fatality is not recorded as a workers compensation claim because of self employed status, family member, visitor, etc.

The HORSC identified that there were inadequacies with the data and made recommendations outlined hereunder.

The most pressing matter to be addressed is the introduction of a nationally consistent system of coding for all injuries, irrespective of whether those injuries are work related or not. In addition, the lack of data on disease and illness also needs to be addressed.

Source: HORSC: Back on the Job Report – June 2003 Section 6.13

Recommendation 9
The HORSC Committee recommended to the Commonwealth Government:

"*Examine the need to extend the National Data Set for Compensation-based Statistics, to provide nationally relevant workers' compensation data that assists meaningful interjurisdictional comparisons for policy analysis and contributes to the development of a national framework.*

Further investigate the implications and appropriateness of a national database on workers' compensation claims, which identifies injured workers, employers, service providers and insurance companies.

Further investigate the implications and appropriateness of additional data matching capacity between Commonwealth agencies and the State and Territory workers' compensation authorities.

The Committee strongly believes that confidentiality should be exercised in relation to the use of these databases. (Paragraph 8.47)"

Recommendation 10
The Labor Council of New South Wales supports the HORSC recommendation, that there is a need to incorporate other data sources as well as the workers compensation data. For example, the National Coronial database, and also hospital based data.

3. Would such frameworks need to encompass all aspects of those arrangements?

The answer is yes, these frameworks should encompass all aspects, however, it should allow for flexibility and the states to address state based local issues.

Any national framework should incorporate principles of a good scheme design, which are as follows:

- Fully funded, with stable and predictable performance
- Full or close to full indemnity for economic loss for persons who have suffered a significant injury
- Redeployment schemes
- Workers choice of treatment providers
- Monitoring and quality control of service providers
- Transparent information on provider performance include insurers and claims agents
- A framework which ensures prompt and timely payments to workers and service providers
- Proper and timely dispute resolution
- Prompt reporting of claims
- Streamlined reporting process (refer to NSW Model)
- Ensuring access to proper legal advice and representation for employers and workers
- Effective claims and injury management
- Systems to avoid include over payment and duplicate payments (millions of dollars are wasted in duplicate payments)
- Incentives for good OHS and injury management i.e. premium discount schemes
- Disincentives for work arrangements and practices which increase OHS risks for workers and which deter prompt reporting
- Education and assistance programs.

Recommendation 11
In applying those principles, the scheme design should seek to align the financial incentives for participants with the desired behaviour. The scheme should provide a guarantee of quality care and support for seriously and permanently injured workers.

4. Are there deficiencies in existing coordinating mechanisms (viz, the Workplace Relations Ministers' Council and Heads of Workplace Safety and Compensation Authorities) and, if so, how might these be addressed?

Yes, there are deficiencies in the current existing coordination mechanisms.

The previous Federal Government established the National Occupational Health and Safety Commission, previously known as "WorkSafe", for the purpose of developing national standards in Occupational Health and Safety and Workers Compensation.

The Commission has produced excellent standards, which have all been adopted by all of the States in their legislation in relation to plant, noise, hazardous substances etc. However, the Federal Government reduced funding, resources and ultimately the Commission's capacity to fulfil its role of providing a proper and consistent national framework.

Therefore, what is required is a model of national uniformity, but not by federal jurisdiction displacement of state jurisdiction, because of the inherent problems in federal jurisdiction displacement of state jurisdiction, as has been discussed.

Recommendation 12
The union movement, however, recommends a uniform, complementary model would allow parallel and complementary developments in regard to occupational health and safety through a centrally organised institution such as NOHSC, to be appropriately funded and resourced and that resourcing to also include in particular, maintaining a national database.

5. Can the perceived problems arising from the current multiplicity of arrangements be adequately addressed by alternative measures?

The Union movement does not agree that there are problems that are so significant it requires wholesale change. A consistent approach in some areas is the preferred option. This is on the basis that most employers only operate in one state.

Recommendation 13
The Labor Council recommends the establishment of best practice principals and performance indicators at a national level. The states must have adequate stakeholder input into the establishment of these benchmarks

Recommendation 14
In establishing benchmarks at a national level there would need to be a review of best practice in each of the state schemes. There would also need to be a review of international Workers Compensation and Occupational Health and Safety systems.

6. If so, how might this occur?

Recommendation 15
The National Occupational Health and Safety Commission should be appropriately resourced and structured to allow for it to be the instrument for national coordination and the establishment of best practice benchmarks and performance indicators.

The states should establish stakeholder Committees, i.e. Advisory Councils comprising employers, employees and regulators to work with NOCSH to establish best practice benchmarks, scheme harmonisation and performance indicators.

7. What Lessons, if any, do the existing approaches provide for the development of alternative national frameworks for workers' compensation and OHS?

The lesson to be learnt is that a National Commission is essential to coordinate national frameworks.

Again, the Labor Council recommends that the National Occupational Health & Safety Commission be funded to allow it to be the instrument to enhance greater consistency between the states in Occupational Health and Safety and Workers Compensation.

Recommendation 16
The Labor Council recommends that the best model for the development of the national frameworks and consistency is the National Occupational Health and Safety Commission. This is provided that the Commission is properly funded and resourced and has dedicated capacity to conduct research and the appropriate technical support.

8. What models of national frameworks are considered to be workable for workers' compensation and OHS?

The Labor Council is of the view that best practice or the best models may not necessarily exist in Australia and therefore recommend that there is a need to research and review other international Workers Compensation and Occupational Health and Safety models, such as Sweden and Germany. There are also some schemes in the US, particularly Wisconsin, that should also be reviewed as part of this inquiry.

Labor Council has a very basic understanding of how most of these schemes operate and our knowledge is, for the most part, based on anecdotal evidence only.

Whilst a number of European countries have Workers Compensation arrangements as an integral part of the Social Security system on, I do not believe, that this would be a viable option for Australia, because of the differences in the social security system. These schemes allow for employee contributions, they have very generous benefits, and a number are controlled and administered by the stakeholders i.e. union, government and employers. In addition most of these countries have entirely different healthcare systems to that of Australia and these factors need to be taken into account when considering the fundamentals of their schemes.

Sweden
In Sweden the unions, who work very closely with the government, actually administer their Social Security/Workers Compensation benefits and workers actually contribute to their accident/sickness scheme.

United Kingdom
The NSW Government held a safety summit in July 2002 and there was a keynote speaker from the UK who spoke about the importance of targets as a means of focusing effort at the industry and enterprise level. The UK speaker advised about some recent success in that country regarding CEOs

of major corporations agreeing to targets for rates of reduction in workplace injuries in their organisations. There were some encouraging examples of those targets being met.

The United Kingdom has no Workers Compensation arrangements; workers can only access benefits through Social Security or Common Law. They have similar OHS arrangements to NSW.

Canada

At the Safety Summit previously mentioned the Canadian Minister of Human Resources and Employment spoke about Alberta's recent adoption of targets in his province. The Minister advised the Summit that some of the corporations were making safety a part of the performance agreements of its senior executives. These managers now face termination if their safety performance is poor for more than 2 months in a row. The important point that the minister made was that these initiatives had been industry driven rather than the Government.

It is our understanding that some of the schemes in Canada, which are government owned, are around 8-10 billion dollars in debt.

New Zealand

The New Zealand scheme has 24-hour accident cover, however, this scheme experienced a major blow out and was recently 8 billion dollars in debt. This was at the time of the Grellman Inquiry.

New Zealand's Accident Compensation Corporation (ACC) is a national, no-fault (with no common law) accident compensation system. It has five component funds or accounts, one of which termed the Employer Account, covers workplace accidents. The other funds cover personal and motor vehicle accidents and medical misadventure some separately for earners and non-earners.

Employers are required to fund the Employer Account through the operation of experience-based premiums. The account is operated on a pay-as-you-go basis, meaning that premiums are designed to cover the cost of payments made during the policy year. This contrasts with the Australian approach of full funding which requires premiums to meet the cost of claims incurred during the policy year, resulting in significant reserves for future payments on outstanding claims. According to Grellman, the major problem with the New Zealand scheme was that it wasn't fully funded.

Other countries to take a similar approach of national compensation for all injuries include Switzerland and the Netherlands. *

Japan

Japan has a publicly underwritten national system for workers compensation; the Workman's Accident Compensation Program (WACI). This provides a level of benefits, which, on balance, exceed those in the US. Further, most employers offer their workers additional benefits which are either self-insured or insured with a private underwriter.

Germany

Germany has a number of industry or regionally based schemes. Some of these schemes are viable, others are experiencing adverse trends.

Industry Focus

Germany, the birthplace of the modern workers compensation system, has a somewhat novel administrative approach whereby each industry essentially has its own publicly underwritten scheme, termed Industrial Injuries Insurance Institutes.

The Industrial Injuries Insurance Institutes are collated into three sub-groups:

- Agricultural Accident Insurance;
- Accidents at Sea Insurance; and
- General Accident Insurance

The General Accident Insurance Group of Institutes covers all the industrial and commercial institutes numbering some 3-dozen. Each of these non-profit organisations is charged with several responsibilities including the delivery General Accident insurance statutory benefits and raising premiums from member employers. Each institute has equal representatives from worker and employer groups. There is also a Central Association which co-ordinates the joint interests and functions of the individual institutes and it too consists of equal worker and employer representatives.*

United States

The US provides a wealth of alternative workers compensation systems for the investigation of best practice. Like Australia, it has separate workers compensation arrangements for each state. Consequently, there are 50 potential state systems to investigate, exhibiting a wide variety of practices, most of which are well researched. *

**Source: Inquiry into Workers Compensation System in NSW: Final Report 15 Sept 97 – Page 197-211(excerpts)*

The United States has mixed arrangements. All of the states have their own schemes with different benefits and administrative arrangements. Some are privately underwritten and others are Government administered, for example:

Washington - is government owned, however the claims are administered in a one-stop shop, which is similar to when the GIO administered all claims in NSW.

A majority of the US schemes blew out in the early 90s and this is the experience of all workers compensation schemes. According to Actuaries, this occurs around the 7 to 10 year mark.

One scheme however, which has not experienced scheme deterioration or adverse trends is Wisconsin (at the time of the Grellman Inquiry):

Wisconsin – Wisconsin is a state who's Workers Compensation is currently enjoying role model status as one of the first alternatives. Other US states turn to the Wisconsin System when reforming their own systems. Premium rates in the Wisconsin System are in the bottom third of all US states and benefits for workers are equivalent to or higher than benefits elsewhere in the US.

The Wisconsin System appears to have a structure that provides long-term stability and viability – a highly desirable feature and one lacking in most Australian systems in the past two decades.

The level of disputes and litigation are also considered to be amongst the lowest in the nation, Wisconsin also has a Workers Compensation Court with around 19 judges. One of the unique features of the Wisconsin system is that the stakeholders i.e. employers and Unions have total ownership and control of that scheme. They have had an Advisory Council since 1911 and this was legislated for in the 1950s. (When the reforms were being considered to the NSW Workers Compensation scheme in 1997 and at the time of the Grellman enquiry the reforms were based very much on the Wisconsin System).

The Council also ensures that there is an exhaustive consultative process where legislative proposals are developed and sent out for public comment. This is done through forums, seminars and conventions. They also have input from Judges and there is a process where criticisms and complaints regarding the system are examined.

Members of Council also receive advice on a regular basis from third parties i.e.: medical and other practitioners involved in the system including insurance companies.

Workers Compensation Research Institute

In the US there is a national body, known as the Workers Compensation Research Institute. This body reviews all of the workers compensation schemes in the US on a regular basis, and reports on each of those schemes.

I refer the Commission to the Workers Compensation Research Institute.

Recommendation 17
The Labor Council of NSW recommend that a review of international as well as state based schemes be conducted in relation to establishing best practice principles or establishing national consistency performance indicators.

At the NSW Safety Summit the overall concept of targets was well accepted, the importance of industry networks and incentive and reward systems was emphasised and much common ground was explored.

Recommendation 18
The Labor Council totally supports the concepts of targets at an industry level and also incentives and rewards for reaching these targets.

9. What are the benefits and costs of the models (including implications for productivity improvements)?

There are schemes in the United States, which have introduced certain measures and established models by increased productivity and decreased costs. These models act to encourage the implementation of good preventative and risk management systems as part of their workers compensation system. These models rely on self-auditing in the first instance. However the models also prescribe follow up audits by the insurance company prior to policy renewal. If the employer does not pass the audit then the insurer examines the possibility of substantially increasing the premiums. This approach has proved to be quite successful in both containing costs and securing improved OHS outcome.

Source: Pricewaterhouse Coopers Actuarial Consultants, John Walsh

Attention is also drawn to the current best practice models in other countries, most notably Europe, where an emphasis upon continuous monitoring and improvement both in regard to production processes and quality assurance with firm benchmark targets and the allocation of appropriate high priorities within corporate decision making processes have led the world in improvement of OHS outcomes.

10. If cooperative national frameworks were preferred, what would be the key elements incorporated into those frameworks (e.g. definitions, benefit structures, prudential requirements of private insurers or self-insurers)?

The Labor Council would not oppose a cooperative national framework on certain key elements. These elements need to be agreed by the state and territories and only on the basis that there is not the adoption of the lowest common denominator.

If the Government is serious and national frameworks are implemented. Some basic features would be:

a) A need for a national body, such as NOSCH, to oversee all the aspects of Workers Compensation and Occupational Health and Safety.

b) A need to set up a proper database system to collect adequate information and use current technology to link as many of the relevant parties as possible. Data is important for properly

assessing the performance of the national system, financially (such as for actuarial assessments) and otherwise (such as tracking injury rates, relative performance of employers and industries, return to work rates etc).

c) The current multiple systems have no linkage between them with regard to data-sharing etc. A national database could be used to better track injured employees etc. It would be technically possible for linkages to Central Government databases, but politically difficult.

d) Funding by way of a privately underwritten insurance system is not recommended, as it will almost certainly lead to a more expensive system for the nation. Insurance default, despite APRA prudential requirements, remains a possibility and would be catastrophic in the context of a national system. APRA probably will not have the means to properly assess insurers in this area.

e) Funding via a properly managed mutual pool arrangement with proper asset backing is the optimum approach.

f) Irrespective of the funding vehicle, it is important to ensure that the system does not become excessively bureaucratic.

g) The ability to audit and investigate:

   i. Employers (to ensure that accurate assessments of wages and number of employers are provided and also to evaluate the implementation of injury prevention programmes have been considered and put in place, against understatement of wages or number of employees, to ensure implementation of return-to-work programmes etc).

   ii. Effective business controllers of outsourcing arrangements such as supply chain and labour hire arrangements to ensure that sufficient commercial motivations exist in favour of employer and work compliance with OHS and workers compensation obligations and to assist in the detection of compliance failures.

   iii. Service providers (against over-servicing etc).

   iv. Administrators (against improper or inadequate management of claims etc).

11. What national and State and Territory infrastructure (legislative, policy, administrative) would be necessary to support any such models? What might be the consequences for State-based schemes if an alternative, national, scheme were available?

National Database

The HORSC Committee found that, currently there is little consistency in the format or the data collected, which makes interstate comparisons difficult. Better data about actual claims experience would enable a proper analysis of the instances that give rise to claims. It is extremely difficult to establish meaningful national benchmarks, to identify performance standards or to monitor emerging trends on a national basis, although the National Data Set for Compensation-based Statistics is a positive step in this direction. Improved data recording would also enable industry trends in terms of health and safety and workers' compensation management to be tracked.

Source: "Back on the Job" HORSC Report – Executive Summary Page 24

Recommendation 19
Labor Council recommends that the Federal Government establish a Policy Coordinating Body of state authorities and stakeholders to oversee and implement the national framework by consensus.

Research & Design

At the NSW Safety Summit one of the primary focuses of the Summit was on how improved design can make a contribution to preventing workplace accidents and incidents, including the incorporation of safety considerations and measures within the design phase of buildings, plant, materials and substances.

The Safe Design Working Group agreed to the following resolutions:

1. Effective prevention requires:

   - Locating responsibility for the elimination or control of risk at the source, whether that be the designer, manufacturer, importer, supplier, or in the workplace.

   - Clients, controllers of the workplace, and employers ensuring that safe design is an integral part of their purchasing and contractors policy.

   - End user consultation and testing being an integral component of the design and procurement process and capacity to achieve safe workplaces.

2. NSW industry and government should undertake safe design initiatives that are consistent with the NSW OHS legislative framework and supportive of the National Safe Design Strategy including:

   - Organise a safe design seminar to share learning and raise awareness

   - Promote awareness of safe design principles amongst design professionals

   - Tailor solutions for small, medium and large business particularly taking into account regional NSW including field days and practical workshops involving industry and professional associations and trade unions

   - Utilisation of NOHSC Solutions Database to promote safe design solutions, and improvement in the routes by which the information is captured and reported

   - Owing to the established link between poor design and workplace injury, illness and death, all industry sectors should consider safe design as a component of their prevention programs

   - Government to consider strategies to give greater attention to OHS in its procurement practices

   - Promoting OHS Awards programs run by associations of design professionals and/or WorkCover that recognise industry effort to address safe design

   - WorkCover should emphasise that the OHS consultative arrangements should include all aspects of safe work design
   - NSW Government to request University Vice Chancellors to give greater focus to OHS in the curriculum of design professionals.

3. NSW Government should undertake to raise with Standards Australia how current and any new standards can better promote and address safe work design principles.

4. NSW Government should encourage government departments responsible for specialist activities (schools, police, fire brigade, ambulance) to develop and maintain design workplace standards and pattern books that can be used as reference tools by design professionals to assist safe design.

Source: Extract from NSW Workplace Safety Summit Communiqué

For these reasons, direct federal funding initiatives to adequately finance the above detailed infrastructure requirements would seem most desirable.

Recommendation 20
The Labor Council of New South Wales recommends that the Federal Government provide funding and financial incentives to employers. There should also be funding made available to industries, particularly high risk industries for research on injury prevention, job design, work organisation and labour market change and the possibility of solutions on engineering out the risks. This federal initiative should be structured to compliment the NSW initiative on safe design.

Most of the OHS Legislation In Australia captures manufacturers and designers in relation to plant and hazardous substances. However the legislation does not capture architects and builders in relation to design and layout of buildings. One of the major problems identified at a recent safety summit in Bathurst was the poor design of buildings, particularly nursing homes and hospitals.

Recommendation 21
The labor Council of NSW recommends that all state and territory jurisdictions amend their legislation to ensure that architects and builders must take into account OHS considerations at the design and planning and fit out stages of construction. The Commission should take note of relevant OHS Legislation in Ireland.

Community Awareness

The community does not view Occupational Health and Safety as a major issue, yet there is public outcry when companies such as Pan Pharmaceuticals place consumers at risk.

Recommendation 22
The Federal Government should also provide funding for a National Marketing Strategy similar to road safety and other community awareness programs. This is in order to raise community awareness and expectations about workplace safety. The Federal Government should provide funding for educational programs in schools. There should be national consistency in education.

12. Should funding or financial incentives/disincentives for State and Territory Governments be components of such models

Having identified infrastructure needs in the form of an appropriate natural database and measures to improve design, it remains to address the sources for funding such infrastructures requirements.

In order to maximise consistently between the various federal, state and territory jurisdiction an appropriately funded central decision making structure (such as the proposed NOHSC) would be of great assistance.

As a corollary, centrally determined funding would further assist these moves towards consistency by ensuring that consistent parallel developments were simultaneously and securely funded through the various jurisdictions without the need for reliance upon a multiple of (potentially precarious) sources of funding.

13. Should the two areas of workers' compensation and OHS be combined in one framework, or are separate frameworks more appropriate?

Clearly, Workers Compensation and Occupational Health and Safety should be treated as interrelated fields. After all, failures to act in relation to OHS directly lead to outcomes with regard to workers compensation for the effected worker. For these reasons there is a great deal of merit in combining the areas of OHS and workers compensation into one framework. However, there are considerable dangers for particular groups of vulnerable workers in any proposal to establish central national control over the workers compensation and OHS frameworks of the various states and territory jurisdictions, in particularly as discussed earlier, those contingent workers engaged in various types of precarious employment, are more suitably dealt with at the level of state and territory jurisdictions which can simultaneously deal with the interrelated industrial relations, OHS and workers compensation concerns of those contingent workers.

This observation is rendered evermore opposite by the previously discussed constitutional limitations upon federal legislative power in regard to the work situation of those contingent workers engaged in precarious employment.
Consequently there is much merit in moving towards a nationally consistent uniform model in relation to OHS and workers compensation by means of complementary and agreed measures between the various federal, state and territory jurisdictions, rather than any misguided inherently defective attempt to displace state jurisdictions

For these reasons, a central body, which has appropriate representation of the relevant jurisdictional stakeholders, should coordinate complementary jurisdictional movement towards national consistency, such a central body could be an appropriately restructured NOHSC.

WorkCover in NSW has combined OH&S and Workers Compensation. This has proved to be a very effective module. In the past workers compensation and OHS were dealt with by two separate organisations. This impeded proactive prevention as the Inspectorate only focused on major industrial accidents and never used Workers Compensation data. The NSW WorkCover inspectorate uses workers compensation data to target and assist poor performing employers. They have a number of industry programs in place.

Injury prevention and injury management should not be seen as separate functions, they should be part of the overall injury management system.

Recommendation 23
Workers Compensation schemes should be governed by stakeholder representative institutions on which are represented the major stakeholders who have effective control of policy formulation. Two particular groups of stakeholders, the employers and employees, should have appropriate input into the scheme design and formulation of legislation both in relation to OHS and workers compensation. Such stakeholder representative institutions should be established on the Grellman model.

Recommendation 24
The union movement in NSW is totally opposed by any move by the Commonwealth Government to take over the administration of the NSW compensation or occupational health and safety systems.

Recommendation 25
The union movement would support the development of national benchmarks and performance indicators for each of the states and the combination, or integration of both. This is on condition that these measurements are based on best practice principals from each of the Workers Compensation and Occupational Health and Safety schemes in Australia and internationally.

National Self Insurance

1. ***To what extent are these differing approaches to self-insurance a source of significant additional administrative or compliance costs for firms wishing to self-insure their workers' compensation liabilities in more than one jurisdiction?***

No data publicly available to quantify the extent to which different approaches to self-insurance result in additional administrative or compliance costs for firms self-insuring.

2. ***Self-Insurers are in a good position to actively manage claims, as they are often the employer. They are more attentive to return to work issues and achieve better workers compensation outcomes***

The Industry Commission Report into Workers Compensation (pg 72) states that self-insurers face particularly strong incentives to prevent injury and illness as the bear all workers compensation costs.

3. ***How might greater uniformity in self-insurance arrangements be best achieved between jurisdictions? And***

4. ***What regulatory frameworks might support suitable qualified employers to obtain self-insurance that is recognised in all jurisdictions?***

While uniformity is sound in principle, it should not be used as a mechanism to reduce entitlements of workers. Any uniform arrangements or regulatory frameworks should reflect the highest standards rather than the lowest common denominator. In particular prudential standards and arrangements should be structured to minimise the risk of failure and to ensure a workers entitlements are met in the event of failure.

Some of the suggestions, which have been put forward in submissions to the Productivity Commission, include:

- Variations on the theme of using Comcare as the central self-insurance mechanism;
- Developing a national regime involving licensing with APRA;
- Developing mutual recognition models between the States;
- Models based on existing road transport and food safety cooperative regulation;
- Harmonisation (mirroring) of legislation approaches;
- A new national scheme established by the Commonwealth government.

Recommendation 26
Labor Council recommends that any proposals that imply some reduction in worker entitlements and/or a lowering of prudential requirements in relation to the administration of the workers compensation system should be rejected.

5. ***What features should self-insurance embody to protect the entitlements of employees of self-insured firms and to guard against a self-insured company failing and being unable to meet its workers' compensation liabilities?***

Robust prudential standards should be put in place to minimise the risk of failure.

Clearly if there is to be any Commonwealth administered self-insurance scheme the Commonwealth would need to put in place mechanisms to ensure workers entitlements are met in the case of failure

of a self insurer. This should be funded from the self-insurance scheme not levies on the state-based schemes.

Similarly if the arrangements continue to be state-based there should be an obligation on each state to ensure workers continue to receive their entitlements in the case of failure.

- NSW WorkCover licensing policy for self-insurers (see appendices material provided).

Suggestions from other submissions include:

- Regulatory requirements and oversight of APRA would be beneficial.
- Nationally consistent criteria for entry into and exit out of self-insurance schemes;
- Consistent benefit structures.

6. *Would allowing firms to self-insure under the umbrella of the Comcare scheme provide a suitable avenue for firms to avoid the additional costs of self-insuring in many jurisdictions?*

The Comcare scheme would represent a reduction in benefits and entitlements for some classes of workers, injuries and situations.

Issues raised concerning the use of Comcare include:

- The model is designed for white collar workers and there is doubt how it would manage other industry sectors;
- Not all self-insurers have similar benefits structures (they vary by jurisdiction);
- Not all jurisdictions permit self-insurance.

(See Insurance Australia Group submission)

Recommendation 27
The Labor Council would oppose any move to allow self-insurance under Comcare, as it would mean a reduction in benefits and entitlements for some classes of workers.

8. *What are the implications of a broadly available national self-insurance scheme for State-based OHS monitoring and enforcement?*

> *Whilst some would encourage self-insurance arrangements on the basis it offers, there should be caution against extending the availability of self-insurance further, they offer quite a lot of incentives when the employer is managing their own injured workforce.*

General Manager of WorkCover, Kate McKenzie told the Committee:

> *"Whilst the self-insurance take-up should be encouraged in the last 18 months, I think that there is an added cautioned that needs to be mentioned here in that this is a long term business. Some of these claims might not occur in 40-50 years, and out there in the business work businesses often do not last quite that long, so there is a big challenge for regulators to ensure that in allowing those arrangements to go ahead there are adequate arrangements in place to keep track of mergers and acquisitions and liquidations of these companies to ensure that the money is always there".*

Self-insurance is often considered to provide benefits to the whole system by introducing competition between insured and self-insured parts of the scheme. The argument is that competition forces improvements on the insured sector, otherwise it loses employers to the self-insured section. This it reduces inefficient cross subsidies because the employers with the best experiences become self-insurers and costs for the remainder are revealed.

The consequences of the better risk employers leaving are that the poorer risk remaining cause the average premium for the insured scheme to rise (therefore the ability to cross subsidise across industry classifications is reduced. From an individual jurisdiction's point of view this appears as higher published costs and because self-insured costs are rarely published a jurisdiction can appear to be more costly than is really the case.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Sections 5.49-5.52

The OHS Model

Introduction

The legislative provisions covering rehabilitation and return to work, and the approaches to the management of occupational health and safety, vary in different jurisdictions. In 1995 the Industry Commission found over 150 statues, which regulate health and safety at work across Australia. Efforts have been made to reduce the complexity but there is still significant work to be done.

The National Occupational Health and Safety Strategy for 2002-2012 highlight the unacceptable level of workplace injury and fatality. The Workplace Relations Ministers' Council committee has commended these initiatives and looks forward to seeing the results of this cooperative approach.

The General Purpose Standing Committee No.1 recognises the importance of workplace injury prevention and occupational health and safety to not only the health and welfare of workers in NSW but also to the financial position of the Workers Compensation Schemes.

> …. It is always very important to bear in mind the importance of the occupational health and safety side of this debate and the contribution that employer's attention to occupational health and safety can make to the improvement in the rate of injury to workers and therefore to the financial health of the scheme, a point that is often forgotten unfortunately.
>
> The underlying problems are those of poor ownership of the mutual responsibilities in the workplace on the part of the employers to recognise that workplace injury is a part of doing business and they need to accept that and they need to take care of the workplace safety and the injured worker when a claim occurs, and on the part of the claimant, to recognise that the main responsibility is to address their injury and get back to work, rather than to seek a maximum in terms of financial compensation. These dynamics are the underlying problems of the scheme.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Sections 3.2-3.3.

NSW OHS Safety Laws

In New South Wales the Occupational Health and Safety and Workers Compensation legislation has been recently amended. The *Occupational Health and Safety Act 2000* and *Occupational Health and Safety Regulation 2001* give New South Wales what is close to being the best legislative framework for occupational health and safety of any Australian state or territory. However, there are a number of states and territories, which have superior provisions in relation to the rights of OHS representatives (in particular, the right of representatives to issue PIN notices).

New South Wales has only recently introduced the new OHS Act 2000 and the OHS Regulation 2001. The Labor Council is of the view that while NSW has superior OHS Laws, there is a certain amount of consistency with other states. For example the provisions covering hazardous substances, plant, etc are very similar. This is a direct result of the NOHSC Commission's input. Consequently NSW should work with the other jurisdictions to increase the level of consistency between them, but only on the basis of improved rights and protection for workers.

Recommendation 28
Labor Council of NSW recommends that, where any other state or territory jurisdiction has OHS Legislative Provisions, which provide fewer legal rights or protection for workers or lower standards for the protection of workers, then that other jurisdiction should adopt the relevant NSW OHS provisions. Conversely, where NSW OHS legislation contains any provisions that provide fewer legal rights and protection for workers, or any lower standard for the protection of workers, Labor Council of NSW recommends that the relevant provisions in the other jurisdiction should be adopted in NSW.

National OHS Strategy

A major national occupational health and safety strategy initiative was introduced in 2002. On 24 May 2002, the Workplace Relations Ministers' Council endorsed the National OHS Strategy. Under this strategy, for the first time, all jurisdictions and peak employers and unions have committed to minimum national targets and five national priorities for improving OHS. The national targets are:

- A significant reduction in the incidence of work-related fatalities, with a reduction of 10 per cent by mid 2007 and at least 20 per cent by July 2012; and
- A reduction in the incidence of workplace injury of 20 per cent by mid 2007 and at least 40 per cent by July 2012.

There are five initial national priority areas for action to achieve short-term and longer-term improvements. They recognise that cooperation among OHS stakeholders will lead to more efficient and effective prevention efforts. The priorities are:

- Reduce high incidence/severity risks;
- Improve the capacity of business operators and workers to manage OHS effectively;
- Prevent occupational disease more effectively;
- Eliminate hazards at the design stage; and
- Strengthen the capacity of government to influence OHS outcomes.

Source: "Back on the Job" HORSC Report – Safety Records and Claims Profiles 6.75-6.76

1. How effective have these arrangements been in promoting greater consistency?

The existing national framework has been partly effective in promoting greater consistency

The ACTU has made a submission to this Inquiry. The Labor Council totally supports their submission.

But this promotion could be more effective if further reforms could be adopted in relation to the composition of NOHSC, its work priorities, level of funding and the willingness of individual jurisdictions to adopt, and consistently apply guidelines developed by NOHSC. In particular, as discussed elsewhere in this paper, the composition of NOHSC should be altered to include as relevant stakeholders, representatives of the various OHS regulatory bodies in all the state and territory jurisdictions.

Notwithstanding the necessity of such obvious reforms, there still remains the following fundamental consideration. All reliable data and evidence clearly indicates that a substantial proportion of employers in the various federal, state and territory jurisdictions are simply failing to fully comply with the respective OHS obligations imposed in each of these jurisdictions. Therefore, while the above-discussed reform of the existing national framework would undoubtedly result in increased consistency at the level of formal OHS entitlements and obligations, no amount of such purely formal consistency can guarantee an improvement in the real performance of currently non-compliant employers throughout all of the various jurisdictions.

The problem with the legislation is not just consistency at the level of formal legal obligations but also the effective implementation of these obligations by the full range of employers. Government simply refuses to tolerate such a dichotomy between formal entitlement and practical enforcement in relation to its collection of taxation revenue or in relation to the enforcement of national competition policy. There can be no argument that the life and health of working Australians are somehow less important than the balance sheet of Government organisations.

Implementation depends upon enforcement and awareness. If a majority of employers were surveyed in all jurisdictions, they would be revealed as having very little if any knowledge about OHS. In addition there is very little, if any compliance with OHS requirements by a large proportion of these employers. As has been discussed earlier, this is not the case with other legal requirements, such as, taxation law, corporation law, fair-trading law or public health requirements.

I draw the inquiry's attention to the recent breaches by Pan Pharmaceuticals of an array of legal obligations concerning manufacturing and processing and further to the immediate action taken by the CGovt regarding the breaches, owing to the grave risks to which the community was exposed.

Thankfully the public harm was minimal. Why is there not the same level of concern, overview and active intervention for people who are exposed to risks in the workplace, some of whom die as a result?

The Pan Pharmaceuticals scandal clearly demonstrates that both government and the citizenry alike agree about the need to properly regulate commercial activities in order to prevent any threat to the health of the public. In such situations, quibbling about compliance costs is not tolerated.

To support our statement regarding lack of awareness, I draw your attention to the following survey finding.

Recommendation 29
Labor Council demands that the life and health of working Australians be treated as no less as important an issue for enforcement and compliance, than either taxation revenue recovery or enforcement of the national competition policy.

Preventing Workplace Injury

As part of the process of developing the OHS Regulation 2001, WorkCover commissioned Coopers and Lybrand to survey 1,500 workplaces. The survey identified areas where OHS performance could be improved in NSW workplaces. It also identified small employers as a group that may need the greatest assistance in improving OHS in their businesses. Key findings of that study, published in OHS Regulation *Regulatory Impact Statement* include:

- Approximately30% of employers or senior managers were note aware that employers have the primary legal responsibility for providing a safe and health workplace;
- Approximately 21% of respondents thought it was likely or very likely that a serious injury could occur in their workplace in the next 12 months – despite this awareness some employers did not plan to make OHS improvements;
- Small employers were less likely than larger employers to identify the possibility that someone could be killed, were less aware of the frequency of serious back injuries and were less likely to indicate that they had plans for making OHS improvements;
- Larger employers indicated that a serious injury would be most likely to be caused by the absence of appropriate risk controls (such as slippery floors, etc), by contract small employers tended to identify individual worker behaviour as the most likely cause;

- Training in safe work practices was given to new employers in only 54% of workplace;
- Supervisors did not receive health and safety training in 40% of workplace;
- Employers who indicated that they had had systems in place for identifying hazards before injuries occurred were more likely to have trained supervisors, have provided health and safety induction training, and have up-to-date safety information.

The results of the survey suggest that the unacceptable level of injury and disease in NSW workplaces can be improved if OHS management practices are improved. At an annual cost of $5,713 million dollars each year, even a small reduction in the level of injury and disease will have major benefits for employers, employees and the community. Significant improvements in prevention are possible and the potential benefits from improving OHS standards are enormous.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Section 3.32

This evidence was also presented to the HORSC

The Committee understands that it is not always possible to take aspects from another jurisdictions scheme and apply them unchanged in the New South Wales context. However, there is scope for practitioners of the New South Wales workers compensation scheme to learn from the experiences of other jurisdictions and adapt measures from elsewhere to suit the New South Wales environment.

2. Can this be improved, and if so how?

The answer is yes. There is a fundamental need for a nationally coordinated community awareness campaign supported by a proper employer/employee education program, coupled with a strategic enforcement program, which should be industry, or risk focused. For example, the rural sector is a high-risk industry and there could be a nationally coordinated campaign:

1. To raise community awareness;
2. To educate employers and employees;
3. To offer financial incentives for research and design; and
4. A strategic enforcement strategy i.e. industry blitzing.

In NSW and Victoria, the governments have offered farmers a rebate if they fitted their tractors with a rollover protection device. This has been successful to a certain degree; however, it has not been followed with a strategic enforcement strategy, such as, fining farmers for not having rollover protection. Recent research has indicated that there is an average of two (2) deaths per month on Australian farms and properties. It is undeniable that tractors are the major causes of these deaths.

Of crucial importance to this tragic phenomenon is the inability of many farmers to spare the time or resources necessary to learn about the problems and necessary remedies. But also the intransigence of many farmers to alter their time honoured ways in accordance with lessons so tragically learnt.

As an example, the National Farmers' Federation acknowledged that workplace safety is a major issue within the farming industry. There is a wide variety of hazards, and farms are often the most difficult to reach to provide support in OHS practices. The NFF is working with the industry and educators to try to improve safety outcomes.

Source: HORSC: Back on the job Report Section 6.35

There is a need to adopt a similar four-pronged strategy to the road safety campaigns.

There should be particular assistance for small business.

This is not merely an academic issue but a real dilemma of life and death.

Consequently Government must both raise the awareness of those in charge of commercial operations and simultaneously supply the appropriate enforcement incentive, in the form of mandatory obligations and their effective enforcement.

Such things could include the composition of NOHSC, its work priorities, level of funding, and the willingness of individual jurisdictions to adopt, and consistently apply, guidelines developed by NOHSC.

Recommendation 30
That there should be a greater responsibility by the host organisation to ensure that a safe work environment is maintained. There also needs to be clearer definitions of the obligations of the three parties involved in a labor hire relationship: the on-hired employees, the host organisation and the on-hired employee service provider.

Representatives of the cleaning industry also commented on the misunderstanding in the community about the responsibilities of the principal employer or contractor. There is the suggestion that by contracting out some operators are seeking to distance responsibility for workers compensation and public liability, which also may affect workplace safety. Research in this area has found in that situations where the outsourcing of labour has become common, OHS deteriorated for both the subcontracted and the employee workers. At the same time, the OHS of self-employed workers was placed even more at risk.

Source: HORSC: Back on the job Report – Sections 6.32-6.33

Recommendation 31
NOHSC, as previously submitted must be better resourced if it is to continue best practise OHS strategies. NOHSC should also receive funding to enable to conduct a national community awareness campaign.

3. ***What are the areas in OHS regulation and implementation where differences between the jurisdictions impose the most cost? AND***
4. ***Is it in the wording of the legislation; differences in regulations; differences in standards and codes of practice; or differences in implementation between jurisdictions?***

These questions assume that employers are aware of their obligations when evidence, particularly that presented above indicates contrary.

The question posed by the issues paper itself raises a much more fundamental issue – are the only costs worthy of consideration? The financial expenditures incurred by employers among whose ranks are many rogues who determinedly refuse to comply with existing OHS obligations – or rather should not the term "cost" refer more properly to the substantial financial burdens and emotional suffering imposed upon those workers whose life or health has been blighted by irresponsible management practices (not even to mention the additional suffering borne by the loved ones of these workers).

Whichever definition of cost is to be considered, there can be no doubt that the major costs, which stem from differences between jurisdictions, concern differences in implementation and enforcement, rather than differences in the working of various legal instruments and guides.

This truism should on no account be taken as justification for any diminutions in existing regimes of enforcement. Rather, the consideration of the terrible costs borne by injured workers and their families should ensure that any move towards increased consistency between the various jurisdictions is so organised as to guarantee that there is a real reduction in workplace fatalities, injuries and disease. This is precisely why international best practice is insisting upon the effective implementation of benchmark standards i.e. targets.

5. What would be the features of a national OHS framework that would generate the greatest benefits?

Labor Council sees a return to a properly funded NOHSC with a research brief, nationally coordinated data collection and a cross-jurisdictional coordinated authority with NOHSC as essential.

In addition Labor Council sees the need for a strategy of coordinated and complementary initiatives both between and within the various Federal, State and Territory jurisdictions ensure real improvements in workplace safety.

Reducing the regulatory burden and compliance costs

1. How significant are such additional administration or compliance costs (any quantification of such costs would be useful)?

The Labor Council is of the view that complaints about the burden on business are exaggerated notwithstanding that the majority of businesses operate in one state. There is no evidence to support the argument that employers are spending hundreds of thousands of dollars on injury prevention strategies. Rather employers are having to outlay large sums in relation to workers compensation, which is a direct result of employees being injured by workplace risks, and employers not having front-end preventative management systems. Employers continue to submit claims for the same type of injury and often do not make the connection that they have to investigate and research why these claims are continuing to occur.

Appendix D of the Industry Commission report on occupational health and safety deals with compliance costs of OHS regulation. However, it does not consider the costs of complying with more than one OHS regime.

2. Does the size or kind of activity of the business or its location matter in terms of the impact of those costs?

No it does not. As repeatedly evidenced, the overwhelming majority of businesses only operate in one jurisdiction and therefore are not affected by differences between the jurisdictions. As for the minority of businesses that do operate across the different jurisdictions, the overwhelming majority of these are large, well resourced corporations, characterised by highly developed and sophisticated management systems, that can easily cope with merely formal differences in the OHS obligations imposed within the respective jurisdictions.

The size or kind of activity that the business is engaged in does not matter, but is rather how the organisations receive assistance to help them implement proper OHS management systems that improve productivity.

The state based jurisdictions are perfectly placed to assist these organisations at a very low cost, implement proper systems. In NSW the Government has established a program known as "The WorkCover Legislative Assist Program". The Government has provided employers and unions with funding for them to develop educational and resource material and also implementing safety management systems.

Furthermore insurance companies should focus on assisting employers with risk management programs as part of their brief.

A number of organisations have received this funding and have produced training; packages; template systems for the risk management process. These organisations have made these resources available to all other employers in the industry. A computer program, which will assist employers in every aspect of the new OHS legislation, this program, can be applied to any other industry.

In theory, larger companies with greater economies of scale should face a lower burden (relatively speaking) than small businesses (Industry Commission report 1995).

The Industry Commission (1995) states that firms that operate under more than one OHS regime tend to be larger firms – and there are benefits to improved consistency between jurisdictions. Small to medium sized firms tend to operate in one jurisdiction only and there are potential efficiency benefits to maintaining different regimes for such operators. Furthermore, small to medium sized enterprises employ more people in total than large firms.

3. Are there particular elements of those different workers' compensation or OHS arrangements that generate most of these additional costs?

No, there are not any additional costs.

Rather than looking at the different workers compensation and OHS arrangements in each state, there is a need to look at the costs of the lack of injury prevention and management by employers in each state and how this impacts on the Federal Social Security System and the community.

The occupational health and safety and workers compensation laws are only the framework for employers to abide by. In NSW employers continuously breach workers compensation legislation by not providing suitable alternative employment and yet there has never been one prosecution in this area.

The insurers in NSW, when the debate was occurring over private underwriting approached the NSW Workers Compensation Advisory Council with a proposal to allow them to charge the true costs of claims to employers who failed to comply and do not make an effort to have proper OHS management systems. The insurers were concerned with the costs burden being unfairly borne by employers who did comply.

4. Within the context of maintaining or improving work-related health and safety outcomes, what options exist for reducing the regulatory burden imposed on business (employers, insurers, rehabilitation providers, etc.) by the existing multiple arrangements?

The majority of employers are not affected by the existing multiple regulatory arrangements as they operate in only one jurisdiction. Similarly, the majority of rehabilitation providers and other health service providers operate in one jurisdiction. (Industry Commission 1995)

Businesses lack of compliance with OHS legislation and regulation as exemplified by the PWC survey in NSW demonstrates that the regulatory burden is not an issue, rather that implementation of community and employer awareness is the problem for maintaining and improving work related health and safety outcomes.

The greatest compliance to state based workers compensation and OHS legislative requirements is with self insurers and this only due to the rigorous auditing process that the NSW WorkCover has in place.

Recommendation 32
The Labor Council recommends that an auditing system be developed to mirror the auditing process that applies to self-insurers.

Access and coverage

The Heads of Workers' Compensation Authorities report (pg 34) provides a preferred position concerning definitions of workers to be covered by workers compensation:

- Common law concept of employment should be fundamental determinant;

Unincorporated contractors and sole proprietors who derive income predominantly from one organisation should be included.

1. How material are any such differences to determining who or what falls within the ambit of workers' compensation or OHS arrangements?

The HORSC recognised this as being a significant material issue.

Labor Council refers the Commission to the HORSC report "*Back on the Job*", and in particular their comments and conclusions.

OHS and Workers Compensation are social legislation. They aim to either prevent injury and death at the workplace or compensate those that are so injured or killed. Rates of work injury and fatality remain high and therefore any workers compensation and ohs legislation should be broad and all encompassing.

2. This is more important in an age when employment is increasingly more casual, transient and precarious in nature, to what extent do these differences impede the collection of meaningful data for the purpose of making business or policy decisions?

I refer to our previous comment about data collection and in particular the failure to include self employed people within the relevant categories of injury and risk. These people often do not workers compensation claims; the jurisdictions rely heavily on this data to accurately reflect the true incidence of work process risks and injuries. The absence of meaningful data in relation to those workers classified as self-employed, necessarily diminishes the real incidence of work process injury and risk, and impedes the formulation of appropriate policy responses aimed at prevention of these very risks.

3. How material are these differences in adding to administration and compliance costs for firms operating in more than one jurisdiction?

Labor Council is of the view that it is not material because the majority of employers only operate in one state. Moreover, in relation to that overwhelming majority of employers who only operate in a single jurisdiction, a substantial proportion fail to even comply either at all or fully, with the full range of their legal obligations in relation to occupational health and safety and workers compensation. For example in the state of NSW it is confidently estimated that only $1/5^{th}$ of employers are fully compliant with these obligations. Thus there can be no question that compliance costs arising from these differences pose any substantial cost burdens for employers. Indeed, the failure by so many employers to fully comply with these obligations is exacerbated by the additional willingness of so many employers to shift what little cost burden they might otherwise bear onto the public purse, by means of their insistence that injured workers be channelled into the social security and public health systems.

4. Where significant differences exist, is it practical to move to nationally consistent definitions (i.e. what are the costs and benefits of doing so) and what might these definitions be?

It is certainly practical to move to nationally consistent definitions by utilising existing consultative processes involving the state and federal jurisdictions jointly through such organisations as NOSCH. However, any move towards nationally consistent definitions by the alternate means of future federal jurisdictional displacement overriding current state jurisdiction applications should be strongly resisted for the following reasons: As has already been discussed, there are substantial groups of contingent workers in precarious employment, who are particularly vulnerable to the imposition of exploitative work arrangements whereby low pay and job insecurity effectively increase the incidence of occupational health and safety risks, in the form of hazardous work practices. Since the exploitative industrial relations arrangements imposed upon these workers create increased OHS risks, which translate into an increased incidence of their need for workers compensation remedies, any move to separate the jurisdiction responsible for industrial relations aspects of their situation from the jurisdiction which regulates their OHS and workers compensation remedies respectively, will necessarily fragment the ability of Governmental policy to comprehensively regulate the situation of these particularly vulnerable workers, and thereby increase their risk of OHS risk or injury.

As has already been discussed before, there are substantial legal obstacles arising from the federal constitution, which seriously hinder the ability of all three areas - OHS, Industrial Relations and Workers Compensation – to be effectively regulated with in the federal jurisdiction alone.

By contrast with this obviously defective model of federal jurisdictional displacement, the development of a nationally uniform approach by way of complementary coordinated initiatives between the various federal, state and territories jurisdictions will ensure that these particularly vulnerable groups of workers are not further placed at risk. Moreover, the development of such a nationally uniform approach by means of complementary and coordinated jurisdictional initiatives will ensure that all categories of workers can benefit from properly comprehensive definitions and formal legal entitlements, which are not currently available in some jurisdictions. For example the definition of "injury" differs across the different jurisdictions and some injuries such as heart attacks are not covered in certain states.

The HORSC has already raised concerns about the impact of such differences between state jurisdictions in relation to the definition of "worker".

5. To what extent has the changing nature of production activities and workplace arrangements affected the number and proportion of workers covered under workers' compensation arrangements?

As has already been discussed, the current workforce includes among its ranks considerable numbers of contingent workers, labouring under work arrangements, which depart from the traditional employment relationship or which subvert that traditional relationship, by commercial structures, which ensure that the effective business controllers of the relevant work processes are parties who do not stand in the position of the formal employer. In particular supply chain arrangements, franchises, and the utilisation of own account workers as part of an insecure and transient workforce, ensures that the effective liability for the workplace treatment of these contingent workers is no longer borne by those who effectively control the organisation and outcome of the work processes.

In addition, the same situation motivates the effective business controllers of these newer workplace arrangements to try and escape existing workers compensation liabilities. As has already been discussed, the failure by so many employers to fully comply with these obligations is exacerbated by the additional willingness of so many employers to shift what little cost burden they might otherwise bear onto the public purse, by means of their insistence that injured workers be channelled into the social security and public health systems.

Consequently the HORSC recognised that the changing nature of productions activities and workplace arrangements has indeed affected the number and proportion of workers covered under workers compensation arrangements. More specifically this change in nature of production activities has artificially deprived many injured workers of effective access to compensation after a work related injury.

Leading Australian research has conclusively demonstrated both the causes and outcomes of these trends. In particular the work of Professor Quinlan and Dr Mayhew has provided specific evidence in relation to a number of different industry sectors to this end, in particular demonstrating the powerful trend towards underreporting of work injuries for those in precarious employment. One ironic consequence of this camouflaging of incidence of actual work injury has been the resistance by workers compensation insurers to extend cover to businesses involved in less traditional arrangements since the insurers have faced a ballooning of their own liabilities once the injured workers have registered claims for workers compensation (to an extent which the insurers had not anticipated owing to the effects of underreporting, which is integral to these newer work arrangements).

It is Labor Council's understanding that in the US, certain labor hire companies are unable to obtain workers compensation insurance.

6. Is this a matter for concern and, if so, why?

Yes, it is matter for concern. Labor Hire companies in NSW have experienced significant increases in their workers compensation premiums because the host employer is not complying with OHS obligations leading to an increased incidence of injury and thereby increased liabilities for the relevant workers compensation insurers.

Furthermore the Industrial Relations and Workers Compensation Tribunals are grappling with the question of who should be ultimately responsible for the relevant OHS and workers compensation obligations arising from the changing nature of production activities and workplace arrangements.

7. How might the definition of worker or employee be changed to address these concerns?

This question has been previously addressed and the Labor council supports the HORSC recommendation.

The Australian Industrial Relations Commission in *Abdalla v Viewdaze Pty Ltd t/as Malta Travel (2003) FB of the AIRC (Lawler VP, Hamilton DP, Bacon C) PR9297971, 14/5/03* has directly addressed the issue of the definition of a "worker" as either an employee or contractor and has in that decision provided detailed indicia.

The definition

8. How might such changes be best introduced?

The National OHS Commission is the vehicle through which such changes can best be introduced, once the relevant stakeholders in the NOHSC process include all the relevant jurisdictions.

The Labor Council recommends that in adopting this proposed structure that an appropriate goal would be to introduce nationally uniform definitions, which have the imprimatur of the HORSC.

9. Should alternative arrangements apply to address this situation and, if so, what might they be?

The Commission should proceed with caution on allowing alternative arrangements particularly self insurance, which threaten the financially viability of existing premium pools and may also further place at risk the large number of contingent workers who are particularly vulnerable.

It is Labor Council's understanding that the South Australian WorkCover system is experiencing difficulty with its current self-insurance arrangements on the basis that they have allowed too many employers to escape their obligation to contribute fully to the WorkCover premium pool.

Under the current environment the majority of employers are small businesses and research indicates that they are the poor performers in injury prevention and injury management. There is a considerable amount of cross subsidisation in the form of contributions by better performing employers to the benefit of those employed by worse performing employers. In reality the states and jurisdictions need to have employers meet certain benchmarks and targets in OHS in accordance with international best practice i.e. significant reductions in injuries and appropriate return to work management schemes. Until this is achieved, the focus needs to be on improving the performance of all players in current systems, rather than just rewarding big corporations who have the resources and finances to implement necessary measures. As indicated above, many employees are not being properly compensated because so many employers are not complying with workers compensation arrangements, whether as self insurers or through full contribution to the premium pool.

10. What might the implications be of changing the definitions of a 'worker' on other regimes for which governments are responsible eg payroll tax?

I refer the Commission to the NSW Government's recommendations arising out of **the Green Paper (WorkCover Compliance Report).**

Effective 1 July 2002
The *Interim Report* contained the following recommendation:

Recommendation 1 that the definition of 'wages' in the *Pay-roll Tax Act* 1971 and the *Workers Compensation Act* 1987 be amended to include the grossed-up value of fringe benefits as defined in the *Fringe Benefits Tax Assessment Act* 1986. The definition of 'wages' contained in the *Workers Compensation Act* 1987 must also be amended to include employer contributions to superannuation (in all forms) and long service leave. Additionally, the pay-roll tax transitional arrangements in respect of leave and superannuation should be removed.

(Note: This recommendation was partially implemented in the June 2002 NSW Budget, through the inclusion of the grossed-up value of fringe benefits (excluding GST) in the definition of wages for pay-roll tax purposes. The remainder of the recommendation should be fully implemented as soon as possible.) (Section 3.4)

Before 1 July 2003

Recommendation 2 that all stakeholders are notified of the intention to clarify the position of employees, employers and contractors for the purposes of workers compensation and pay-roll tax and are consulted prior to implementation. (Section 4.4)

Recommendation 3 that employers be given notice of the intention to introduce an incentive for principals to be concerned with ensuring the compliance of their contractors. (Section 5.4)

Recommendation 4 that:
1. Notice of intent is given to introduce the pay-roll tax grouping provisions to workers compensation from 1 July 2004,
2. OSR review the provisions in relation to their application to all types of entities, and simplify the language in relation to shared staff, and
3. WorkCover consult with charities in order to identify any special issues arising from the implementation of grouping provisions for workers compensation premium purposes. (Section 6.4)

Recommendation 5 that WorkCover, together with the insurers, review the forms used for collection of wages data from employers to ensure that they are simple to understand and hence straightforward to comply with. (Section 7.4)

Recommendation 6 that the NSW Government negotiate with the Commonwealth Government to allow use of ATO BAS data for workers compensation compliance activities. (Section 8.3)

Recommendation 7 that OSR and WorkCover review their approaches to collection of penalties to ensure that they are operationally aligned prior to implementation of the common audit program by OSR. (Section 9.4)

Recommendation 8 that WorkCover and OSR embark on a coordinated education and awareness campaign targeted at small business advisers and software providers. It is also recommended that WorkCover and OSR negotiate with the professional accounting associations to include workers compensation and pay-roll tax requirements in the continuing professional development requirements for their members. (Section 10.1)

Effective 1 July 2003

Recommendation 9 that the definition of 'wages' in relevant pay-roll tax and workers compensation legislation be aligned to include:
1. Any payment from which an employer is required to withhold income tax under the PAYG withholding system (excluding no ABN withholding; voluntary agreements, workers compensation payments; and payments to non-residents), and
2. The grossed-up value of fringe benefits, and
3. Employer contributions to superannuation (in all forms), and
4. An anti-avoidance provision allowing the relevant authority to deem as wages the market rate of pay for regular distributions from a trust to a working beneficiary. (Section 3.5)

Recommendation 10 that provisions similar to those in the *Industrial Relations Act* 1996, s 127 be introduced to the workers compensation and pay-roll tax legislation in respect of evaded workers compensation premium and pay-roll tax, extended so that principals:
(1) Are not able to rely on statements which they later come to know to be false; and
(2) Are liable for penalties when they become liable for their contractor's evaded premium and tax. (Section 5.5)

Recommendation 11 that OSR be given legislative power to carry out wages audits on behalf of WorkCover, and that initially, those audits focus on employers with wages greater than $600,000. (Section 8.4)

Effective 1 July 2004

Recommendation 12 that the definitions of 'worker' in workers compensation and 'employee' in pay-roll tax legislation be based on the following:

Step 1. The recipient of any payment or benefit defined as wages for pay-roll tax or workers compensation purposes is to be treated as a worker/employee; OR

Step 2. Include all contractors as workers and include the labour content of payments made to these contractors as wages paid to a worker/employee *unless*

Test 1. The labour content is less than 50% of the total value of the contract excluding GST; OR

Test 2. The services are provided a business which is carried on by an incorporated entity with two or more employees, or in any other case, the business has at least one employee; OR

Test 3. The services are provided under one or more contracts with a total value of less than $10,000 (excluding GST) in any financial year; OR

Test 4. The services are provided to a householder; OR

Test 5. The services are provided in special cases; OR

Test 6. *For pay-roll tax purposes only,* the services are provided by an entity which is exempt from pay-roll tax; OR

Test 7. *For workers* compensation *purposes only*, the contract is with an incorporated body; OR

Step 3. *For workers compensation purposes only,* identify those categories of individuals deemed to be workers but for whom there may or may not be payments made or contracts recognising their work. (Section 4.5)

Recommendation 13 that WorkCover develop an online compliance verification system for access to the information contained in the workers compensation certificate of currency and that it be extended as soon as possible to include pay-roll tax registration information. (Section 5.6)

Recommendation 14 that the modified pay-roll tax grouping provisions be introduced for workers compensation and pay-roll tax. (Section 6.5)

Recommendation 15 that OSR should extend audits to cover employers of all sizes and develop a centre of excellence in pay-roll tax and workers compensation compliance. (Section 8.5)

Effective 1 July 2005

Recommendation 16 that OSR collect workers compensation premiums monthly from those employers which are required to remit pay-roll tax monthly, provided that the current workers compensation scheme funding arrangements remain unchanged. (Section 7.5)

Long Term

Recommendation 17 that the concept of 'wages' used for pay-roll tax and workers compensation purposes be aligned with terminology used in Commonwealth tax legislation where appropriate. (Section 3.6)

Recommendation 18 that inter-jurisdictional and Commonwealth definitions of employer groups be harmonised and improved where possible. (Section 6.6)

Recommendation 19 that the NSW government investigate the possibility of appointing the ATO to collect pay-roll tax and workers compensation premiums as an agent for NSW. (Section 7.6)

Source: WorkCover Compliance Paper - Final

11. Are existing OHS arrangements able to deliver appropriate levels of work health and safety even where workers' compensation coverage does not apply?

The OHS Legislation is different to Workers' Compensation. The New South Wales OHS Laws capture all arrangements i.e. Labor hire host employer. All employers, contractors, workers, visitors, children, etc. This is covered by Sections 81 and 82 of the NSW OHS Act 2000.

12. If not, what measures might be introduced to address any deficiency?

All jurisdictions should ensure that they have OHS Legislation that covers levels of health and safety regardless of whether compensation is applicable.

Benefit structures (including access to common law)

Further to information available within WorkCover, the submissions by the Insurance Council of Australia, the Insurance Australia Group and the Actuarial Association provide significant discussion of the likely effects of different benefit structures. For example, there is a common suggestion that restrictions to accessing common law for workers compensation purposes is desirable for maintaining the funding integrity of workers compensation insurance schemes.

1. What are the effects on firms and employees of having different benefit structures?

Given that most employers operate in one state the effect is minimal. Even if an employer operates in different states they would have dedicated staff/department in each state to manage claims.

In addition the benefits structure operate in similar ways in each jurisdiction i.e. weekly benefits, medical benefits and lump sums. Moreover, the benefits structures are not overly complex compared to other matters such as tax and superannuation obligations. Employers are also provided with assistance by various bodies such as insurance companies and regulators.

2. To what extent do differences in compensation structures add to the costs of operating in more than one jurisdiction?

There may be costs involved related to different premium rates, however, where premium rates are low there are significant cost transfers to social security and Medicare. In addition many states artificially cap premium rates effectively subsidising poor performing employers and industries.

Recommendation 33
Any state or territory workers compensation scheme should ensure that employers and other commercial parties in control of workplace processes are required to share the true cost of workers compensation, taking into account the prudential behaviour of employers, relevant industry specific OHS risks and histories of claims management including return to work, claims experience and injury prevention.

3. Can separate arrangements (such as make up pay in negotiated workplace agreements or individuals taking additional private insurance) address any inequities between workers or perceived deficiencies in income replacement or medical benefits?

There are a number of top-up insurance arrangements that provide additional benefits to injured workers. These vary from industry to industry. Labor Council supports these arrangements in providing additional benefits to minimum statutory entitlements but would not want these to be substitutes for high-quality statutory schemes.

The interaction between legislative provisions and enterprise specific agreement creates disturbing possibilities for the reduction of worker rights and protection, especially given the temporary nature of workplace agreements, the shift to enterprise arrangements and the differences that can exist between enterprises and industries.

Recommendation 34
Labor Council recommends that any enterprise specific arrangement relating to OHS or workers compensation remuneration must not in any way diminish the currently existing legal rights and protection for workers or other standards for the protection of workers contained in existing state or territory legislation. Conversely no legislative provision or administrative arrangement in any state or territory jurisdiction should diminish the legal rights and protection for workers or any other standards for the protection of workers currently contained (or to be negotiated in future for) any enterprise specific agreement.

4. Is there any one compensation structure for providing income replacement and meeting medical and related costs among the various Australian schemes that is clearly superior?

5. What principles should guide the design of a compensation structure for any national frameworks? And

The Labor Council of NSW does not consider any one state or territory scheme as being the best practise model. All of these schemes have positive and negative elements for injured workers, particularly as none of these schemes provide full income replacement in the event of incapacity for work. However, the Labor Council believes that the NSW scheme is superior to other schemes in relation to benefit levels and the continuation of those benefits.

Recommendation 35
A best practise model should incorporate the following features:
1. Expedient processing of claims;
2. Provisional payments of medical and weekly benefits pending determination;
3. Full income replacement;
4. Unlimited access to common law rights;
5. Domestic assistance benefits;
6. Income Benefits beyond pension age;
7. Workers' rights to choose treatment and rehabilitation providers;
8. Compensation for other losses associated with incapacity such as diminution of superannuation and long service leave;
9. Mortgage and rent assistance schemes;
10. Employers' obligations to provide suitable alternate employment;
11. Provisions to ensure that workers do not suffer reduction in income or loss of other benefits relating to continuity of employment;
12. Employer and insurer obligations to assist injured workers to re-enter the active workforce including the provision of appropriate redeployment and training schemes, the provision of suitable advice in relation to treatment and financial planning; and
13. the provision of suitable treatment, counselling and financial services for the family and dependants of workers killed or seriously injured on the job.

6. How might greater uniformity of the compensation structure (or elements of it) between jurisdictions be achieved?

An effective and well-resourced national body such as the National Occupational Health and Safety Commission can achieve this.

7. Should access to common law damages be part of any national workers' compensation framework?

Yes, most definitely.

Recommendation 36
Unions support access to Common law damages. Workers with such claims are often the most seriously injured and should have recourse to better compensation in the event that their injury is caused by the negligence of their employer. In NSW the Unions were disappointed that the Government has chosen to limit the access of injured workers to common law damages.

Recommendation 37
Common law damages should provide an opportunity to serious injured workers to be compensated for economic and non-economic loss. Providing a lump sum, which they can use to make life more bearable after a workplace injury. This might be paying off the mortgage, alleviating the severe financial hardship that many seriously injured workers experience when their capacity to earn a living is taken a way by injury; moreover, the availability of common law damages also acts as another incentive for employers to take steps to prevent injuries in the workplace.

8. What are the implications of including, limiting or removing access to common law damages (on incentives for prevention of work-related injury and illness; on obtaining appropriate compensation; on facilitating effective rehabilitation; and for doing so in a cost-effective and equitable manner)?

The failure of a workers compensation system to provide access to decent common law damages is to relegate seriously and long term injured workers to the workers compensation treadmill, receiving low benefits, uncertain return to work outcomes and for many an uncertain financial future. Most schemes after six months either discontinue weekly benefits or significantly reduce benefits. In New South Wales the current statutory rate for a claimant without dependents is $310.90/week gross. Clearly this has not kept pace with the cost of living in NSW, particularly in metropolitan areas. Workers who are seriously injured and are unable to return to any type of employment, find it difficult to live on this low income and prefer a lump sum to assist them in meeting their mortgage repayments and investing their own money.

Unions have all had experience with members who after a workplace injury that incapacitates them for work for any significant period of time lose their homes and suffer family break-ups because they cannot financially support their families. It is a travesty.

Sometimes there is no capacity to rehabilitate seriously injured workers. There are also barriers to such workers getting employment because of employers' reluctance to take on employees who have had injuries and claims history. Such workers should have access to common law damages in order to manage their financial situation and lives.

There are many workers compensation schemes that do no have access to common law rights. We refer the Commission to jurisdictions in the Unites States who do not have common law or lump sum option. These schemes experience the same difficulty in relation to injury prevention and effective rehabilitation.

Cost sharing and cost shifting

1. ***What consequences has the changing nature of the workforce had for the sharing of costs of work-related injury/illness between employees and their families, employers and government providers of income and medical/health support?***

The employment relationship in Australia is changing rapidly. One in four employees are employed on a casual/part-time basis. There has been a significant growth in labour hire arrangement and pressure on employees into self-employment arrangements bona-fide and otherwise. As a consequence of this there has been significant under compliance in premium payment, return to work and occupational health and safety. This has been identified in a number of Government Inquiries.

2. ***To the extent that the current coverage of workers under the various workers' compensation schemes results in work-related costs being borne by other government programs, are changes required? And***
3. ***If required, how might these be introduced?***

As the nature of employment changes definitions of "worker" need to be reviewed and amended to ensure that workers are properly covered for work related injuries as well as to avoid unnecessary burden to the public health and social security systems.

The Labor Council of NSW supports the HORSC's Recommendation 1 in their "*Back on the Job*" Report.

5. ***What changes in access arrangements for government income and medical/health support might contribute to a more appropriate and equitable sharing of the costs of work-related injury and illness?***

Until such time as the State based schemes provide adequate compensation and medical coverage, there should be no change to access arrangement for government income that disadvantages injured workers and their families.

Early intervention, rehabilitation and return to work

1. Are the differences in the approaches taken by the various jurisdictions delivering significantly different outcomes and costs?

Yes, there are a number of differences in the approaches by the various jurisdictions. However not one of the jurisdictions has a proper early intervention and return to work program in place.

In August 1999 the NSW Workers Compensation Advisory Council made a number of recommendations (i.e. employers, employees, representatives, self-insurers and insurers) to the Government on how to improve early intervention and return to work.

The Workers Compensation Advisory Council advised that the general practitioner was the key in relation to an injured worker's return to work and that the GP should be given total control over the injured workers/clinical management and oversee all provider service such as physio, chiropractor, etc. The GP should also be the primary referral agent to a rehabilitation provider and oversee and monitor all aspects of the injured worker's return to work plan.

The GP in this role would need to be properly educated and remunerated.

There were other recommendations such as

- Providing a subsidy to small employers to allow them to bring the injured worker back to work in some kind of capacity and also to hire casual employees to assist with any duties that the injured worker is unable to perform. For example if a farm employee sustains a serious shoulder injury and is limited for a period of time in performing all of their duties, this would allow the employer to employ additional staff to assist with the tasks and at the same time provide a work conditioning program for the injured employee.

- Establishing proper redeployment programs – providing proper assistance to injured workers who have been terminated in obtaining suitable alternative employment.

- Financial incentives to prospective employers to take on injured workers. There have been a number of state based jurisdictions that have used these types of programs and it is our understanding that they have been successful. I draw the Commission's attention to the South Australian Workers Compensation System, which had these types of arrangements in place.

The Commonwealth Government can play a very strategic role in educating and building the capacity of GPs to play an effective role in return to work.

Doctors

Mr. Andrew Hemming of HEMSEM argued that the medical profession is a pivotal part of the workers' compensation system and that there needs to be proper registration, certification and accreditation, followed up by meaningful and continuous training of medical practitioners, to ensure that workers' compensation systems.

Source: "Back on the Job" HORSC Report – Workers Compensation Schemes: Issues and Practices 4.116

Medical Practitioners

The role of the medical practitioner in rehabilitation and early return to work is pivotal. The need to provide a medical certificate to initiate workers' compensation processes and to recommend suitable duties indicates their pivotal role.

The need for medical education of practitioners was suggested as necessary to address some of the above concerns.

Source: Excerpt from "Back on the Job" HORSC Report – Rehabilitation Programs and Benefits 7.67

2. To the extent this occurs, does this suggest a need for more comprehensive or consistent approaches?

Yes, however more importantly it needs to have the right outcomes. This is one of the most important aspects of scheme design because it is a major cost driver and the majority of schemes experience deterioration as a result of workers remaining on weekly benefits and not returning to work.

The Workers Compensation Research Institute in the US identified that return to work was a significant problem. They identified that a number of US schemes faced the problem of injured workers not being able to find alternate employment.

Once a worker is terminated it is very difficult for them to find alternate employment, particularly those with limited transferable skills. It is the same in Australia, where most employers do not want to take on a person who has had a workers compensation claim.

Unless this issue is properly addressed then the costs of these schemes will continue to deteriorate.

Recommendation 38
Labor Council recommends that state and federal industrial relations legislation be amended to ensure adequate protection for injured workers from termination for a period up to 2 years following a work related injury. Labor Council draws the Commission's attention to the legislation in Canada where the employer has an absolute obligation under their Statutory *Duty to Accommodate*.

The NSW Workers Compensation Legislation contains provisions applying penalties to employers who refuse to provide suitable alternate employment. However these provisions fail to prescribe specified penalty quantum upon employers who have been convicted. Furthermore, no employers have yet been convicted.

Recommendation 39
The Labor Council recommends that there needs to be a proper penalty system in place which deters employers from simply terminating injured workers and not properly investigating all redeployment options.

3. How might national frameworks be established to provide for greater consistency in early intervention, rehabilitation and return to work in all jurisdictions? AND
4. What features should such frameworks embody to best provide incentives to achieve early intervention and effective rehabilitation to injured or ill workers and to care for the long-term and permanently incapacitated?

The HORSC recommended that the Commonwealth Government in collaboration with the states and territories, develop a program to implement the National Occupational Health and Safety Commission *Guidance notes for best practice rehabilitation management of occupational injuries and disease* nationally. (Paragraph 8.90)

The HORSC has recognised the outstanding work of the National Occupational Health and Safety Commission by recommending that its Guidance Notes be implemented across the states and territories. This recognises and supports the strategic role the Commission can play.

The House of Representatives Standing Committee made the following recommendations in relation to return to work:

Similarly, there would be advantages in the implementation of nationally consistent rehabilitation and return to work practices, and measurement of occupational rehabilitation outcomes to identify where best practice is occurring. A set of national occupational rehabilitation standards would ensure that quality occupational rehabilitation services are being delivered nationally. The NOHSC has developed guidance notes for best practice rehabilitation management of occupational injuries and disease. The Committee recommends that the Commonwealth Government, in collaboration with the States and Territories, develop a program to implement the National Occupational Health and Safety Commission *Guidance notes for best practice rehabilitation management of occupational injuries and disease* nationally (*Recommendation 11).*

Another issue of concern was the extent to which there is vertical integration in situations where insurance companies own and operate rehabilitation and return to work providers. There is frequently a dilemma between the financial incentive for the insurer to process the workers' compensation claim expediently and ensuring the best possible long-term outcome for the injured worker. There is currently inadequate accountability. The Committee recommends that the Minister for Employment and Workplace Relations work through the Workplace Relations Ministers' Council to eliminate vertical integration whereby insurance companies own and operate rehabilitation and return to work providers (Recommendation 12).

Recommendation 40
The Labor Council supports the above recommendation and is of the clear view that insurance companies should not own their own rehabilitation companies, as this is a complete conflict of interest. Further, the Labor Council recommends that employees should have the right to choose their own rehabilitation provider.

It was suggested that returning injured people to work could be better managed through a larger plan, and that the Commonwealth has available the Job Network program and Jobsearch database. The Committee recommends that the Commonwealth Government, in collaboration with the States and Territories, investigate the potential interface of Commonwealth employment schemes with State re-employment programs, to develop more effective ways to assist injured workers to return to work, including communication of this information to providers who are responsible for return to work programs, without additional cost to the Commonwealth (Recommendation 13).

Recommendation 41
The Labor Council of NSW supports all of House of Representatives recommendations in relation to return to work.

Dispute Resolutions

Recommendation 42
Labor Council recommends that any dispute resolution systems' must have as their key objectives the following

- the reduction in risks faced by workers in the workplace
- Injured workers are entitled to a fair and due process for the determination of their claim
- Injured workers are provided with a fair and humane outcome
- Disputes in relation to their claim and treatment are resolved in a timely manner
- Workers have access to appropriate and adequate legal representation
- There are appropriate and adequate cost recovery mechanisms
- Injured workers have access to medical and rehabilitation assessment reports
- The provision of interpreter services for injured workers
- Proper and fair appeal mechanisms are in place
- Systems and processes are easy to access and use i.e. in completing and filing documents

2. Is there compelling evidence that particular dispute resolution practices are demonstrably superior in this regard?

Provisional Liability

At the time of the HORSC inquiry Labor Council of New South Wales made the following statement:

> "The new reforms that have gone through in terms of provisional liability are excellent reforms. There have hardly been any disputes since the reforms were implemented in January, and there have only been half a dozen disputes in the new Workers Compensation Commission; so there is a lot to be said for the way that scheme is operating. Also the latest actuarial advice indicates that the scheme is going forward well, claims are down and people are returning to work. Even though it is early days, there is certainly a trend of people going back to work early. We believe that is because, when people are paid on time, disputes are less likely to occur. People are getting treatment early and that is really encouraging and certainly beneficial to any scheme."

Source: "Back on the Job" HORSC Report – Workers Compensation Schemes: Issues and Practices 4.149

Since the HORSC Inquiry there has been further and quantifiable data

Yes. One of the significant changes the NSW Government introduced into the NSW workers compensation system was the introduction of provisional liability payments. This is a mechanism where the insurer must pay up to the first 12 weeks of benefits and the first $5000 worth of medical expenses pending a decision on liability. The insurers are given very little scope to avoid these obligations when processing claims. Indeed their remuneration arrangements are tied to their performance in provisional liability and dispute resolution.

This has made a positive impact on the cost of the WorkCover Scheme forward projections by the Actuaries, PriceWaterHouse Coopers in their latest *Monthly Monitoring Report dated 31st May 2003* and the WorkCover *Performance Monitoring of Scheme Reforms Quarterly Report* by the Performance Evaluation Team, Strategic Analysis Branch. These reports highlighted that over the last 9 quarters from March 2001 to March 2003 that the number of new claims notified to WorkCover continues to show a downward trend. These Reports are attached as an Appendix.

To summarise the abovementioned reports, the experience of the NSW WorkCover scheme going forward is positive and there are downward trends to date payments are lower than the previous year which has been as a result of all payment types. For example significant new reports, continuing

weekly benefits and open claims. The actuaries advise that this is a consequence of provisional liability. The most important high-level indicators of scheme performance (KPIs) in the short to medium terms are as follows.

The development of various claims statistics over time has been compared for the most recent 6 policy underwriting years. This allows an insight into how each underwriting year has been progressing compared to earlier underwriting years at the same stages of development.

The most important monthly high-level indicators of scheme performance ("KPIs") in the short- to medium-term are as follows:

- ***New reports, and especially <u>significant</u> new reports:*** These are the indicators of claim frequency, and are usually the fastest indicator of scheme activity;

- ***Payments – (total, and broken into weekly, medical, lump sums and other):*** especially weekly and medical payments, which are the first benefits paid to claimants, and rehabilitation and investigation payments, which are indicators of claim/injury management activity; and

- ***Number of continuing weekly claimants:*** Active intervention is designed to achieve earlier return to work, so a medium-term indicator of scheme success is a reduction of the number of injured workers receiving weekly benefits.

In each case the KPI will be monitored in "benchmark terms" over a number of comparable fund years standardised for economic inflation and workforce growth.

Recommendation 43
The Labor Council recommends that all other state based jurisdictions adopt the NSW Provisional Liability Principles.

3. What changes are required to introduce such best practice to all schemes?

Given the quantifiable results experienced by the NSW scheme, this is a model that should be adopted by other jurisdictions. NSW actuaries estimate that up to 70% of scheme performance and the positive effect on claims going forward is due the provisional liability aspects.

There should be a judicial process for the resolution of workers compensation claims for employees and employers. Such systems can operate cost effectively without compromising the rights of parties to access to justice.

Recommendation 44
The Labor Council of NSW recommends a system whereby legally qualified arbitrators who are well versed in workers compensation laws, operate under the auspice of either the NSW District or Workers Compensation Court to provide a fair a final determination of claims and disputes, subject to a fair appeals process.

4. How might a national framework be introduced to deliver increased national consistency in this regard?

In relation to the provisional liability it could be incorporate into a National code, and this could be developed by NOHSC.

In relation to dispute resolution there are already consistencies between State court jurisdictions.

7. For any national frameworks, what features are required to achieve an effective dispute resolution mechanism that: encourages the development of internal dispute resolution processes by employers; encourages the use of alternative dispute resolution, including mediation and conciliation; retains an appropriate appellate structure for employers and employees; and minimises costs for preferred outcomes?

The Labor Council of NSW draws the Commission attention to the NSW provisional liability provisions.

The Labor Council of NSW supports access to a just dispute resolution with access to alternative dispute resolution and final determination by a court where necessary.

Premium setting

WorkCover issued a green paper on possible changes to the premium system in the 3rd quarter 2001. The current premium system has largely remained unchanged since 1987 except for the introduction of ANZSIC classification system in 2001. Many commentators believe there is significant leakage from the premium system and a lack of fairness between employers. Employers have found legitimate ways to exploit the system's weaknesses. The weaknesses in the system distort employer financial incentives and actively work against the objectives of the Scheme.

Limited financial incentives arise from the premium system for smaller employers to mitigate against the occurrence of claims and to improve the management of claims.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report – Section C of Areas for Further Scheme Reform by Ernst and Young

Group Involvement rebates/Premium Discount Scheme

Group improvement rebate programs have been used by some North American jurisdictions as a method to improve workplace occupational health and safety, and engage small business employers to pro-actively help each other to achieve superior occupational health and safety standards.

The concept of a group improvement rebate program has been examined by the NSW Government, which has looked at similar programs in North American and Australian jurisdictions, including South Australia. The NSW Government has introduced the Premium Discount Scheme (PDS), which has different features of a group improvement rebate program. This has been available to NSW employers since 30 June 2001.

The PDS provides incentives to employers to implement programs to improve workplace safety and -return-to-work strategies for injured workers. The incentive scheme provides a discount on the employer's workers compensation premium.

WorkCover Victoria has also recently been examining the concept of adopting a group improvement rebate program but has not implemented the program to date.

Although the exact nature of the programs varies between jurisdictions, essentially they all have very similar aims. In essence, the core aims of the programs are to:

- Improve OHS, return to work rates and injury management through employer collaboration;
- Give small employers an opportunity to reduce their premium rates, and
- Involve in a pro-active way small employers in the Scheme.

Another benefit of the group improvement rebate program is that it improves ownership of the scheme by the employers involved by giving them more control over the premium charged and promoting active participation in aspects of the scheme's management. Mr Mountford identified the likely improvements to scheme ownership by employers as one of the attractions of the program for WorkCover Victoria:

> *"What we have been doing, certainly in the last 18 months, is seeking to get more ownership of the scheme by the employers and the unions. We have done that through stakeholder forums, where we regularly meet with them and discuss what we are doing, and through programs, such as the group improvement program, where we seek to get them more actively involved."*

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Sections 5.5-5.10

Premium Setting

1. What principles should guide premium-setting policy for workers' compensation under a national framework?

The Labour Council of NSW supports employers paying the true costs associated with claims with adequate protection for small employers.

2. Should caps on premiums be imposed and, if so, how might they apply?

Premium scheme should be structured to ensure a reasonable balance between user pays and insurance principles. For small business particularly there should be caps on the impact of claims experience on premiums.

3. How effective are the existing premium setting arrangements in providing incentives for employers to reduce the incidence of work-related injury or illness and facilitate rehabilitation and return to work?

There should be a strong clear relationship between an employer's occupational health and safety and injury management performance and their workers compensation premium. This relationship should be very transparent to the employer.

In addition to the normal claims experience adjustment mechanism in NSW there is a premium discount scheme (PDS) where employers can obtain a rebate up to 15% on their premium costs provided they satisfy certain auditing requirements relating to occupational health safety and return to work management. In NSW injuries and significant claim numbers are down. Labor Council of NSW is of the view that the PDS has impacted on these results. The Legislative Council General Purpose Standing Committee No1 found:

The Premium Discount Scheme (PDS) is one means by which WorkCover is structuring incentives to promote safer workplaces and better return-to-work strategies for injured workers. The PDS has been available to all NSW employers since 30 June 2001. The PDS is a voluntary scheme, which provides a discount on the employer's workers compensation premium, for a period of 3 year for any individual employer, as long as their OHS and injury management systems meet WorkCover's benchmarks.

Employers who qualify for the PDS can receive the following discounts:

- In the first year, up to 15% of their premium, to a maximum discount of $75,000;
- In the second year, up to 10% of their premium, to a maximum discount of $50,000; and
- In the third year, up to 5% of their premium, to a maximum discount of $25,000.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Sections 3.43-3.44

Recommendation 45
The PDS should be expanded and adopted by other jurisdictions.

4. Does the current interaction with OHS arrangements provide an appropriate mix of incentives to reduce the incidence of work-related injury or illness?

The Labor Council of NSW considers that there insufficient interaction between occupational health and safety and workers compensation. This has been clearly identified in a number of inquiries into workers compensation and occupational health and safety. Governments, including the Federal Government, need to enforce occupational health and safety and workers compensation with the same tenacity as they do for taxation, environmental requirements and trades practices. The PDS as outlined above is a good example of good linkages between OHS & premiums.

5. Is the variety of premium setting arrangements a significant source of additional administrative or compliance costs for firms operating in more than one jurisdiction?

6. Do different premium setting arrangements lead to a diversion of activities between jurisdictions?

There should be more consistency between premium rates across states. The Labor Council of NSW considers that a fairer premium rates across all schemes should be in the order of 2.8% to 3% of wages. A number of jurisdictions artificially deflate their premium rate in response to political pressures. The states with low premium rates such as Queensland, have achieved this rate by transferring the associated costs of injured workers onto the social security and Medicare system.

Workers compensation schemes may succeed in generating budgetary surpluses as a result of improved efficiencies in administration or improvement in scheme compliance. Any such surplus funds should be earmarked for distribution in equal portions to the following three areas of expenditure:

- Retention as reserves to cover future scheme liabilities
- Subsidy of employer premium discount schemes
- Improvement in the level of worker benefits

Recommendation 45
Labor Council recommends that the minimum premium rates should be set in the order of 2.8 to 3% of wages. Labor Council advises that such a range of premium obligations would be likely to ensure the accrual of sufficient compensation scheme funds to provide injured workers with all adequate requirements. Such an outcome would avoid any need for reliance by these injured workers upon public subsidy (in the form of Medicare or Social Security). Artificially low premium rates lead to increased pressure upon the quantum of entitlements for injured workers. The provision of adequate premium rates avoids this undesirable outcome.

7. Are there significant benefits to be derived from allowing a variety of arrangements?

Schemes should provide for some flexibility such self-insurance and specialised insurance arrangements. However, these should be pursued with caution to ensure there is not a dramatic impact to the statutory premium pool.

8. If the differences generate significant net additional costs, how might greater uniformity in premium setting arrangements be achieved between jurisdictions?

WorkCover issued a green paper on possible changes to the premium system in the 3rd quarter 2001. The current premium system has largely remained unchanged since 1987 except for the introduction of ANZSIC classification system in 2001. Many commentators believe there is significant leakage from the premium system and a lack of fairness between employers. Employers have found legitimate ways to exploit the system's weaknesses. The weaknesses in the system distort employer financial incentives and actively work against the objectives of the Scheme.

Limited financial incentives arise from the premium system for smaller employers to mitigate against the occurrence of claims and to improve the management of claims.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report – Section C of Areas for Further Scheme Reform by Ernst and Young

The role of private insurers in workers' compensation schemes

There has been substantial debate about the relative merits of public versus private provision of workers' compensation insurance. There has also been substantial research about the effects of insurance arrangements on workplace safety, the structure of workers' compensation insurance market and the employers' costs of workers' compensation insurance.

It is clear that each workers' compensation system exists as a product of its environment, that is, each system operates within a particular social, political, historical and industrial context. With that in mind the debate about the merits of the different insurance arrangements has tended to centre on questions concerning availability and affordability of insurance and the 'quality of services'.

Source: Workers' Compensation under Alternative Insurance Arrangements, Terry Thomason, Timothy P. Schmidle, and John F. Burton, Jr (April 2001) W.E. UpJohn Institute for Employment Research.

1. What have been the effects of the different levels of private sector involvement?

Private and Public Schemes

The success (or failure) of private or public schemes is largely driven by the context in which the scheme operates. There is little evidence to suggest that the insurance regulatory market impacts workplace health and safety (measured by lost time injury rates). However, there is a clear (albeit complicated) relationship between insurance arrangements and employer costs. That is, employer costs in public and private schemes are comparable. Where as, employer costs are substantially greater when a public scheme competes directly with a private scheme.

Therefore, the views on whether a solely privately underwritten or publicly managed workers compensation scheme is better usually comes down to philosophical differences. There are many examples of public schemes that perform well and those that perform poorly as there are for privately underwritten schemes. Each system has advantages and disadvantages.

Source: Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements, Terry Thomason, Timothy P. Schmidle, and John F. Burton, Jr (2000) W.E. UpJohn Institute for Employment Research

Criteria for assessing the performance of schemes again depend on philosophical views. For example a low cost scheme would be seen to be unfair to claimants.

The elements of scheme design remain the same - regardless of whether a scheme is privately or publicly managed. These elements include benefit design, compensation levels, benefit delivery, role of service providers (excluding insurers), insurance system premium system and the type and extent of regulation.

The Industry Commission report (1994) (pg 210) echoes this, noting that any particular market structure may not of itself be critical to 'good' performance. Other factors, including the quality of scheme administration are also important.

The major difference between the two systems is financial accountability. In a privately underwritten system insurers are financially accountable for the financial status of the scheme. If premium rates are inadequate then insurers fund any shortfall, not employers as in publicly managed schemes. In other words insurers bear the risk for the financial performance of the scheme whether it is good or bad.

Different financial accountability changes the financial incentives on insurers to manage claims and other aspects of their responsibilities. For example private underwriting creates greater incentives on answers to reduce the cost of claims than in a public system.

The other major difference is the regulation and management of insurers or agents by WorkCover. Typically in a privately underwritten system there is substantially less management i.e. control of insurers than under a public system. In both systems the regulator must ensure insurers comply with the legislation. In a private system the regulator must ensure insurers remain solvent whereas in a publicly managed system there is no equivalent requirement. In Australia workers compensation regulators largely rely non the APRA to ensure insurers remain solvent.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Sections 3.16-3.17

Private v Public Scheme Design Options

The Grellman Report recommended that New South Wales become a privately underwritten scheme. The further 2001 Act repealed provisions enabling the private underwriting of the New South Wales workers compensation scheme. The Committee discussed the advantages and disadvantages of a privately underwritten scheme with witnesses during its public hearing held in preparation of this Report.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Section 3.10

However Mr Grellman also told the Committee that the timing is not right for such a move:

> I am not sure that just at this point of time is the right time to transfer that across. There are two reasons that I say that. Firstly, there is the HIH royal commission, which will doubtless have something to say about the whole arena of genera insurance, the way it is regulated, and the prudential environment within which general insurers should operate, and I think it would be worthwhile awaiting to see what implications that might have. Secondly, the Australian Prudential Regulatory Authority (APRA) is in the process of introducing additional responsibilities and obligations on insurers, which I think, will have an impact. Others will be more qualified than I to speak about this, but as the new APRA guidelines on insolvency and capital adequacy impact the industry I would not be surprised if arenas settled before private underwriting is revisited.

Source: Legislative Council General Purpose Standing Committee No1 – NSW Workers Compensation Scheme – Third Interim Report Sections 3.12

> There is no simple answer. The answer is dependent on the motivation implied by underwriting the scheme. An insurer will certainly manage their claims and premium collection differently if they have full underwriting control. That is not necessarily all good news. We are aware of certain insurance failures over the past few months. The good news should be that that will basically focus the insurer on more efficient management of the claims. If that effect happens, then that will, in my view, improve the financial position of the scheme. If the insurer, despite the best intent, does not have that effect on claims, and that has happened in the past, then by definition there will be a negative effect on the scheme.

Research clearly indicates that a private scheme is no any better (or worse) than a public scheme - the success or failure will depend entirely upon the context within which the scheme operates. Given the extensive reform and improvement to the NSW WorkCover Scheme since 2001 it is not appropriate to proceed to private underwriting in NSW at this time.

7. What features would be required to ensure their presence was not accompanied by undesirable outcomes for the operation of those schemes (eg unsustainable discounting of premiums)?

Private Underwriting

The costs of administering a scheme are far greater under a privately underwritten scheme. The unions and Employer on the Worker's Compensation Advisory Council come to this clear conclusion after closely monitoring the Worker's Compensation system in NSW. The cost of moving to provide underwriting would have added to scheme costs.

Workers Compensation Advisory Council: NSW Workers Compensation Scheme Reform Proposals – August 1999

In April 1999 the Advisory Council resolved to recommend to the Government that the move to file and write private underwriting be deferred. Abandonment had been considered but did not gain adequate support at the time. This recommendation followed a lengthy period of speculation about the likely impact of private underwriting upon the price of premiums. Since before the last state election various insurers had been quoting probable average premium rates under a file and write system ranging between 3.6% and 4.1%.

At this time, Trowbridge issued its December six monthly valuation report, which concluded that the Interim Managed Fund was operating at an average premium rate of 3.08%. The target premium rate, on the other hand, was 2.8% and collections, according to Trowbridge, stood at 2.83%.

In June 1999 the Government resolved to defer the introduction of private underwriting for up to a year and legislated accordingly. Prior to this date the Attorney General and Minister for Industrial Relations, the Honourable Jeff Shaw MLC QC referred to the Advisory Council the task of developing further reforms to the workers compensation scheme which would have the effect of addressing the scheme deficit and reducing "the current high levels of premiums".

The decision to recommend deferral was based on the Advisory Council's view that:

- Increases in premiums of the magnitude apparent from the above figures, resulting from a move to private underwriting, were unacceptable.

- Despite the availability in the Act of a rebate mechanism, it was the Advisory Council's view that the additional cost of premiums over and above the potential cushioning effect of the rebate was unsustainable.

- Beneficial improvements in claims experience costs has been only partly revealed up to that time and a further period of development was needed to prove that the far reaching philosophical changes in the September 1998 legislation were actually working effectively.

- The Rating Bureau Premium Methodology contained unacceptable elements. One of the most significant of these was the proposed move from the existing 120 tariff classifications to more than 500 ANZSIC industry classifications. This has originally been proposed during the Tripartite Working Party discussions as a means of improving the transparency of premium calculations, but on the basis that the transition from one classification structure to the other needs to cushion any significant premium increases. No agreement on this mechanism was reached with the Rating Bureau and the Bureau for a number of vulnerable industries proposed crippling increases in premiums.

- At the time of negotiating for the introduction of file and write underwriting with the insurers, Heads of Agreement were drawn up in which the insurers agreed that during the period of the Interim Managed Fund their performance as third party agents would replicate the behaviours that

would be expected of insurers in a file and write underwriting environment. The Advisory Council decision to recommend deferral was also predicated on the basis that the insurers did not fully deliver upon this undertaking and that that failure had led to a slower implementation of the new philosophies in the new 1998 September legislation than might otherwise reasonably have been expected.

It is worth noting that scheme performance throughout 1999 has continued to demonstrate improvements of the kind assumed by the Advisory Council in formulating 1998 legislation.

The task presently before the Advisory Council presumes the move to file and write private underwriting will occur on or before 1st October 2000 and that specific measures will be recommended with cost savings that will permit that to occur without increases from the present target average premium rate of 2.8% (and allowing for the funding of the deficit in the tail of the 1987 Act over a reasonable period of time).

The negotiating principles which underpinned the development of the 1998 WIMWC Act were that premiums should not rise beyond the 2.8% average rate and that core compensation benefits should not be reduced. Critics of the scheme recommended by the Advisory Council asserted it had no chance of delivering cost improvements of the magnitude need and that the Advisory Council (and the Government) had failed to grasp an opportunity to set the Workers Compensation Scheme on a sustainable path.

What the Advisory Council had sought to achieve was a fundamental change of the philosophy underpinning the operation of the scheme, moving away from the easy answers of premium increases and core benefit reductions to a new system of early intervention and intensive case management of the injury management model. Significant detailed changes in practices, procedures and behaviours by the key stakeholders and by all service providers were envisaged.

Although this new philosophy is easy to identify in words, its effective implementation takes considerable time, commitment and the application of substantial resources from the Advisory Council, WorkCover and all participants in the system. To date this new scheme has delivered significant improvements – improvements of the kind that would otherwise have been impossible to deliver on a consensus basis.

In August 1999 Advisory Council actuary, David Zaman, estimated the average risk premium (i.e. excluding levies and loadings) to be 2.5% and the gross premium (including levies and loadings – i.e. the average market premium rate) to be 2.8%. In about March 1999, based on 31 December 1998 data, Trowbridge Consulting (the WorkCover actuary), made a forward estimate of the risk premium for 30 June 1999 of 2.73% and a gross premium of 3.08%. In about May 1999, Price Waterhouse Coopers (the Rating Bureau actuary) made a forward projection of the risk premium for 30 June 1999 at 2.77%.

The Advisory Council notes that WorkCover's actuary, Trowbridge Consulting, is scheduled to deliver a full scheme for 30 June 1999 on 9 September 1999. In mid September, Price Waterhouse Coopers is scheduled to indicate the estimated average risk premium rate for 1999/2000.

Trowbridge's last actuarial estimate of the tail deficit of the 1987 managed fund was $1.864b as at 31 December 1998 and it projected the deficit to rise to $2.03b at 30 June 1999. In August 1998 both the Advisory Council and Rating Bureau Actuaries have indicated their belief that the deficit at 30 June 1999 was approximately $1.8b as a result of intensive activity in commuting a large number of tail claims. These figures suggest that the tail debt has more than stabilised.

The Advisory Council has been working on the assumption that to cover all the costs of the Workers Compensation Scheme in a managed fund arrangement, including a component to amortise the deficit over 10 years, would require savings of the order of $200m-$300m, whereas savings required to get to the same point in a file and write privately underwritten system would require savings of the order of $500m-$600m.

Irrespective of the particular type of system adopted for the future, premium rates should be capped at a level, which incorporates the aggregate estimated savings.

The central problem confronting the Advisory Council is that the move to private underwriting entails significant additional costs, which have to be recovered by way of either increased premiums, or reduced benefits. At the same time, it is universally acknowledged that the current and proposed scheme design will deliver significant savings over time. However, while the insurers have been repeatedly invited to incorporate an "efficiency dividend" in the calculation of premiums, they have refused to do so, indicating that when the expected improved performance ultimately shows up in claims experience data, it will then be priced into premiums.

For their part, employers are opposed to premium increases and seek a system with a commencement average gross premium rate no higher than 2.8% and with a planned capacity to amortise the tail over a reasonable period. Reductions in average gross premiums are essential, with rates below 2.3% being a legitimate target.

Unions, on the other hand, indicate they have been prepared to cooperate in reducing scheme costs to a level necessary to reduce the average premium cost, including tail deficit reduction, to 2.8% but they are not prepared to make further benefit concessions merely for the sake o funding the move to private underwriting.

The Advisory Council now recognises two broad possibilities, although there are various shades of opinion on each of these and their constituent elements. The first possibility is a file and write privately underwritten system in which insurers "buy in" to the scheme by incorporating an "efficiency dividend" in their start-up premiums of a sufficient magnitude to ensure an average premium rate no higher than 2.8%, including tail deficit funding over 10 years. This system would also require the following elements to win support from all or most Advisory Council members.

Effective performance criteria, beyond the promise that the market place will deliver all the benefits we seek.

- The awarding of licences on a competitive tendering basis rather than simply issuing licences to every organisation that wants one.

- The second possible system is a managed fund including claims agents who are insurers or other providers of injury management services.

Suffice it to say, that the savings identified by the Advisory Council so far would not be adequate to support a move to private underwriting. Indeed, there is now increased scepticism about the likelihood that private underwriting will deliver the necessary improvements in efficiency and the premium reductions without significant control mechanisms and effective performance criteria. On the other hand, there is still a debate about the detailed method by which a managed fund could adequately control the scheme and deliver the efficiencies and cost reductions that would be needed over the long term.

The specific measures outlined in the Appendix are the outcome of a wider discussion on numerous issues, some of which require further investigation and negotiation.

Recommendation 46
The Labor Council of NSW recommends that the Government should manage all state and territory jurisdiction based schemes. Given the experience of the NSW Advisory Council, on which Labor Council plays a major role, the Labor Council and the NSW union movement would reject any proposal to privately underwrite the NSW workers compensation system.

Cost of workers' compensation

Each State and Territory in Australia has a workers' compensation scheme, and there are two at the Commonwealth level. In 1995 the Industry Commission estimated the cost of work related injury and disease to be at least $20 billion annually. In addition to these costs are the social costs to the injured workers, their families and the community.

Source: "Back on the Job" HORSC Report – Introduction 1.5

Fraud

Cost of Fraudulent Claims

The costs incurred by fraudulent behaviour by employers and employees and service providers are difficult to quantify. Under the NSW scheme we have seen considerable over servicing by some service providers, particularly in the areas physiotherapy and certain rehabilitation practices but very little evidence in relation to worker fraud.

The experience of Unions, particularly in the construction industry, is that employers have been able to minimise their workers compensation liabilities by failing to comply with their obligations in the payment of premiums. In NSW there has been a concerted effort by the NSW Government to address the issue. This has culminated in stronger laws compelling principal contractors to be more attentive to the issues of workers compensation compliance, as well as streamlining definitions between workers compensation and payroll tax regimes and introducing grouping provisions to reduce the incentive to employers to sort the system.

The recent Upper House Committee Report on the Inquiry into Aspects of Australian Workers Compensation Schemes actually found the level of employee fraud is generally considered to be low.

In relation to service providers, the labor Council is of the view that the treating doctor should have carriage of the total clinical management of an injured worker's claim and they should actually control the number of physiotherapy visits, referral to rehabilitation providers, referrals to specialists and also manage the return to work process. This would ensure that the doctor would clinically manage and have total control of the claim. In NSW, the WC and Workplace OHS Council has monitored very closely the over servicing of providers and there appears to be a downward trend in relation to these costs.

Employee fraud

The HORSC found that:

The level of employee fraud is generally considered to be low, although it is difficult to quantify. Fraud by exaggeration is more prevalent than deliberate initiation of a claim to commit fraud. Some participants in the inquiry argued that there are significant levels of employee fraud although very few figures are available. The inadequacy of available data is a significant issue. The Committee believes that the level of fraud cannot be estimated without accurate information on:

- The number of claims withdrawn or closed by the claimant or the insurer when evidence showed the claim to be fraudulent;
- Instances when the matter was not pursued because of the small amount of money involved; or
- Instances when another penalty such as a fine was imposed or the money repaid.

Source: "Back on the Job" HORSC Report – Executive Summary Page XXI

The various activities, which may be perceived as fraudulent behaviour by employers, included:

- Not obtaining insurance cover, fragmentation of businesses that have common ownership to reduce overall liabilities for workers' compensation, underinsurance by not declaring wages that form part of the definition of remuneration for premium purposes, exclusion of deemed workers from wage declarations, artificially isolating lower risk activities undertaken into separate entities within a group, providing false statements in connection with an application for an insurance policy, deducting monies from wages for workers' compensation purposes, failing to pass on

compensation benefits to workers or passing on a lesser amount, or informing workers that they are not covered by compensation;

- Provide incorrect information concerning rights and entitlements, not paying employee's full entitlements and/or withholding access to certain services, automatically rejecting claims and delaying the process leaving the employee without adequate income support, or putting up continual obstacles making the process distressful and difficult;

- Underinsurance and employer premium avoidance;

- Safety breaches not recorded, people not encouraged to record safety concerns and unaware that they could or how to report these, management taking over OHS role if cannot find a representative on their side, fear of being labeled a WorkCover fraud prevents people reporting safety breaches, or supporting the view that workers' compensation is for physical injury only;

- Incorrectly informing employees that they are not covered under the legislation or by the workers' compensation scheme, failure to declare remuneration/wages for the purposes of evading or minimising the insurance premium, incorrectly classifying the business to attract a lower premium, not having workers' compensation cover, deducting monies from wages for the purposes of workers' compensation premiums, pressuring employees to take other leave instead of lodging a workers' compensation claim, failing to submit a claim to the insurer, requesting employees to enter into a work agreement that does not reflect the true nature of the working relationship, cover-up of company negligence during the case, such as modifying equipment after an injury to avoid occupational health and safety prosecution, or failing to comply with Occupational Health and Safety Standards;

- Providing false statements or information during a claims process;

- Using duress to prevent employee's lodging claims, employers not paying on an accepted claim,

- Not paying premiums, deeming employees to be independent contractors, failure to process workers' compensation claims, underestimation of payroll, misrepresenting the nature of the enterprise to achieve lower premium ratings, failure to take out policies in all jurisdictions in which work might be undertaken, failure to provide suitable duties for injured workers, or failure to give access to quality rehabilitation and vocational training services;

- Not providing suitable duties for rehabilitation of injured workers, or providing cash in hand employment to someone who has English as a second language and then claiming that they were a contractor when injured.

Source: "Back on the Job" HORSC Report – Background 2.32

Fraud

It is generally accepted that in most situations the level of employee fraud is minimal. The Committee believes that caution should be exercised in the allocation of money for the detection and elimination of fraud. This allocation must have some relevance to the level of fraud and the impact of fraud on premium levels for employers. With the current system in place, in many instances, resources would be better allocated to preventive activities and improving efficiency.

Source: "Back on the Job" HORSC Report – Executive Summary Page XXIX

The HORCS Committee believes that the need to address the current inadequacies and streamline the workers' compensation system is much more important than allocating significant additional resources to the detection and elimination of fraud. If the system operated more effectively and efficiently, this would largely eliminate opportunities for fraudulent behaviour by any of the participants. Chapter 8

looks at national issues and the need for greater interjurisdictional consistency in a number of key areas.

Source: "Back on the Job" HORSC Report – Introduction 1.21

Employee/Worker

Over the last two decades different forms of employment have become increasingly prevalent as Australians make choices about work, family, lifestyle and security and as a result of the changes to the Australian economy. These developments include:

- More flexible working hours;
- A strong growth in casual, part-time and fixed term employment;
- A rapidly expanding use of contractors and outsourcing;
- An increase in the number of owner-managers; and
- Moves to home based work and tele working.

The Department of Employment and Workplace Relations commented that all Australian workers' compensation jurisdictions have relied upon the simple common law definition of contract of services (employee) in providing cover to workers, and that this usually excludes those engaged under a contract for services as an independent contractor. The employer's control over the manner in which the work is performed is the determining factor.

Source: "Back on the Job" HORSC Report – Background 2.16-2.17

Additional Information

Employer non-compliance and fraud

The HORSC stated that there were a number of suggestions that could facilitate an improvement in the level of employer compliance. The New South Wales Government released a Green Paper in September 2001 listing a number of options(refer the Commission back to the previous part of this submission where the recommendations of the NSW Government's Green Paper are outlined) to improve employer compliance:

- Requiring principal contractors to have responsibility for ensuring subcontractors are correctly insured under the correct tariff and declared correct wages;
- Requiring employees' pay slips to contain details of the lawful employers' full legal name and workers' compensation insurer; and
- The introduction of grouping provisions to enable assessment of premiums at the group level to overcome restructuring of groups aimed at minimising premiums or avoidance of premiums.

Source: "Back on the Job" HORSC Report – Fraud Detection and Elimination 5.26

Contracting

The Committee received evidence that the increasing trend towards contractor, subcontractor and casual employment has affected safety outcomes. These employment relationships invoke a grey or weaker link between the employer and employee, resulting in a perceived reduced duty of care towards their 'workers'.

Recommendation 47
That there should be greater responsibility by the host organisation, to ensure that a safe work environment is maintained. There also needs to be clearer definitions of the obligations of the three parties involved in a labor hire relationship: the on-hired employees, the host organization and the on-hired employee service provider.

Rural workers

Injured rural workers have specific needs associated with the high incidence of injury and their frequent remoteness from many services. Injured workers in rural areas also have limited redeployment opportunities, as many work opportunities in agriculture require manual labour. This leads in part to the high cost of claims in the farming sector. Similarly, in the meat industry there are few light duties for return to work programs. The National Farmers' Federation believes that more support is required for rural and regional areas in respect to rehabilitation, return to work and alternative work options. Access to medical specialists, rehabilitation providers, government authorities and claims officers is more difficult and expensive due to travelling time and limited access.

Source: "Back on the Job" HORSC Report – Rehabilitation Programs and Benefits 7.62

WorkCover Assist Program

WorkCover Assist is a program that provides targeted assistance to trade unions and employer groups to assist in the development and implementation of effective and practical industry specific strategies that are directly related to the reform initiatives contained in the 2001 legislative reform package. To

be eligible for funding under the program, the organisation must be able to clearly demonstrate that the funding will directly assist the organisation members in meeting the objectives of the new legislation.

Source: Legislative Council General Purpose Standing Committee No1: NSW Workers Compensation Scheme – Third Interim Report 2.9

A number of employers and trade unions have received funding under the NSW Legislative Program for the second consecutive year. This has allowed employers and unions to assist workplaces implement and meet their OHS and workers compensation obligations. These programs have reached a record number of workplaces and WorkCover would have to have spent millions of dollars in advertising to have the same effect.

There have been a number of outstanding initiatives developed by employers and unions including safety management systems, websites and user friendly information tailored to particular industries and their target audience.

Recommendation 46
The Labor Council recommends that all state and territory jurisdictions should adopt the WorkCover Legislative Assist Program.

REFERENCES

- The House of Representatives Standing Committee on Employment and Workplace Relations – *Back on the Job: Report on the Inquiry into Aspects of Australian Worker's Compensation Schemes June 2003* (HORSC)
- Legislative Council General Purpose Standing Committee No1: NSW Workers Compensation Scheme – Third Interim Report
- Inquiry into Workers Compensation System in NSW: Final Report 15 Sept 1997
- PriceWaterHouse Coopers Actuarial Consultants, John Walsh
- NSW Workplace Safety Summit Communiqué
- WorkCover Compliance Report (Green Paper)
- Performance Monitoring of Scheme Reforms Quarterly Report by the Performance Evaluation Team, Strategic Analysis Branch, WorkCover Authority of NSW
- NSW Workers Compensation Monthly Monitoring to 31st May 2003 by PriceWaterHouse Coopers.
- National Self-Insurance Association submission to the Productivity Commission; http://www.pc.gov.au/inquiry/workerscomp/subs/sublist.html
- Insurance Council of Australia submission to the Productivity Commission; http://www.pc.gov.au/ic/inquiry/47workhe/finalreport/index.html
- Institute of Actuaries submission to the Productivity Commission; http://www.pc.gov.au/inquiry/workerscomp/subs/sub088.pdf
- Insurance Australia Group submission to the Productivity Commission; http://www.pc.gov.au/inquiry/workerscomp/subs/sub089.pdf
- Web search failed to find data to provide quantitative analysis of issues concerning self-insurance;
- Work, Health and Safety (1995) Industry Commission (now Productivity Commission) Report No. 47 into occupational health and safety.
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