Mr H Plunkett
Assistant Commissioner
National Workers' Compensation and
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Productivity Commission
PO Box 80
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Dear Mr Plunkett

Thank you for your invitation of 13 March 2003 for the Tasmanian Government to make a submission to the Inquiry by the Productivity Commission into National Workers' Compensation and Occupational Health and Safety Frameworks.

My Government remains strongly committed to addressing issues related to workplace injury and illness which can impose significant social and economic costs on injured workers and their families, employers and the wider community. I agree that primary responsibility for workers compensation should remain with the States, but acknowledge that there may be aspects of this complex area which would benefit from a national approach. Nevertheless, any decision to move towards a national approach should be based on clear evidence of benefits to employers and workers resulting from proposed changes.

Thank you again for the opportunity to provide a submission to the Inquiry.

Yours sincerely

Jim Bacon MHA
Premier

PRODUCTIVITY COMMISSION

NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

ISSUES PAPER (April 2003)

TASMANIAN GOVERNMENT SUBMISSION

Introduction:

In responding to the Issues Paper, the Tasmanian Government (the Government) makes the following general observations:

- Under Tasmania *Together*, the community's long term social, environmental and economic plan, the Government is committed to working with the community to achieve a number of goals, standards and benchmarks. One such standard is to ensure healthy, safe and fair workplaces. In line with this, the Government believes that the development and implementation of any workers' compensation or occupational health and safety (OHS) framework should involve extensive consultation, in particular, with employers and workers.
- The Issues Paper appears to focus on the needs of multi-national companies. Those specific needs may not be consistent with the needs of:
  - workers;
  - employers operating in only one jurisdiction; and
  - small business.

  Any system needs to provide a balance between the interests and needs of all parties.
- The Government is prepared to consider any significant difficulties faced by business operating in a number of different OHS and workers compensation systems. However, no compelling evidence has yet been presented to the Government to demonstrate that this is a major problem.
- The Issues Paper raises many highly technical and complex issues. The Government is unable to provide detailed responses or comments on such issues given the limited timeframe provided for submissions.

The Government also notes that it is currently conducting a review of recent changes to Tasmania's workers compensation arrangements. A broader review of the Tasmanian legislation will be considered once the outcomes of the Productivity Commission Inquiry and other national inquiries/reviews are known.

National Frameworks:

The Government is prepared to consider any evidence that there may be significant disadvantages and/or difficulties associated with the operation of a number of different workers compensation systems and occupational health and safety (OHS) arrangements. While it would seem that multiple jurisdiction-based systems will cause additional administrative and compliance costs for employers and insurers operating in more than one jurisdiction, the Government is not in a position to determine whether those costs are substantial.

One issue which has been of concern for a number of years is the "cross border" situation where workers are required to work in more than one State, leading to confusion and uncertainty about workers' entitlements, and employers' obligations. It is noted that the States and Territories have been working towards addressing workers compensation cross border issues through uniform legislation which is intended to be implemented in all States and Territories this year. Tasmania has always supported the concept of cross border legislation and intends to implement the proposed legislation as soon as practicable.

The Government believes that there are some advantages to having multiple jurisdiction-based regimes. States and Territories have different needs and conditions, and individual regimes allow them the flexibility to provide for those specific needs. Another advantage is that the States and Territories benefit from and build upon each other's experience and initiatives leading to overall improvement in the schemes.

The Issues Paper proposes a number of possible models for establishing national workers compensation and OHS frameworks. The Government notes that the issue of whether any of these models is desirable or preferable to the current arrangements is more within the province of the multi-national companies and insurers. It would be incumbent upon any party asserting the desirability of a model to justify the reasons why that model is to be preferred (the benefits as opposed to the costs of implementing such a model). The practicality of the models in operation would need to be considered carefully. For example, in one of the models it is suggested that employers could choose the OHS arrangements to operate under with this being recognized in all jurisdictions. The difficulties in enforcing a potentially wide range of OHS arrangements would make this scenario virtually unworkable.

State schemes may well become unviable and/or inefficient if an alternative national scheme is available. If the States and Territories are also to administer the national scheme, this could require a substantial increase in resources. Even in the situation where the national scheme is to replace the State scheme, there would be dual systems operating for a considerable period of time until the claims falling within the old State scheme have been finalised. The issue of whether the two areas of workers compensation and OHS should be combined in one framework is complex and may depend upon the size of the jurisdiction.

The only comment that the Government wishes to make on the coordinating mechanisms (Workplace Relations Ministers Council (WRMC) and Heads of Workers Compensation Authorities (HWCA)) at this stage is that WRMC is largely dominated by industrial relations issues, which may, at times, overshadow important OHS and workers compensation issues. This may be accentuated in jurisdictions where industrial relations, OHS and workers compensation are not within the same ministerial portfolio. It is noted that some of the reforms made by the Federal Government in respect of industrial relations issues have directly impacted upon OHS, for example, allowing longer working hours increases OHS risks. In some instances, industrial relations reforms have had an indirect impact on workers compensation. For example, some reforms have contributed to the change in the nature of employment relationships leading to a reduction in the number of individuals covered by workers compensation.

National Self-Insurance:

While the Government accepts that the conditions of access to self-insurance differ between the jurisdictions, it is not in a position to comment on whether those differences impose significant additional administrative or compliance costs for businesses wishing to self-insure their workers compensation liabilities in more than one jurisdiction. The Government suggests that proponents of this view should prove that significantly higher costs exist due to multiple self-insurer regimes.

The Government's view is that any form of national self-insurance will have an impact on the Tasmanian workers compensation system as it would result in some self-insurers (in all likelihood, the larger national employers), leaving the State system – therefore reducing the premium pool. Not only would these employers be benefiting from the activities funded by the pool (such as enforcement and promotional activities), without contributing to that pool, but the premium pool would also become more susceptible to any extraordinary events (for example, the collapse of an insurer).

A system of mutual recognition may not have as great an impact. However, some form of financial arrangements would have to be made to ensure the viability of the State premium pool. The Government is also concerned that attempts to reduce the burden on employers wishing to self-insure in more than one jurisdiction may result in a substantial increase in the burden on the States and Territories, particularly in monitoring and enforcing compliance where the OHS standards differ between jurisdictions.

As to the features that should be incorporated into any national framework for self-insurance, the Government notes that the WorkCover Tasmania Board recently undertook a review of its self-insurer permit conditions. The outcome of that review was that applicants for self-insurer permits or renewal of permits are to be subject to rigorous financial audits, new entry and exit provisions and auditing in accordance with SafetyMAP and InjuryMAP tools. These new, more onerous requirements reflect the Board's view that self-insurers should exhibit the highest standards in OHS and injury

management as well as satisfying stringent financial and prudential standards. The Government believes that these features would also be appropriate in any national self-insurance arrangement.

The OHS Model:

The Issues Paper seeks comments on the effectiveness of the National Occupational Health and Safety Commission (NOHSC) in promoting a greater level of consistency in OHS arrangements. The Government believes that NOHSC has been effective in ensuring greater consistency and driving change through the development of a suite of national standards, such as manual handling, national certification, hazardous substances etc, and establishing common approaches to OHS issues. There is little doubt that smaller States benefit from the research and policy input provided by the larger jurisdictions. However, the implementation of some NOHSC initiatives and standards can be difficult for smaller States given more limited resources, competing priorities and the need to adapt NOHSC products to suit local conditions. The Government also wishes to make the observation that representation and participation in national forums impose significant costs upon jurisdictions. The impact of these costs is substantially greater on the smaller jurisdictions.

In relation to the issue concerning the areas in OHS regulation and implementation where differences between the jurisdictions impose the most cost, the Government notes that these differences would not appear to be particularly significant. Evidence is yet to be provided as to the additional costs imposed by these differences.

Reducing the regulatory burden and compliance cost:

The Government is not aware of any compelling evidence suggesting that compliance costs are significant for businesses operating in more than one jurisdiction.

Access and coverage:

The Issues Paper indicates that there are differences in the definitions of employer, employee (worker) and work-related injury and illness applied in the legislation in different jurisdictions. The Government acknowledges that there are differences in definitions in the workers compensation arena and these differences can be fairly significant. The differences in definitions of employees and employers in the OHS area are of less concern, as the legislation generally applies a very broad duty of care extending to anyone who has anything to do with a workplace, for example, contractors and visitors to workplaces.

Definitions and the manner in which they are interpreted are of crucial importance in determining who and what falls within the ambit of the workers compensation scheme. Most States base their definition of “worker” upon the concept of a “contract of service”.

However, there are differences in the deeming provisions and in the coverage given to contractors. It is not only the differences in the definitions between jurisdictions that cause confusion and uncertainty – it is also the ambiguity surrounding the definitions themselves and the manner in which they are interpreted by the decision-making bodies in the various jurisdictions. For example, there has been considerable litigation on the meaning of "contract of service" and the application/scope of this term is still not clear. The changing nature of employment relationships has also had a significant impact on the ambit of the scheme.

The Government believes that there would be considerable benefits in moving towards nationally consistent definitions of employer, worker and work-related injury/illness, bearing in mind that careful consideration needs to be given to how far the ambit of workers compensation should extend. However, there may be a number of obstacles. The creation of nationally consistent definitions would be an extremely large task. Any attempt to create such definitions would require significant consultation between Governments and all affected parties/bodies. It is also questionable whether the creation of nationally consistent definitions would completely remove the uncertainty as to who is covered by workers compensation. Even if nationally consistent definitions were introduced, employers would still endeavour to interpret and apply the definitions to their own advantage.

As to the implications of changing the definition of "worker" on other regimes for which governments are responsible, there may well be a significant impact where data is shared between regimes for compliance purposes. There are certainly benefits to be gained by harmonising the definitions between regimes, (for example, data comparison for compliance purposes), and this is something that is currently being explored in Tasmania with respect to the definition of "wages" in the workers compensation and payroll taxation arenas. As yet, there have been no conclusive discussions about harmonisation of the definitions of worker and employer, but there is an expectation that this can be achieved in the future.

It is noted that the issue of definitions of worker and employer have been recently considered in other forums and papers including:

- the Royal Commission into the Building and Construction Industry;
- the report on the Review of Workers Compensation and Occupational Health, Safety and Welfare Systems in South Australia by Brian Stanley, Frances Meredith and Rod Bishop; and
- the final report of the Review of Employers Compliance with Workers Compensation Premiums and Payroll Tax in NSW.

In examining this issue, it may be appropriate to consider the recommendations made by those papers/reports.

The Issues Paper asks whether existing OHS arrangements are able to deliver appropriate levels of work health and safety even where workers' compensation coverage does not apply. The Government believes that this situation is addressed in the *Workplace Health*

and Safety Act 1995 which extends a broad duty of care on and towards all parties at workplaces, whether they be employers, principals, employees, contractors or visitors.

Benefit structures (including access to common law):

The Government acknowledges that there are a number of different benefit structures applying in Australia. However the Government has not been provided with any evidence as to whether those differences add to the costs of operating in more than one jurisdiction.

It is also difficult to comment on whether one benefit model is clearly superior to others as this question depends on the criteria by which models are assessed. The Tasmanian benefit structure underwent significant reform in the amendments to the *Workers Rehabilitation and Compensation Act 1988* that took effect on 1 July 2001. The amendments implemented a number of recommendations made by a Joint Select Committee (JSC), established in 1996 to inquire into the Tasmanian workers compensation system. In considering the benefit model, the JSC stated that:

> "It is critical that the form and level of benefits is aligned with the objectives of the system. Thus benefits which encourage dependency or maintenance of symptoms are incompatible with the objectives of the Tasmanian system. The form of the benefit structure embodies a balance between the interests of employers (affordability) and the interests of workers (benefit adequacy). Selecting a benefit structure also involves a balance between the interests of severely disabled workers and those sustaining minor injuries and illnesses."

The current Tasmanian benefit model was developed in accordance with the principles stated by the JSC, and the Government believes that any proposed national framework/benefit structure should be designed having regard to these principles.

The revised Tasmanian model restricts access to common law damages by imposing a 30% whole person impairment threshold. Up until 1 July 2001, the Tasmanian workers compensation system allowed unlimited access to common law. This change to access to common law has sparked a strong debate about the merits of common law.

The types of issues that the Government believes should be considered when examining access to common law damages include:

- the adequacy of common law settlements/awards in meeting key objectives of workers compensation schemes, including rehabilitation and return-to-work;
- the social and economic effects on workers of pursuing common law claims;
- the adequacy of common law settlements/awards in meeting the current and future needs of seriously injured workers;
- the costs imposed on workers compensation systems by varying levels of access to common law damages;

- the relative efficiency, including administrative costs, of common law compensation arrangements in comparison with no-fault compensation arrangements;
- whether access to common law creates inequities between injured workers by allowing some workers access to potentially greater levels of compensation than others; and
- whether there are strong justifications for retaining access to common law in primarily no-fault based workers compensation schemes. For example, is there any evidence that access to common law provides greater or more effective OHS incentives? Do common law damages provide more equitable compensation to seriously injured workers and, if so, should this be more appropriately addressed through changes to the no-fault benefit models? etc.

Cost sharing and cost shifting:

At this stage, the Government only has anecdotal evidence of situations whereby injured workers have found themselves reliant upon the social security system upon exhausting lump sum settlements. There have been some cases in which workers have suffered considerable financial hardship and distress where settlements have been exhausted prior to the expiration of social security preclusion periods. This is clearly a matter of grave concern.

In reviewing the Tasmanian workers compensation system, the JSC considered the merits of adopting a structured settlements approach. In indicating its support for structured settlements, the JSC noted the disadvantages of lump sum settlements as follows –

- they promote a tattslotto culture and weaken the return-to-work focus of the system;
- they may result in cost to the Commonwealth Government where settlements are used for purposes other than those for which they are intended; and
- they may be inadequate to meet the future needs of recipients;

In addition to the above identified disadvantages, the Government also believes that there is a real potential for mismanagement of large sums of money, particularly if clear legal and financial advice is not obtained and followed.

Although the JSC supported a structured settlement approach in principle, it noted that that it was not possible to proceed with that approach at that time given the uncertainty of the taxability of differentiated lump sums and periodic payments. At this stage, that taxation issue still appears to be a major impediment to introducing structured settlements.

The Government also notes that there is a view that cost shifting also occurs from the Commonwealth to the State workers compensation systems, in that workers' compensation is payable for injuries (including aggravations of injuries) that may only have a tenuous connection with employment.

Early intervention and return to work:

The Government believes that in broad terms the differences between jurisdictions with respect to early intervention and return to work arrangements are not particularly significant. This is an aspect of workers compensation systems that is largely driven by notions of best practice and there are benefits in being able to compare results and innovations. This is a strong example of where a multiplicity of systems is providing a demonstrated benefit.

There may be some differences in reporting and legislative requirements which could create some difficulties for employers operating in more than one jurisdiction if claims management is centralised. However, the Government's view is that claims are best managed at the local level and that therefore these differences are largely irrelevant.

The Government notes that the WorkCover Tasmania Board has established a committee to review the performance and services provided by rehabilitation providers in the Tasmanian workers compensation system. That review is currently in progress and is expected to be completed before the end of this year.

Dispute resolution:

The Government is of the view that a dispute resolution system cannot be considered in isolation from the whole workers compensation system it forms part of, as it is designed to suit the specific scheme. Substituting an alternative dispute resolution mechanism may require wholesale change to the scheme.

The Government notes that there is a substantial body of work on the required features of an efficient and effective dispute resolution system. The HWCA examined the issue of dispute resolution in its report "Promoting Excellence - National Consistency in Australian Workers' Compensation". The report attempted to outline a best practice dispute resolution model. The Tasmanian dispute resolution system closely resembles that model. Further, there appears to be a high level of satisfaction with the way in which the Tasmanian dispute resolution system is operating.

Premium setting:

Tasmania has a privately underwritten scheme.

The experience of the scheme has been varied from under-pricing of insurance premiums in its early years, to a period of loss-leader behaviour, to dramatic increases in premium rates following the introduction of the *Workers Rehabilitation and Compensation Act 1988*.

The JSC was established to address concerns about increasing premiums and consider and make recommendations about changes to improve the system and make it more

competitive. The recommendations of the JSC led to amendments to the Act that came into effect on 1 July 2001. Actuarial advice obtained at the time of the introduction of the amendments to Parliament indicated that the reforms would lead to cost savings of about 11–13% and, hence, reductions in premium rates. To date, there have been significant decreases in premiums. The indicative average premium rates have dropped from 3.1% in 1999-2000 to 2.48% in 2003-2004. This is in spite of other significant external events that have impacted on insurance premiums generally, including the collapse of HIH and the withdrawal of reinsurance for acts of terrorism.

Workers compensation insurers are licensed by the WorkCover Tasmania Board under the Act. The Act requires licensed insurers to set premiums in accordance with the claims experience of an employer, an employer's commitment to OHS and an employer's agreement to provide suitable alternative duties to injured workers (section 101(2)). In practice rates, are affected by a number of factors including investment, international insurance trends and claim costs. In addition to this, insurers employ a combination of industry rating, experience rating, and discounts for safety initiatives. Rates are not capped for particular industries. Some insurers have chosen to price themselves out of the market in various industries, resulting in a lack of competition and high premiums in high risk sectors such as, mining and forestry. This can be frustrating for employers in those industries who consistently perform well in occupational health and safety, but do not necessarily see their efforts rewarded in their premium rates.

The role of private insurers in workers compensation schemes:

The Government supports the involvement of private insurers in workers compensation schemes.

The JSC considered the issue of insurance delivery. It received submissions that a single insurer model should be adopted along the lines of the Motor Accidents Insurance Board (MAIB) motor accident scheme on the basis that the model provides:

- a greater emphasis on accident prevention and research;
- greater expertise in claims handling and the avoidance of unnecessary disputes;
- a stronger and better coordinated focus on rehabilitation and return to work; and
- a more efficient insurance pool.

The JSC noted that although the MAIB scheme was very successful functionally and financially, there was no guarantee that it could be successfully transferred to the workers compensation system.

Insurers submitted to the JSC that competition between insurers encourages cultural, regulatory and organisational improvements. The financial risks are taken by the insurers rather than the Government.

The JSC found that both types of insurer schemes have been subject to success and failure. Where failure occurs in a single insurer scheme the Government and community bears the loss, whereas in a privately underwritten scheme, the loss is borne by the insurers. The JSC recommended that Tasmania retain the multi-insurer structure.

However, the collapse of HIH in March 2001 highlighted that the privately underwritten, multi-insurer schemes do face difficulties in dealing with losses of high magnitude. The government underwritten single insurer schemes remained largely unaffected by the demise of HIH. However, there were major implications for privately underwritten schemes. This highlights the need for strong national measures that effectively eliminate the possibility of similar events occurring.

To fund the liability arising from the HIH collapse, the Government was forced to introduce a levy (special contribution). Without this levy, insurers and self-insurers would have been subjected to an unsustainable cost burden in contributing to funding the HIH liability which could lead to the withdrawal of some insurers from the market and dramatic increases in premiums. The levy is currently set at 4% of premium (notional premium for self-insurers) and is subject to annual review. It is expected that the levy will be required for approximately nine or ten years to cover the HIH liability.

It is noted that the privately underwritten multi-insurer jurisdictions have also had to respond to the withdrawal of reinsurance for acts of terrorism. In Tasmania, the unavailability of re-insurance for acts of terrorism effectively placed employers and insurers in breach of their obligations under the *Workers Rehabilitation and Compensation Act 1988*. The Government responded to this issue by amending the Act to transfer the liability arising from an act of terrorism to the Nominal Insurer. The amendments allow the Minister for Infrastructure, Energy and Resources to determine (from three specified options) the manner in which the Nominal Insurer's liability for an act of terrorism is to be funded.