Law Council
OF AUSTRALIA

Ref: MHL.JGW.LCA1668

2 December 2003

Commissioner Mike Woods
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Commissioner

NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS INQUIRY

I am writing to give you the Law Council's first submission on the Productivity Commission's Interim Report in the above inquiry. The Law Council will make a more comprehensive submission after appearing before the Commission on 4 December 2003. This submission outlines the Law Council's views, so as to assist discussion at the Commission's hearing on 4 December 2003.

This submission was made with the assistance of the Law Council's Accident Compensation Committee.

I refer to the Law Council's earlier written submission of 12 June 2003 in response to the Commission's *Issues Paper* of April 2003 in this inquiry, and the Law Council's appearance before the Commission on 24 June 2003. I note also the submissions to the Productivity Commission by member organisations of the Law Council: the NSW Bar Association and Queensland Law Society.

General perspective

Although the Law Council acknowledges that it is desirable to have commonality, as between jurisdictions, in both workers' compensation and occupational health and safety ("OHS") schemes, it must be appreciated and factored into this aim that the States and Territories differ substantially in terms of geography, industry, population base and economy.

The Law Council believes there is greater likelihood for achieving commonality in relation to OHS than in relation to workers' compensation; and that commonality in OHS does not depend on commonality in workers' compensation. Commonality in OHS can, and should, be pursued independently of efforts towards commonality in workers' compensation.

Workers' compensation

The Law Council's views are that:

- National frameworks for workers' compensation should be a set of recommendations which can be adopted by the States and Territories if applicable.

- The Law Council supports "Model D" in the Productivity Commission's Interim Report: that the Commonwealth, States and Territories establish a national workers' compensation body that would be charged with such functions as developing standards for implementation by individual jurisdictions. The Law Council would support the representation of the Law Council among other stakeholders (eg unions, employers) on that proposed body.

- The Law Council believes that Model D should be given time to assess its success before the Commonwealth pursues "Models A to C" in the Productivity Commission's Interim Report.[1] The Law Council notes that (for understandable constitutional reasons) non-corporate employers are left out of Models A to C. The Law Council considers it to be an important concern how non-corporate employers, and their employees, would fare if they were left in State/Territory schemes from which the major corporate employers had departed for Models B or C.

- In relation to benefit structures, the checks and balances within individual schemes must be appreciated. The Law Council believes there should be a limit as to how proscriptive the national frameworks would be. In particular the Law Council does not support excluding common law from national frameworks for workers compensation, or only including it in the limited form suggested by the Commission (see Interim Report at pages 183-184).

- The Law Council considers that there may be some advantage in having, in respect of common law access, recommendations in response to the Negligence Review Panel ("Ipp") report, with common assessment of damages for all personal injury torts. However, the Law Council is opposed to the abolition or emasculation of common law for workplace injuries.

- Although the Law Council agrees with reducing delay and excessive adversarialism in litigation, the Law Council believes that the Interim Report is somewhat simplistic in its comparison of common law and no-fault systems in this regard. It is notable that the Comcare scheme had the highest rate of disputation (expressed as the percentage of new disputes as a proportion of new claims) of any of the workers' compensation schemes in 2000-01, whereas the Queensland scheme had the lowest (24% as

---

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

compared with 5%, see Interim Report at page 288, figure 12.1). The ACT, which along with Queensland has unrestricted common law access, also compared favourably with Comcare: in 1999-2000 (figures were not available for the ACT on 2000-01) the comparison was 23% for Comcare compared with 19% for the ACT.

- Again, legal costs as a proportion of total claims varied considerably between schemes, such that one could not simply say that abolition of common law would necessarily lead to a lower legal costs proportion (see Interim Report at page 288, figure 12.2).

OHS

The Law Council's views are that:

- The Interim Report does not provide sufficient justification for national legislation, but this does not preclude there being recommendations which can be adopted by the respective States and Territories if considered to be applicable and beneficial.

- The Law Council would support governments exploring the Interim Report's recommendations for achieving national uniformity in OHS legislation and regulation. However, it may be premature to expect identical legislation and regulation in all jurisdictions given local factors.

The Law Council looks forward to appearing before the Productivity Commission on 4 December 2003. Any questions in the interim can be made in the first instance to Mr James Greentree-White on (02) 6246 3715.

Yours sincerely

Michael Lavarch
Secretary-General