# PRODUCTIVITY COMMISSION

# NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

## INTERIM REPORT

## TASMANIAN GOVERNMENT RESPONSE

The Tasmanian Government (the Government) makes this submission in response to the Productivity Commission's interim report on national workers compensation and occupational health and safety frameworks. The Government previously made a submission to the Commission on 16 July 2003 (submission number 135).

In principle, the Government supports the concept of greater national consistency in occupational health and safety (OHS) and workers compensation (WC) arrangements. However, the Government is not persuaded that the Commission's interim recommendations with respect to national OHS and WC frameworks are appropriate or desirable having regard to the interests of all parties concerned in workers compensation schemes. The Government is concerned that in attempting to address the issues of concern to large, national employers, the Commission has overlooked the needs and interests of small, single jurisdiction employers and workers.

The Government also has concerns about the lack of detail on important issues concerning the implementation of these proposals, their operation and the roles of the Commonwealth and the States and Territories. Further specific concerns and comments on the national frameworks recommendations are set out below.

The Government notes that the Commission has made a number of other interim recommendations with respect to the principles to be incorporated into workers compensation systems. For the most part, these principles are not new - many were previously recommended by the Industry Commission in 1994 and 1995, and in the Heads of Workers' Compensation Authorities report *Promoting Excellence* 1997. It is somewhat disappointing that the Commission has not progressed further and provided more satisfactory solutions for some of the difficulties that stand in the way of greater national consistency, e.g., the definition of worker. In any case, the Government supports in principle, a number of the interim recommendations that the Commission has made with respect the principles to be incorporated into workers compensation schemes and notes that many of these principles are currently incorporated into the Tasmanian workers compensation system. Further comments on these recommendations appear later in this submission.

**National frameworks for occupational health and safety:**

Under its interim recommendations on national frameworks for OHS, the Commission has recommended that the board of the National Occupational Health and Safety Commission (NOHSC) be reduced to between five to nine members. This body would recommend national legislative frameworks regulations and standards for adoption by Workplace Relations Ministers' Council (WRMC). The Government does not support this recommendation. The Commission gives no indication as to how the members of the smaller NOHSC board would be chosen and what sort of expertise and skills is considered appropriate. The Government is most concerned that if the NOHSC board is reduced, it will not be possible to ensure equal representation of the jurisdictions. In the absence of equal representation, the interests of the smaller jurisdictions such as Tasmania may be overlooked. The Government does not believe that this problem will be overcome by the Commission's proposal to include heads of State, Territory, and Commonwealth OHS departments on advisory committees. Ultimately the final decision-making will rest with the peak body and lack of representation on this body could cause jurisdictions to walk away from those decisions.

The Government does not support the Commission's interim recommendation that NOHSC be jointly funded. States and Territories already expend significant financial and human resources in participating in national forums and projects. This is particularly onerous on a small jurisdiction such as Tasmania where resources are limited. Any further requirement to fund NOHSC activities would take resources away from essential prevention activities within this State. The Government's belief is that it is up to the Commonwealth to demonstrate its commitment to national consistency in OHS by funding NOHSC.

Whilst the Government agrees in principle with national consistency in OHS, it does not support the introduction of template legislation. In the Government's view, template legislation will not adequately allow for variation to take account of local conditions. In addition to this, the Government notes that the introduction of template legislation in the dangerous goods area has been fraught with difficulties for OHS authorities. Another difficulty in implementing template legislation is in reaching agreement of Parliamentary Counsel in all jurisdictions as to how the legislation is drafted. Some years ago, template legislation was proposed with respect to noise standards. This project had to be abandoned due to failure to reach agreement on drafting.

In lieu of template legislation, the Government would prefer an approach similar to the Building Code of Australia, where technical matters are prescribed, and variations are included in State appendices.

The Committee has recommended that the *Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth),* be amended to enable those employers who are licensed to self-insure under the Commonwealth's workers compensation scheme to elect to be covered by the Commonwealth OHS legislation. The Government is strongly opposed to this recommendation. Firstly, there are no details provided on how and by whom this legislation would be enforced. For a small State, with limited resources, this issue is of considerable significance. Secondly, the Government questions whether the Commonwealth legislation would adequately address issues that are of local concern. For example, plant requirements, which are of great significance in

Tasmania due to the forestry and mining operations carried on in this State, may not be addressed as thoroughly in the Commonwealth legislation. Thirdly, the Government does not see it as desirable to have workers, working side by side within this State, subject to different OHS laws,

**National frameworks for workers compensation:**

The Commission has recommended that:

> *the Commonwealth should develop a national workers compensation scheme to operate in conjunction with existing State and Territory schemes by taking the following progressive steps:*
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> - *Step 1- immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme subject to meeting its prudential, claims management, OHS and other requirements;*
> - *Step 2 - in the medium term, establish a national self-insurance scheme for all employers who meet prudential, claims management, OHS and other requirements; and*
> - *Step 3 - in the long term, establish a broad-based national self-insurance scheme for all employers, which would be competitively underwritten by private insurers and incorporate the national self-insurance scheme established under step 2.*

The Government does not support this recommendation as it has serious concerns about the implications of this proposal on State schemes, particularly the smaller schemes such as Tasmania. The Government is concerned that step 1 and more particularly, steps 2 and 3 of the proposal, could result in the loss of a number of large self-insurers and employers from the Tasmanian scheme.

Under the Tasmanian legislation, self-insurers pay a contribution based on notional premium, into the Workers Rehabilitation and Compensation Fund. This Fund is used to resource administrative activities, compliance and education. If self-insurers pull out of the Tasmanian scheme to self-insure through a national scheme, then the Tasmanian workers compensation scheme will be left with less resources and will either have to scale back on these activities or impose higher rates of contributions on the remaining self-insurers and licensed insurers, increasing the burden on the smaller, locally based employers. Given that the companies that choose to self-insure through the national scheme will still be in operation in Tasmania, they will receive the benefit of compliance and educational activities although no longer contributing to the Fund. The Commission has not indicated whether it is envisaged that some sort of levy would be returned to the States and Territories to compensate for the loss of these resources. The Government strongly suggests that this be considered.

The Government also notes that the loss of employers from the scheme will reduce the funds available to the Nominal Insurer to meet any liabilities it may have under the Act. This may further increase the burden on employers remaining in the scheme.

Further, the Government has serious concerns about the viability of the Tasmanian schemes, and indeed, other small State and Territory schemes, if steps 2 and 3 of the proposal are

implemented. Even at Step 2, it is possible that some employers, who do not presently self-insure, may choose to apply for self-insurance under the national scheme, leaving the Tasmanian scheme and premium pool. At Step 3, if a large number of employers choose to leave the state scheme for a national workers compensation insurance scheme, then the reduction in the premium pool is likely to result in the State scheme becoming inefficient and uncompetitive, and in the extreme, unviable. For example, a loss of employers in a high-risk industry class may cause premiums to rise due to lack of competition or increased risk exposure. In a private scheme, a lack of competition, either generally or in specific industry classes represents a serious risk to the viability of the scheme. Also, as it is likely that the better performing employers would move to the national scheme, this may cause premiums to rise for those employers remaining within the scheme. The Government is also seriously concerned that State and Territory schemes may ultimately be forced to cut costs to "compete" with a national scheme, to the detriment of workers.

The Commission has also recommended that the States and Territories should join with the Commonwealth to establish a new national body for workers compensation that would be directly accountable to the Workplace Relations Ministers' Council (WRMC). It is proposed that that body would be established by Commonwealth legislation and have a board of five to nine members with relevant skills and expertise in workers compensation. The main functions of the body would be to develop standards for consideration by WRMC, data collection, analysis and research and monitoring and reporting on performance. The Commission proposes that the Commonwealth, States and Territories would retain responsibility for implementation and would jointly fund the body.

The Government is not convinced of the need for another national body. Many of the functions to be undertaken by the proposed new body are already carried out through committees established by the Heads of Workers Compensation Authorities (HWCA). If there is concern about the status of the HWCA, given that it has no ministerial authority, then the Government suggests that perhaps HWCA could be made accountable to WRMC rather than establishing a new body. In any case, the Government does not support the proposal that the new body be jointly funded.

The Government is also concerned about the limited membership proposed. No detail is given in the report as to how members would be selected, but it seems extremely unlikely, with such a small membership proposed, that all jurisdictions will berepresented equally. The Government believes that it is essential that all jurisdictions have an equal voice on any national body setting standards to be applied across Australia.

**Defining access and coverage:**

The Commission has recommended a number of principles to be used in defining "worker" and "work-related fatality, injury and illness" in workers compensation schemes.

In relation to the recommendations concerning the definition of worker, the Government is disappointed that the critical issue of who is or should be covered by workers compensation did not receive greater attention. Whilst it is acknowledged that the report focuses on principles to be applied in a national framework, all jurisdictions recognise that there are

problems in this area providing impediments to national consistency. All jurisdictions appear to support a nationally consistent definition for clarity and certainty, however, there are significant policy issues about the inclusion or exclusion of certain contractors and working directors, and implementation, compliance and cost issues. It was hoped that the Commission may have been able to offer a solution to these difficulties.

Given issues such as the changing employment environment, and the confusion and uncertainty arising from the common law definition (these issues are recognised by the Commission in Chapter 5 of the report), a project has been initiated by HWCA to consider the definition of "worker". The project team consists of departmental officers from all jurisdictions and is due to provide a progress report to HWCA in March.

In relation to the recommendation that the definition of work-relatedness should be in terms of "arising out of or in the course of employment", the Government notes that the Tasmanian legislation currently refers to "arising out of and in the course of employment". This is presently under review, with consideration being given to whether this requirement should be changed to "arising out of or in the course of in line with the other jurisdictions. In any case, under section 25(5) of the *Workers Rehabilitation and Compensation Act 1988,* an injury is taken to have arisen out of a worker's employment if the injury occurs during attendance at the worker's place of employment on a working day. It is arguable that this provision has the same effect as the "arising out of or in the course of' test.

**Injury Management:**

The Government supports in principle the principles recommended by the Commission in respect of injury management.

**Common law access:**

The Government notes the Commission's recommendations with respect to access to common law. As indicated in the report, the Tasmanian legislation still provides access to common law, however this is subject to a 30% whole person impairment threshold. There is no cap on damages. The Government supports the view that access to common law should be restricted to the most seriously injured workers and this is the reason for the 30% WPI threshold introduced by the *Workers Rehabilitation and Compensation Amendment Act 2000* (the 2000 amendments) which commenced on 1 July 2001.

The Commission has recommended that if access to common law is permitted, it should be for non-economic loss only. The reasons for this recommendation are not clear. Generally, awards of common law damages would include a component for past loss of earnings and future loss of earning capacity. Statutory benefits received for loss of income would be offset and the worker would not be able to claim any further statutory benefits following the award or settlement. It is not clear whether it is proposed that the worker would continue to receive statutory benefits once the common law damages for non-economic loss has been received.

**Statutory benefit structures:**

The Government supports in principle the Commission's recommendations in respect of the matters to be considered in designing a new benefits structure and in respect of the principles to determine a benefits structure.

It is noted that the Tasmanian workers compensation benefits structure embodies the majority of those principles. The benefits structure was reformed by the 2000 amendments to increase the level of the step-downs and replace the dollar cap on weekly benefits with a maximum ten-year entitlement. The current step-downs are as follows:

- 100% normal weekly earnings for the first 13 weeks of incapacity in the aggregate;
- 85% normal weekly earnings for weeks 14 to 52 of incapacity in the aggregate;
- 70%normal weekly earnings from week 53 to ten years of incapacity in the aggregate

The intention of the amendments was to balance the interests of employers and injured workers and bring the cost of the system in line with other States and Territories. The Government's objective was to provide greater income security for families of long-term injured workers whilst at the same time making the system more affordable.

Although the full effect of these changes will not be known for some years, insurers have responded positively to the changes by reducing premium rates and engaging in vigorous competition. After many years of premium rates above that of most other State and Territory schemes, the Government expects that the average premium rate for 2003/04 will be lower than the national average rate for the first time since national comparisons have been made.

However, as noted above, financial performance must be balanced against meeting the needs of injured workers. It has been suggested that the second step-down to 70% normal weekly earnings is too harsh, causing, in some instances, unintended hardship to long-term injured workers. To address these concerns, the Government initiated a review of the Tasmanian workers compensation system focusing, in particular, on the effects of the step-downs. The Government understands that that review has now been completed and the report to be handed down shortly. Depending on the recommendations of the review, it may be that the benefits model will be amended further.

**Premium setting:**

The Government agrees with the Commission's recommendation that premium setting should provide for full funding of schemes, appropriate incentives, and administrative simplicity. Whilst the Government supports the principle of no-cross subsidisation as a matter of policy, it recognises that in practice some level of cross-subsidisation is inevitable.

**The role of private insurers:**

The Commission has recommended that in privately underwritten schemes it should be sufficient for insurer licensing requirements to rely on APRA authorisation under the

*Insurance Act 1973* as evidence that prudential concerns are satisfied. Whilst the Government supports this recommendation in principle, it does view it with some caution, given past experiences. The Government notes that Tasmania carried, and continues to carry a heavy financial burden resulting from the failure of the APRA processes in the HIH case. Although this was a clear failure of a Commonwealth regulatory responsibility, the Commonwealth did not provide any financial assistance to those schemes affected by the failure.

The Government supports in principle the recommendation that a national policyholder's support scheme be established to deal with insurer insolvency. However, it notes that there are some issues that have not been addressed in the model proposed on pages 259 - 260 of the report, such as how immediate claims are to be paid.

**Self-insurance:**

The Government agrees with the principles recommended by the Commission for assessing self-insurance licence applications. The Government notes that under the Tasmanian workers compensation scheme, applicants for self-insurance (and renewal of self-insurance) undergo safety and injury management audits aimed at improving performance. Applications are assessed in accordance with principles similar to those recommended by the Commission, i.e., financial history, ability to provide statistical and other information required or likely to be required, ability to satisfy prudential standards, capacity to provide high-quality injury management to injured workers, and commitment to occupational health and safety, rather than on the basis on the number of employees or turnover.

**Dispute Resolution:**

The Government supports in principle the Commission's recommendations for mechanisms to manage and resolve disputes about claims, and notes that many of the principles highlighted by the Commission have been applied in the Tasmanian scheme, e.g., medical panels, provisional liability (without prejudice payments), early exchange of information.