The New South Wales Bar Association

SUBMISSION OF THE NEW SOUTH WALES BAR ASSOCIATION

TO THE PRODUCTIVITY COMMISSION ON THE

NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH

AND SAFETY FRAMEWORKS INQUIRY

11 JUNE 2003

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INTRODUCTION

1. Workers compensation has been a volatile social and political issue in NSW since 1987. Prior to the creation of a statutory Commission under the Workplace Injury Management and Workers Compensation Act 1998 members of the Association, in conjunction with solicitors, played an active and effective role in the management and resolution of disputes in workers compensation matters under the no fault scheme and at common law.

2. The Act put in place strictures on the pursuit of common law damages such that the rights have effectively been abolished.'

3. It is anticipated that the Compensation Court of New South Wales, an independent Court constituted by its own statute, will cease operation in December 2003. Thereafter all disputed claims under the no fault scheme will be determined by the statutory Commission in which barristers play no part.

4. The Bar spoke out against the changes broadly on three bases:
   (i) the abolition of common law rights represented an unjust impost on established rights;
   (ii) the imposition of a whole person impairment threshold test in no fault matters severely diminished available compensation for pain and suffering and loss of enjoyment of life and imposed an unattainable threshold for the pursuit of common law damages;
   (iii) the dispute resolution process adopted as a model for the new Commission was arbitrary, lacked transparency and was not amenable to independent review.

5. The Bar's voice in matters concerning workers compensation is heard both as an active advocate for workers' rights, as a proponent of judicial method

as best ensuring adherence to the Rule of Law, and as a stakeholder within the system itself. This submission attempts to articulate the relevant arguments from these three perspectives.

6. It is clear that the scope of the Productivity Commission's enquiry goes beyond rights issues and dispute resolution. Pre-accident occupational health and safety standards and post-accident rehabilitation modalities are deserving of equal if not greater focus.

7. It is, however, too narrow to suggest that the latter have nothing to do with the former. The quantum and entitlement of workers rights, be they common law or no fault, can affect employer premium levels. An employer's premium experience can affect its occupational health and safety behaviour. A proper investigation of workplace injuries can effect workplace modification.

8. This submission is intended to be broadly based, so as to illustrate that individual government's can, with deft rather than heavy handed action, obtain better results in this policy area without harshly impinging upon rights or circumventing the Rule of Law.

THE ISSUES PAPER - APRIL 2003

9. The Issues Paper nominates eleven areas of interest. The list is not exhaustive. It supplements the twelve specific matters referred to in paragraph 9 of the paper (ie "Scope of the Enquiry").

10. The areas of interest are:

(i) National Frameworks;

(ii) National Self Insurance;

(iii) The Occupational Health and Safety model;

(iv) Reducing the regulatory burden and compliance costs;

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[1] Refer ss.151 G and 151H of the Workers Compensation Act 1987, as amended, limiting common law damages to claims for past and future economic loss subject to a 15%

(v) Access and coverage;
(vi) Benefit structures (including access to common law);
(vii) Cost sharing and cost shifting;
(viii) Early intervention, rehabilitation and return to work;
(ix) Dispute resolution;
(x) Premium setting; and
(xi) The role of private insurers in workers compensation schemes.

11. Some of the specific matters within the "Scope" fall within these headings. There is substantial interaction upon close analysis.

12. Foreshadowing detailed arguments the Bar Association submits:-

13. 13. National Frameworks

The Bar Association submits:

(i) A co-operative model similar to the present occupational health and safety regime is inapplicable to pecuniary needs of individuals in different parts of Australia.

(ii) A co-operative model regarding common definitions of worker, injury and disease can best be examined by industry Ministers and industry.

(iii) A co-operative model on peripheral issues such as journey claims is inappropriate whilst different compensatory regimes exist in third party insurance.

(iv) A mutual recognition model permitting multi-state employers and self insurers to insure with an overarching Comcare-type scheme should be approached with caution.

(v) Multi-state employers and self insurers should be appraised of all the implications of a Comcare umbrella scheme prior to any move to create such a scheme.

14. The Occupational Health and Safety Model

~~permanent impairment threshold.~~

The duty of care is the fundamental but basic underpinning of workplace safety. Common law liability, before and after accidents, is a necessary overarching principle which will, in conjunction with a no-fault scheme, achieve proper balanced outcomes. This would represent an innovative consistent and effective model.

15. Benefit structures

The Bar Association endorses the concept of personal responsibility in risk allocation. The ultimate balancing of these risks, pregnant as they must always be of debate, cannot be determined at a national level. Each government of each state and territory is responsible for determining the allocation of risk within its jurisdiction. Common law liability has a vital place in workers' compensation.

16. Dispute resolution

The Bar Association suggests that the Productivity Commission examine the operation of the District Court of New South Wales in its implementation of case management and introduction of a Philadelphia arbitration system. This constitutes the best of an informal arbitral system with safeguards.

Subject to its criticism of present New South Wales arrangements, the Bar Association, as a broader proposition, adopts the Industry Commission position articulated in Report 36 of 1994 that each jurisdiction should control its own dispute resolution system.

1. National Frameworks

1.1 In its report "Workers Compensation in Australia ',[2] the Industry Commission closely examined the vexed issue of National Frameworks for Workers Compensation. Then, as now, each State and Territory operated a different scheme. In addition, certain employees and seafarers were covered by separate schemes, most notably Comcare.

2 **No.36 of 1994 published 4 February 1994**

1.2 The utility of a National Framework depends upon the objects sought to be achieved.

1.3 There is, for example, some desirability in Australia-wide industries arranging their affairs on the basis of common definitions of "worker", "injury" and "disease". As a simple proposition, some savings may be achieved by excluding so-called "journey claims" from coverage. The object is simplicity through uniformity.

1.4 Wider considerations are the questions of benefit levels, benefit types (ie no fault or common law or both) and dispute resolution.

1.5 Wider again are return to work stipulations, criminal sanctions and rehabilitation.

1.6 Each of these have a cost. The Commission is correct in examining issues afresh however should refrain from duplication.

1.7 Work is in progress in New South Wales on the question of who and who is not a worker eligible for no fault benefits.[3]

1.8 The rapidly changing face of employment in Australia is the key determinant. It has been recognised that whilst the substance of the relationship remains the same, the nuts and bolts of working arrangements have been altered so as to create uncertainty of definition.[4]

1.9 Consistency and uniformity have never been absolute objectives in policy making in respect of personal injury generally. It is important to note that

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[3] Refer Review of Employers Compliance with Workers Compensation and Pay-roll Tax in New South Wales, Interim Report 22 February 2002 as cited and explained in the submission of the Federal Department of Employment and Workplace Relations dated August 2002 to the House of Representatives Standing Committee on Employment and Workplace Relations enquiry into aspects of Australian Workers Compensation, pp.22 and 23.

[a] Refer to submission of the Federal Department of Employment and Workplace Relations August 2002, op cit, pp.22 and 23, citing Tasmanian and Queensland enquiries in 1998 and 1999.

the New South Wales community already tolerates differential entitlement for injury. Although the Bar Association disagrees, it observes in this context that persons injured in motor accidents, work accidents and other accidents involving negligence (for example medical negligence) are treated entirely differently.

1.10 This is a response to perceived political imperatives regarding premium payers including green slip holders, patients and other persons. A nationwide endeavour seeking to achieve uniformity in workers' compensation matters must find its roots in something more than a desire for simplicity.

1.11 The Association recognises portability of the workforce as a factor, but not an important one. The needs of larger intra-state employers such as transport companies are more likely to drive the debate. [5]

1.12 In the view of the Bar Association the most cost effective method of examining the question of uniform definitions, if it needs to be debated and resolved, is under the auspices of the various industry Ministers and their Departments in consultation with directly interested entities. The Bar would offer legal opinion if called upon.

1.13 A wider and more controversial matter concerns benefit levels and benefit types. In its Report 36 of 1994 the Industry Commission recommended major changes to existing arrangements so as to pursue uniformity.

1.14 The "National Uniform Benefits Structure" was proposed to be implemented as a nationally available workers compensation scheme operating in parallel with existing schemes.[6] Although the Industry Commission claimed not to have recommended a specific benefit structure, it in fact did so.'

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5 Supplementary submission of the National Meat Association of Australia, October 2002 pp 5,6 and submission of the Australian Industry Group p 5, both to the House of Representatives Standing Committee on Employment and Workplace Relations. Report no.36 of 1994, pp.216-218.

s Report no.36 of 1994, p.106.

1.15 It recommended:

(i) employers be liable to pay a significant part of the cost of compensating employees suffering work-related injury or illness for long periods;

(ii) the weekly benefits structure be developed to apply to all jurisdictions;

(iii) that an "illustrative benefits structure" encompassed

(a) liability in the employer for five years subject to termination benefits by reason of workers' unreasonable defaults;

(b) 95% of actual pre-injury earnings (indexed) for the first six months;

(c) for total incapacity, 95% of actual pre-injury earnings for the next four and a half years, then 85% of earnings thereafter till deemed retirement or return to work;

(d) for partially incapacitated workers, 75% of actual pre-injury earnings for a further one and a half years, then 60% of actual pre-injury earnings for another three years;

(e) replacement of common law remedies with "Table of Injuries" no fault compensation determined by a Commonwealth Tribunal.[8]

1.16 The basic model as described was costed for the Industry Commission by Trowbridge Consulting. This organisation determined that such a structure delivered a premium of between 2.5% and 3% of payroll.[9]

1.17 It appears the Trowbridge report was not annexed to the Report. We would assume, consistent with discourse in this policy area, that the figures are a mean or average.

1.18 In the event, in 1994 costings, the Victorian Department of Premier and Cabinet argued that such structure would add $2 billion to employer's

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8 Report no.36 of 1994, pp. 106, 107, 108, 121 and 122.

workers compensation costs. WorkCover NSW argued that between $350 million and $650 million per annum would be added to total workers compensation costs. Another consultant, Robert Buchanan Consulting Pty Ltd, estimated it "could go much higher".[10]

1.19 The Commission recognised a *short run* impact of increased premiums would result from such a scheme. In the Bar's view, this was short sighted and arguably wrong.

1.20 A very useful example of the practical effects of a high benefit pension type scheme is Comcare.

1.21 This is a scheme covering consistent identifiable industry sectors, run by government, with generous weekly benefits and limited common law remedies. The Comcare common law limit of $110,000 has not been changed since its introduction in 1988.

1.22 Comcare has described its two governing statutes, the Safety Rehabilitation and Compensation Act 1988 and the Occupational Health and Safety (Commonwealth Employment) Act 1991 as:

> *"An integrated and cost effective approach to injury prevention, workers compensation and occupational rehabilitation across Commonwealth employment.* "[11]

1.23 In 2000/2001 Comcare administered 6,440 claims. To put matters in perspective, by contrast, 85,340 statutory claims were lodged in Queensland, 86% administered by WorkCover and the remainder by 24 licensed insurers.[12]

Report no.36 of 1994, p.113.

Report no. 36 of 1994, p.113.

Comcare submission to the House of Representatives Standing Committee on Employment and Workplace Relations, September 2002, p.3.

1.24 The number of workers under Comcare reduced in the 2000/2001 period by reason of the restricted definition of "worker" interacting with government policies of outsourcing and privatisation.[13]

1.25 The incidence rate (number of injuries per 1,000 employees) resulting in more than one week or more off work decreased in the Comcare scheme over the three year period to 2000/2001. This, at 12.0 was one of the lowest in Australia (Australian average 15.2).

1.26 The frequency of injuries resulting in one week or more off work per million hours worked was 5.8, the lowest in Australia, and well below the Australian average of 9.0.[14]

1.27 The types of work done by workers covered by Comcare can be, for the most part, categorised as low risk. 2001/2002 indicators show the higher risk entities to be Comcare itself, Telstra, Australia Post, Centrelink, Australian Customs Service, ABS and the Agricultural, Fisheries and Forestry Department. Some of these involve physical labour and some do not. The purely clerical and administrative departments tend not to have a high incidence of claims.[15]

1.28 In a report entitled "Work, Health and Safety - an Inquiry into Occupational Health and Safety" (Report 47 of 1995 published 11 September 1995), the Industry Commission noted the very low frequency rate of injury in work involving clerks, managers, administrators and professionals.[16] These are a significant percentage of workers covered by the Comcare scheme.

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12 Queensland Government submission to House of Representatives Standing Committee on Employment and Workplace Relations, August 2002, p.1.

13 Comcare submission to House of Representatives Standing Committee on Employment and Workplace Relations, September 2002, p.35.

14 Comcare submission to House of Representatives Standing Committee on Employment and Workplace Relations, September 2002.

15 Refer tables in the Comcare submission to House of Representatives Standing Committee on Employment and Workplace Relations, September 2002, pp.29 and 30.

16 Report no.47 of 1995, table at p.16.

1.29 Notwithstanding all these factors, namely diminution of the number of workers covered by the scheme, preponderance of low risk occupations, low incidence rate and low frequency rate major problems were identified: (i) claim costs were higher than in most other jurisdictions;

(ii) rehabilitation costs were higher than in most other jurisdictions;

(iii) the median number of days compensation paid was 57 for Comcare, compared with the substantially lower national median of 38 days; (iv) half Comcare workers incurred rehabilitation costs whereas one-third was the national average.[17]

1.30 These results were attributed by Comcare to the relatively high benefit structure, longer periods of compensation and the absence of employer excess thresholds.[18]

1.31 Critically, in 2002/2003 the average workers compensation premium rate paid by Comcare users increased from 1.0% to 1.13%. The significant driver was identified as the duration of claims.[19]

1.32 Although premium rates of 1.13% are more than satisfactory from a political perspective, an *increase* in premium levels for Comcare (focussed as it is on early intervention, rehabilitation and higher benefit structures in relatively low risk occupations) should ring alarm bells should such a scheme be contemplated in the highly industrial States of Australia.

1.33 It must be recognised that national uniformity in benefits should not be an end in itself. It should also not reflect a lowest common denominator. The Productivity Commission should take account of the financial realities of workplace injury for individuals in different states and territories.

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17 Comcare submission to House of Representatives Standing Committee on Employment and Workplace Relations, September 2002, p.46.

18 Comcare submission to House of Representatives Standing Committee on Employment and Workplace Relations, September 2002, p.47.

19 Comcare submission to House of Representatives Standing Committee on Employment and Workplace Relations, September 2002, p47.

1.34 Mr Don Stewart was commissioned by the Industry Commission during preparation of Report 36 of 1994 to conduct a study (albeit small) on the personal costs of occupational injury. The Commission recounted Stewart's findings as follows:

> *"Stewart found that most respondents suffered significant income reduction compared with their pre-injury earnings. Injured workers indicated that they were often forced to borrow from family and friends, and some were forced to seek cash assistance from welfare organisations to pay bills."*

1.35 Only two of the sixteen constituting the study had maintained their pre-accident income. The remainder lost between 30% and 100% of their pre-accident earnings .[20]

1.36 The New South Wales Bar Association submits that the Productivity Commission, looking at the matter broadly, from an economic and social justice vantage point, would not fail to recognise that workers in New South Wales (particularly Sydney) face higher mortgage commitments and other higher costs of living. A concrete example of inequity is the application of the maximum $110,000 common law benefit payable under Comcare. This sum has not been indexed or changed for 15 years. On a theoretical payment of the maximum, this represents substantial and just alleviation of personal and financial suffering to a Comcare worker in Hobart, but will do little to alleviate the needs or distress of a Sydney-based Comcare worker.

1.37 The Productivity Commission should analyse very closely (especially in respect of Victoria, Queensland and New South Wales workers) the concept of "windfall gains", whether they be from statutory lump sum benefits or common law verdicts.

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20 Report no.36 of 1994, p.101, box 4.1.

1.38 The Productivity Commission should also be very cautious in analysing the type of high benefit pension scheme which appeared to have been recommended by the Industry Commission in Report 36 of 1994.

1.39 The Bar Association submits:

(vi) A co-operative model similar to the present occupational health and safety regime is inapplicable to pecuniary needs of individuals in different parts of Australia.

(vii) A co-operative model regarding common definitions of worker, injury and disease can best be examined by industry Ministers and industry.

(viii) A co-operative model on peripheral issues such as journey claims is inappropriate whilst different compensatory regimes exist in third party insurance.

(ix) A mutual recognition model permitting multi-state employers and self insurers to insure with an overarching Comcare-type scheme should be approached with caution.

(x) Multi-state employers and self insurers should be appraised of all the implications of a Comcare umbrella scheme prior to any move to create such a scheme.

2. National Self Insurance

2.1 Reference will be made in other parts of this submission to the unique position of self insurance within the various workers compensation systems.

2.2 The intrinsic advantage of self insurance is that injury prevention, workers compensation costs and rehabilitation are all subject to immediate managerial attention.

2.3 Queensland permits administration of its scheme only through the WorkCover Authority and self insurance. There is no scope for private underwriters. The system is cost-effective.

2.4 New South Wales permits self insurance. The Bar Association is not aware of any history of claim defaults or prudential mismanagement by New South Wales self insurers.

2.5 As a general proposition it is thought that self insurers would probably reject self insurance under a Comcare scheme if fully appraised of some of the matters referred to in this submission. One obvious disincentive would be an increase in premium rates. Another obvious disincentive would be the administration of workers compensation claims by a party independent of the self insurer.

2.6 It is the Bar Association's view, based upon direct exposure to senior management of New South Wales self insurers, that such input as the Commission requires in respect of successful interaction between workers compensation occupational health and safety can most readily be obtained from self insurers.

2.7 The Bar cannot speak on behalf of self insurers, however the experience of its members is that their conduct represents the high water mark in proper and cost effective administration of schemes, whether a hybrid scheme incorporating no fault benefits and common law or otherwise. The Bar Association is not aware of the attitude of self insurers to the current benefits scheme or to the Commission apparatus which administers New South Wales workers compensation benefits.

3. The Occupational Health and Safety Model

3.1 For reasons of brevity, occupational health and safety shall be referred to under the acronym "OHS".

3.2 It is vital in any consideration of the interaction between OHS and workers compensation to consider Report 47 of 1995 issued by the Industry Commission. All relevant issues were comprehensively examined in this Report. The Bar Association cautions against reinventing the wheel.

3.3 The major focus of the present enquiry, concerned as it is with better workers compensation outcomes for workers and employers, is how best can OHS be introduced and maintained in the workplace so as to prevent injury.

3.4 Good OHS practices, unlike rehabilitation, can prevent injury.

3.5 Rehabilitation, claims management and dispute resolution operate in the aftermath of injury or disease, and so are necessarily reactive.

3.6 As will be discussed later, improvement in OHS practices can and do lower business costs in an appropriate premium regime.

3.7 The crucial consideration, from the Bar's perspective, is what overall system is best equipped to deliver outcomes and whether there is a need or efficacy in overarching Commonwealth action.

Overall System

3.8 The drivers in OHS appear to be:

(i) workers' representatives including safety committees;

(ii) management acting benevolently, the so-called "culture of care";

(iii) management responding to financial imposts including workers compensation premium increases; and

(iv) management responding to coercion by regulatory inspectorates or by prosecution.

3.9 Although the Industry Commission in Report 36 of 1994 rejected the concept of a breach of duty of care (ie common law liability) as appropriate to benefit delivery to injured workers, it endorsed an identical concept in rspect of OHS.

3.10 The specific recommendations and commentary areas follows:

> "The objective of enforcement should be to achieve compliance with the duty of care - the primary requirement in OHS legislation. By focussing on the duty of care, enforcement is directed at the obligations of the OHS legislation, rather than compliance as an end in itself. Only then can inspectorates ensure that the contribution of enforcement to the prevention of injury and disease at work has been maximised. In doing so, enforcement should encompass *all (Commission italics)* who hold a duty of care - employers, their employees, the suppliers of their plant, materials and equipment, and any others who influence the risks at the workplace ... Under this approach to enforcement breaches of individual requirements in legislation are enforced to the extent they breach the duty of care. For example, a breach of a technical regulation would not be enforced if a workplace had satisfied its duty of care through alternative (but equally effective) means. Where breaches of regulation amount to a breach of the duty of care, enforcement of the duty of care will ensure compliance with the regulation .,,22

3.11 This conceptual approach is found in the Commission's executive recommendations nos.1 and 2, which read as follows:

> **Recommendation** I
>
> The Commission recommends that the principal OHS legislation in each jurisdiction place a duty of care on all those who influence the risks to health and safety associated with work. The duty should require the person responsible to do whatever is reasonably practicable to avert any risks under their influence. Such a duty would be placed upon:
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> - employers, including the self employed;

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21 Report no.47 of 1995, p.1 12.
22 Report no.47 of 1995, p.110.

- suppliers of plant, equipment and materials, including manufacturers, importers, installers and erectors;
- designers of plant, equipment and materials;
- owners and occupiers of workplaces;
- employees, including those employed by a contractor at other than their normal workplace; and
- visitors to a workplace.

Duties of care should be owed to all those who are exposed to any risks to their health and safety associated with work, including employees, contractors and their employees, visitors and those in the vicinity of the workplace.

Recommendation 2

The Commission recommends that the principle OHS legislation in each jurisdiction provide all those having a duty of care a specific defence against *a prima facie* breach of their duty of care. The defence should be that it was not reasonably practicable for them to have done more than they did to reduce risk.

3.12 The Commission proposed greater emphasis on individual enterprises and industries developing their own *voluntary standards and codes of practice (Commission italics).* This was seen as a route to best practice. The Industry Commission observed:

"To date, too much reliance has *been placed on government to lead the development of codes of practice."*

3.13 These recommendations clearly nominated the recognised duty of care owed not just by employers but by all others potentially affecting workplace safety as the key determinant. It was recognised as efficient and fair.[23]

[23] Report no.47 of 1995, p.xxxviii.

3.14 This exposes the key dichotomy which policymakers must address. Is it suitable or acceptable to employers and employees to have the safety of a workplace determined according to the requirements of a duty of care, but the consequences of breach of such duty compensated without regard to such standards?

3.15 This tension has not been identified or addressed before.

3.16 Sophisticated analysis requires examination of the experience of states and territories *with common law systems* as an adjunct to no fault benefits to assess whether these have superior health and safety outcomes compared with those which have no common law.

3.17 The important point, we believe, is to assert, as is the case, that viable common law rights are available to injured workers in Queensland, Victoria, Western Australia, the ACT and Tasmania. It is to these jurisdictions to which enquiry would best be first directed. A convergence between the standards required for OHS and the standards which determine benefits is surely desirable.

3.18 As addressed later in this submission, perhaps the most important factor bringing OHS to the attention of boards of management and to small business employers is the imposition of premium on at least an annual basis, if not more often. It is this imposition of premium and the variation of same which can reflect the cost of common law to the employer and to the system.

3.19 The alternative, or supplement, is an inspectorate or prosecutions model. The inspectorate model is based upon enforcement of OHS obligations by criminal sanction. Clearly there is a place for it but the real question is whether it is effective.

3.20 Management is more likely to focus on real costs in the form of regularly renewed policy premiums when OHS issues are on the table. This is

3.20 Management is more likely to focus on real costs in the form of regulatory renewed policy premiums when OHS issues are on the table. This is especially so when insurers are proactive. Consideration should be given to the activities of Insurance Australia Group ("IAG") as described by this organisation in its submission to the House of Representatives Standing Committee. This will be expanded upon under Part 10 of this submission "Premium Setting". In the present context, the Bar asserts that proactive insurer management together with introduction by relevant authorities of premium refinement schemes or penalty-bonus schemes are more likely to have the desired effect on OHS outcomes than an inspectorate model.

3.21 Although the Bar Association cannot comment on present tendencies, it notes that the Industry Commission found in Report 47 of 1995 that the probability of inspection by relevant OHS authorities was as follows:[24]

New South Wales	20.8%
Victoria	17.9%
Queensland	25%
Western Australia	17.9%
South Australia	18.5%
Tasmania	36%
Australian Capital Territory	22.7%
Northern Territory	35.7%

3.22 In the present debate it is important for the Productivity Commission to determine whether or not the incidence of inspections has increased. If it has, have OHS standards thereby been supplemented or increased? In 1995 the Industry Commission reported:

> *'In the Commission's view the current approach to enforcement is not working. A survey by Deloitte Touche Tomatsu on behalf of the Commission revealed significant non-compliance (Deloitte 1995).'*[5]

3.23 When the Commission comes to examine OHS issues in the current enquiry, the Bar Association submits that the duty of care be the

[24] Report no.47 of 1995, p.104.

fundamental but basic underpinning of workplace safety. Common law liability, before and after accidents, is a necessary overarching principle which will, in conjunction with a no-fault scheme, achieve proper balanced outcomes. This would represent an innovative consistent and effective model.

4. Reducing the Regulatory Burden and Compliance Costs

4.1 The Bar Association is not seized with sufficient information to address this section of the Issues Paper. It does however note that so far as OHS arrangements are concerned that this was the subject of a very comprehensive report by the Industry Commission Report 47 of 1995.

5. Access and Coverage

5.1 The issues raised for consideration in the Paper under this section are addressed in other parts of this submission.

6. Benefits Structures (including access to Common Law)

6.1 This section of the Issues Paper appears to call for commentary on the advantages or otherwise of different no fault benefit structures as between States and Territories and Comcare and, in addition, the place, if any, of common law both in respect of benefits and in respect of injury prevention. This overlaps with Parts 1 and 3 however does call for discrete submissions.

6.2 The Bar Association endorses the concept of personal responsibility in risk allocation. The ultimate balancing of these risks, pregnant as they must always of debate, cannot be determined at a national level. Each government of each state and territory is responsible for determining the allocation of risk within its jurisdiction.

6.3 It is important to recognise that no fault and common law schemes are not mutually exclusive.

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24 Report no.47 of 1995, p.104.

6.4 As referred to in other parts of this submission the common law experience of an employer has a clear role in affecting premium and acts thereby to enforce responsibility.

6.5 Philosophically the basis of common law theory is the allocation of personal responsibility. Modern exposition of the theory takes account of compulsory insurance but declines to depart from the fundamental underpinning.

6.6 Businesses, however large, act through individuals. It is these individuals upon whom fall the responsibility to implement regulatory safety standards, co-ordinate work activity and balance expenditure between production and profit as against costs such as workers compensation premiums.

6.7 Likewise workers (howsoever defined) have a responsibility to act safely, failing which the common law provides for a reduction in damages.

6.8 New South Wales has acted in the area of public liability to reinforce this conceptual basis of personal responsibility. The passage of the Civil Liability Act 2002 followed upon by the Civil Liability Amendment (Personal Responsibility) Act 2002 encompasses in statutory form the legislature's expectations as to personal responsibility and the philosophical underpinning of common law theory.

6.9 The action of the New South Wales government in respect of public liability matters must be seen in the context that most negligence in this area of activity arises from haphazard acts. Generally, there is no ongoing relationship as between the victim and the negligent actor. In this regard the workplace is entirely different. There is an ongoing relationship between the employer and the employee which of itself must cause community notions of personal responsibility to be activated.

6.10 In enacting the Civil Liability Act 2002 the New South Wales Government also put in place structural changes which alleviate the cost to the system.

6.10 In enacting the Civil Liability Act 2002 the New South Wales Government also put in place structural changes which alleviate the cost to the system. The Government has recognised that small claims can be eliminated by the use of an appropriate threshold and that legal costs can be contained within the new structure. In addition amendments to the Legal Practitioners Act have had a sobering effect upon members of the legal profession who might be of an entrepreneurial bent in commencing or maintaining litigation. This is a sophisticated response by the New South Wales Government to a complex problem.

6.11 In the ultimate the employer chooses whether or not to create a safe workplace. The Industry Commission recognised that there were economic grounds for "sheeting home to firms" responsibility for accidents. To do so, in the view of the Commission, reflected the self evident fact that an employer is better placed than an individual employee to control potential workplace hazards.26

6.12 The Master Cleaners Guild (WA) Inc identified management issues as the key determinant, stating:

"The real issue is the success of management systems and therefore initiatives designed to improve management system uniformity and performance compliance are to be encouraged. This approach should continue to reinforce the self-regulatory responsibilities of employers focussed on the industry operations and hazard management specific to the hazards and risks that an organisation confronts in its day to day business. "27

6.13 The Industry Commission found:

"Holding firms liable to compensate workers for work related injury and illness has the particular advantage of creating a powerful

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6 Report no.36 of 1994, Overview, p.xxix.

Master Cleaners Guild submission to the House of Representatives Standing Committee, October

incentive for firms to maintain a safe and healthy working environment.[28]

6.14 Critically, in so observing, the Industry Commission did *not* regard common law damages as the appropriate vehicle for creating such incentive.

6.15 The Bar Association disagrees. The Industry Commission (in its separate report 47 of 1995) definitively endorsed the employer's duty of care, and its breach, as the governing standard for OHS. An effective, affordable common law damages regime is equally effective to the sheet home responsibilities so as to enhance OHS outcomes and hence prevent injuries.

6.16 In the experience of members of the Association employers involved in common law litigation are often quick to accept responsibility but expect, and argue for, proper balancing of the equation. If premiums are to reflect OHS activity, the degree to which an employee is responsible must be factored in.

6.17 Speaking beyond the scope of the Inquiry of the House of Representatives Standing Committee on Employment and Workplace Relations, the Master Cleaners Guild (WA) Inc recommended, on the question of alternative systems, in October 2002 as follows:

"Undertake review of the 'no blame' system with a view to responsibility and reduction of entitlement being apportioned to employees where contributory negligence of the employee is demonstrable. "

6.18 In Report 36 of 1994 the Industry Commission formed the view that common law litigation was an inappropriate method of obtaining good OHS

[28] Report no 36 of 1994, Overview, p.xxix.

outcomes. The reasoning is exposed briefly at pp.59, 60 and 121 of the report.

6.19 It also found that common law was an inappropriate vehicle to deliver benefits to injured workers. The reasoning is articulated at pp.118 to 122.

6.20 The Bar Association challenges both these conclusions.

Common law and accident prevention

6.21 Under the heading "Common Law and Prevention", the Commission's reasoning, paraphrased, was as follows:

(i) Although negligence and contributory negligence create positive incentives for both employers and employees to be careful, these incentives are diluted where compulsory insurance exists.

(ii) Time lags between incident and premium increases weaken incentives for prevention.

(iii) Incentives are diluted where premium is not fully experience rated.

(iv) Proving negligence can involve significant cost.

(v) Common law inhibits rectification of the workplace as "any improvement implemented by an employer is viewed by the legal fraternity as an admission that previous systems of work were inadequate".

6.22 These reservations must be viewed in contemporary terms having regard to present arrangements. As to each:

(1), **(iii): Although negligence and contributory negligence create positive incentives for both employers and employees to be careful, these incentives are diluted where compulsory insurance exists. Incentives are diluted where premium is not fully experience rated.**

6.23 As will be discussed in Part 10 (Premiums), there is sufficient material within the Industry Commission's two reports to meet this perception. The Commission should also examine contemporary activity. The WICS premium system introduced by WorkCover NSW in July 2001 has introduced an experience rated, business specific premium regime. Insurance Australia Group, in its submission to the House of Representatives Standing Committee, outlined a proactive insurer system which, by its own reckoning, is achieving palpable results. It has achieved good premium outcomes and identifiable workplace risk reduction by utilising the New South Wales WorkCover "premium discount scheme". IAG also held the view that the "provisional liability" provisions in New South Wales enhanced early notification and gave employers greater control over claims.[29] More importantly, the availability of insurance has not been shown to create disincentives to safe operation. **It is clear that sensitive, intelligent industry analysis, together with a basic understanding of insurance risk, can lead to much better outcomes.**

(ii): **Time lags between incident and premium increases weaken incentives for prevention.**

6.24 The time lag between an incident and a premium increase may weaken incentive in a poorly administered scheme. If the premium increase is related to the *fact* of an event, a timely examination of the circumstances, in conjunction with an experience rated bonus/penalty scheme, can alleviate this difficulty. The key is the immediacy and transparency of premium increases to adverse events. The Industry Commission recognised that cross-subsidies and the artificial suppression of premium volatility should be discouraged where practicable *as they undermine safety incentives* and discriminate against firms with superior safety records .[30]

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29 Submission of IAG to the House of Representatives Standing Committee, 19 August 2002, p.10.

30 Report no.37 of 1994, pp.69-70.

6.25 The Industry Commission also found experience rating appropriate for large firms and bonus/penalty schemes appropriate for small firms. Implicit in all of this is that an event based evaluation, including potential or actual common law liability, is an excellent incentive so long as it is timely.

6.26 On the other hand, if premium increases related to the *payment* of common law damages, then the incentive system works equally well provided litigation is concluded with due dispatch.

6.27 New South Wales has dealt with this problem. The introduction of increased monetary jurisdiction in the District Court of New South Wales coupled with a Philadelphia arbitration system supervised by the Court has resulted in 54% of matters being completed within 12 months and 91% of matters being completed within 24 months. The median period is 11.5 months.[31] The arbitration system has proved effective. In the period January 2002 to September 2002 only 100 individuals out of 4,789 cases arbitrated applied to be reheard by a judge.

6.28 Another cause of time lag is the effluxation of limitation periods. This is generally three years. The Commission should call for WorkCover statistics identifying the period between the date of injury and the date of commencement of proceedings in order to analyse whether this theoretical three year hiatus is in fact a factor in delay and, ipso facto, an impediment to the timely setting of premium and implementation of better OHS practices.

(iv): **Proving negligence can involve significant cost.**

6.29 Costs are an issue in common law litigation.

[31] 2001 Annual Review District Court of New South Wales

6.30 In an unfettered system, such as Queensland, costs comprised 16% of total common law payouts to injured workers.[32] In a system where costs are regulated better outcomes can be expected.

6.31 The Bar Association recognises the need for control of legal costs subject to the right of legal representation to all litigants and equality of opportunity for legal representation as between injured workers and insurers.

6.32 If the costs referred to in the Industry Commission report relate to investigation of the event, the Bar Association holds the view that such a process in fact enhances workplace safety and is a proper and necessary cost.

(v): **Common law inhibits rectification of the workplace as "any improvement implemented by an employer is viewed by the legal fraternity as an admission that previous systems of work were inadequate".**

6.33 The perception that the legal fraternity view rectification as an admission does not accord with the law. It may be evidence of negligence but cannot amount to an admission.[33]

6.34 The contention of the Industry Commission is cynical and unrepresentative. Large organisations readily adopt change for the better without considering the impact on litigation prospects. Smaller employers do not stand by in the face of a demonstrated defect so as to allow a repeat accident. For small employers one injury is enough. A second accident in the same circumstances is likely to have such adverse premium effect as to place the business in peril. Mr Mike Patten, Chief Executive Office of the Council of Small Business Organisations Australia, wrote in his submissions to the House of Representatives Standing Committee:

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[32] Queensland Government submission to the House of Representatives Standing Committee, 14 January 2003.

"In summary, small business would like to have reduced cost of premium for their workers compensation, to maintain a safe workplace, train their staff in operating safely and being mindful of their duty of care."

6.35 This organisation speaks on behalf of employers of the *44.5%* of the Australian workforce who work in businesses with *20* employees or less. These businesses are spread over *1,140,000* separate businesses throughout Australia. The remaining *55.5%* of working Australians are employed in businesses with *20* or more employees spread over *52,000* separate businesses.[34]

6.36 It is the Bar Association's submission that the proposition articulated by the Industry Commission that various factors militate against common law as a means of OHS management are not borne out by present facts.

Common law and compensation

6.37 The second issue is that of compensation. Under the heading "Compensating for Permanent Impairment and Pain and Suffering" the Industry Commission in Report *36* of *1994* opted for uniform payments based on a "Table of Injuries" rather than access to common law. The arguments ran:

(i) a perceived advantage of case by case flexibility at common law is diminished by lack of consistency in awards;

(ii) common law leads to increased costs (legal and verdict);

(iii) common law leads to significant delays;

(iv) common law provides a disincentive to rehabilitation and return to work;

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33 Refer McHugh JA in Currie v. Western Suburbs Hospital (1987 9 NSWLR 511.

34 Submission of the Council of Small Business Organisations of Australia Ltd to the House of Representatives Standing Committee.

(v) common law creates adversarial conditions and is detrimental to rehabilitation and return to work;

(vi) a "Table of Injuries" gives certainty.

6.38 Some of these contentions are discussed above. As to the remainder:

(vii) (i),(iv) a perceived advantage of case by case flexibility at common law is diminished by lack of consistency in awards; common law provides a disincentive to rehabilitation and return to work; common law creates adversarial conditions and is detrimental to rehabilitation and return to work;

6.39 The progressive inhibition of common law rights is variously justified by government by a need to prevent under or over compensation, to stop spiralling costs and hence premiums, and to reallocate resources from the legal profession to others. These political priorities are a given.

6.40 In a different context, the New South Wales Government has addressed these issues. The Civil Liability Act 2002, following upon medical negligence legislation, are promoted in the community as models of a responsible legislative course between proper compensation and affordable premium.

6.41 The comparative merits of common law damages and "Table of Injuries" are unsupported by analysis. At face value Report 36 of 1994 seems to criticise common law damages in toto (ie the sum of *all* heads of damages) whilst nominating a preferable competitive model (Table) only in respect of pain and suffering and loss of enjoyment of life. This is deficient.

6.42 It also ignores, in the ultimate, that an individual or individuals (be it a judge, arbitrator, medical panel or administrator) must still assess a "Table" injury on a case by case basis.

6.43 It should be observed, strongly, that the effect of an alternative model under the Comcare scheme and the New South Wales Workplace Injury Management and Workers Compensation Act 1998, ie permanent bodily impairment, affords and gives derisory benefits to injured workers.

6.44 If the tenor of other submissions to the Productivity Commission supports this view, then it is incumbent upon those so advocating to state clearly that the object is costs savings at the expense of injured workers. The Bar Association would seek to make further submissions and invite proper data in this event.

6.45 If common law is accepted to be appropriate for seriously injured workers, it is axiomatic that rehabilitation and return to work will be more difficult for such workers. Small business has suggested a pooling system so as to alleviate to some degree the problem faced by small employers in this regard.[35]

6.46 This is a genuine problem and should not be addressed on the basis of supposition or anecdote. Any proposed weekly benefits scheme with compensation levels at or near pre-accident earnings is equally an impediment to genuine attempts to return to work. Those workers who are unwilling participants due to common law factors might be observed to be equally unwilling participants under a pension scheme. If coercion is then introduced the relationship breaks down in any event. The National Meat Industry of Australia (NMIA) submitted in this regard:

> *"In some cases the earnings rate while on compensation is so attractive that there is little incentive to return to work.* "[36]

6.47 The matter calls for new and innovative thinking, not supposition.

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35 Submission of the Council of Small Business Organisations of Australia Ltd to the House of Representatives Standing Committee.

36 NMIA submission to the House of Representatives Standing Committee, p.17.

6.48 For example the CFMEU has suggested in the past that a device for rendering rehabilitation and common law more compatible would be to subject the right to common law action to an eligibility condition that the claimant must have taken all reasonable steps towards rehabilitation.[37]

6.49 The Bar Association believes that arguments seeking to dismiss the role of common law in injury prevention and injury compensation have not been critically examined and have, in recent times, been demonstrated to be wrong by measured legislative action.

6.50 In so saying, the New South Wales Bar Association does not agree with the approach adopted by the New South Wales Government in the case of injured workers in New South Wales. This method is unsatisfactory. Whilst the Bar Association preferred view is for general entitlement to common law damages, if the need for restriction prevails, then the Civil Liability Act 2002 is the most relevant and sensible model.

6.51 On the particular issue of injury prevention, this submission will be expanded in Section 10, Premium Setting.

7. Cost Sharing and Cost Shifting

7.1 The question whether and to what extent Commonwealth Consolidated Revenue meets unfunded or underfunded State and Territory workers compensation schemes is primarily political. These are macroeconomic issues weighing the variable needs of the Commonwealth revenue base against the need for small and large business activity. The Bar offers no comment at this juncture.

7.2 If good policy requires protection of the revenue base at the expense of workers and their schemes, the Commonwealth is seized with power to act. Recoupment of Medicare and social security payments and preclusion from

37 Report no.36 of 1994, Appendix D5.

future social security payments already occurs in the workers compensation area.

8. Early Intervention Rehabilitation and Return to Work

8.1 Most of the matters raised in the Issues Paper are addressed separately in this paper. The Bar makes no separate submissions in relation to this section.

9. Dispute Resolution

9.1 In the view of the Bar Association of New South Wales, dispute resolution procedures in New South Wales for workers compensation matters under the Workplace Injury Management and Workers Compensation Act 1998 are unsatisfactory. Arbitrators need not hold legal qualifications, yet they purport to determine legal rights. Parties may be heard (by telephone) in the absence of the other party (s.354). Arbitrators have no immutable tenure and answer to the direction and control of a Registrar who is in turn subject to the direction and control of the President (s.372). Errors are appealable only where the President of the Commission determines that the question involves a novel or complex question of law (s.351). Legal costs are so low as to have generated an appeal to the New South Wales Court of Appeal in the matter of Caret/ v. Blasdom Pty Ltd listed for hearing on 28 May 2003.

9.2 The Productivity Commission should reject any dispute resolution mechanism which bears resemblance to the present New South Wales model.

9.3 The Bar Association has long argued that dispute resolution should be an open, fair and impartial process. The decision maker should be independent of Government and of vested financial interests. Courts and properly constituted administrative tribunals are examples of such bodies. These forums are assisted by lawyers. Parties are assisted by lawyers.

9.4 A lack of properly remunerated legal representation is likely to adversely affect the least powerful. The Industry Commission in Report 36 of 1994 found that in most cases the least powerful person was the claimant.[38]

9.5 In administrative systems the facility of proper appellate supervision is vital.[39]

9.6 The Bar Association suggests that the Productivity Commission look very closely at the experience of the District Court of New South Wales in its implementation of case management and introduction of a Philadelphia arbitration system. This constitutes the best of an informal arbitral system with safeguards.

9.7 Subject to its criticism of present New South Wales arrangements, the Bar Association, as a broader proposition, adopts the Industry Commission position articulated in Report no.36 of 1994 that each jurisdiction should control its own dispute resolution system. The Commission stated:

> *"A jurisdiction in control if its own dispute resolution system has an incentive to develop the most appropriate process for its particular circumstances. Such a system is likely to be more responsive to change than a single national structure ... it also avoids the possibility of the dispute resolution system being captured at a national level by particular interest groups.* s[40]

10. Premium Setting

10.1 This part of the submission, addressing Section 10 of the Issues Paper, should be read in conjunction with the brief submissions in relation to Section 11 concerning the role of private insurers in workers compensation schemes.

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38 Report no.36 of 1994, Appendix D26.
39 See discussion in Report no.36 of 1994, Appendix D24.
40 Report no.36 of 1994, appendix D19.

10.2 Premium as penalty was accepted by the Industry Commission in Report 36 of 1994 as likely to influence employer OHS and rehabilitation practice. In other words, it has previously been assumed that increased premiums (or the threat of them) will cause employers to make the workplace safer and, later, to implement strategies to get workers back on the books. In assessing its own proposed benefits model, complete with increased premiums, the Industry Commission said:

> *"However, as employers and employees respond to changed incentives (higher premiums), the incidence and severity of work related injury and illness would fall - which would tend to reduce premiums over the longer term. Employers would increase their injury and illness prevention activity and would more actively encourage rehabilitation and return to work."*

10.3 This observation was repeated by the Industry Commission in its subsequent report.[42] In so doing, the Industry Commission identified the appropriateness of experience rating for large employers and bonus/penalty schemes for smaller employers.

10.4 Premium rating may occur on a number of different bases, either as broad industry classifications with or without cross-subsidisation, occupational classification and/or bonus penalty schemes and other incentives. All of the premium regimes should be designed to place maximum pressure on employers to discharge their duty of care to employees. There will always be complaints by particular industries concerning the high levels of premium which the particular activity attracts. The reality is that high risk occupations generate more, and more serious, injuries and any system of insurance which is risk based must reflect disparities in experience.

10.5 Evidence accepted by the Industry Commission in Report 47 of 1995 indicates that in the United States there is a demonstrated strong link

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41 Report no.36 of 1994, p.113.

between the level of workers compensation premiums and workplace health and safety. The Commission cited studies which found that experienced rated premiums constituted a powerful inducement to businesses to invest in safety. A Canadian study showed significant similarities, for example reductions in fatalities in construction industries by 50% and forestry industries by 9% purely attributable to increased premiums. The Commission also observed a significant decline in new claims in Australia which apparently had been documented responsive to experience rated or bonus/penalty schemes.[43]

10.6 A supplementary common law scheme need not give rise to prohibitive premiums. The question is common law should exist so as to effect premiums. The Commission should address competing arguments in Victoria.

10.7 In Victoria the no fault scheme is supplemented by a modified common law scheme. The premium model is industry classified up to remuneration of $650,000 (ie many small businesses) and progressively experience rated thereafter. In the three years to 2002/2003, average premium rate was 2.22%.

10.8 These outcomes were achieved in the context of a supplementary common law scheme for seriously injured workers in a highly industrialised State. To make it plain, a highly industrialised State will include manufacturing industry workers, labourers, truck drivers and process workers.[44]

10.9 This Victorian average was criticised by the National Meat Industry Association, citing its participants as experiencing an 8% premium.[45]

Report no.47 of 1995, p.185.
Report no.47 of 1995, pp. 180-181.

42 Victorian Government submission to the House of Representatives Standing Committee, pp.9,
43 12.
44 Supplementary submission of NMIA to the House of Representatives Standing Committee, October 2002.
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10.10 This is, however, indicative of a high risk industry and should not, of itself, in the view of the Bar Association, encourage cross-subsidisation or removal of common law rights.

10.11 It is also significant to note, in this micro economic area concerning the meat industry, for example, that the Queensland Government submission to the relevant House of Representatives Standing Committee stated:

> *"The industry rate for meat processing in Queensland is $8.631 per $100 in wages and is the second lowest of all workers compensation authorities in Australia."*[46]

10.12 The lesson to be learned from Victoria and Queensland is that good premium levels can be achieved in the context of a modified or unfettered coexisting common law system.

10.13 The mechanics of premium setting are constantly under review. The WorkCover Industry Classification System ("WICS") system of premium setting was introduced by New South Wales WorkCover in July 2001. This constitutes the latest attempt to match experience rating with premium setting in a fashion more directed to specific employer needs. The system is in its infancy and requires industry monitoring.

10.14 The WICS system replaced the ANZSIC (Australia and New Zealand Standard Industry Code) system which was adopted with some variables in a number of other jurisdictions.

10.15 IAG made a comprehensive submission on the question of premiums to the House of Representatives Standing Committee. The submission outlines preferred methods of premium setting. The Bar Association endorses the group assertion that the WICS system, which provides for many more categories of industry, may enhance premium setting and employer

response. The Bar Association also suggests IAG's recommendation, framed as follows:

> *"A system be established to develop, collect and co-ordinate data needed for more accurate risk rating of individual organisations, taking into consideration any risk reducing measures or activities that the organisation has undertaken.''*

10.16 Premium Discount Schemes, as operated in New South Wales, together with targeting by insurers, has apparently achieved good results.[48]

10.17 In the specific case of self insurers, the Industry Commission in Report 47 of 1995 specifically referred to the real effect of monetary incentives on OHS outcomes for self insurers. As indicated previously in this submission, the Productivity Commission has a great resource in its investigations in the self insurance industry.

10.18 Once again, the Bar Association would caution the Productivity Commission against reinventing the wheel. Very detailed work has been done by the Industry Commission in the 1990s on appropriate and effective premium regimes. The Industry Commission was certainly of the view then that cross-subsidisation was a disincentive to safe work practises.

11. The Role of Private Insurers in Workers Compensation Schemes

11.1 Licensed private insurers participate as risk insurers in administration of workers compensation schemes in Victoria, Western Australia, Tasmania and the ACT.

11.2 The role of private insurers in New South Wales are limited to fund management and is not private insurance in the strict sense.

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46 Queensland Government submission to the House of Representatives Standing Committee, 14 January 2003.

47 IAG submission to the House of Representatives Standing Committee, 19 August 2002, pp.7 and 8.

11.3 The Bar Association would prefer to make any submission required after examination of other relevant submissions.

11.4 It would counsel, however, in response to the Commission's Issues Paper, that any scheme created by the Commonwealth in which such insurers participated would need hands on robust prudential supervision by the relevant Commonwealth agencies.

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[48] IAG submission to the House of Representatives Standing Committee, 19 August 2002, p.10.